



REPUBLIC OF KENYA



KENYA LAW
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**Hamisi v Republic (Criminal Appeal E009 of 2022)
[2022] KEHC 15741 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E009 OF 2022
MW MUIGAI, J
NOVEMBER 22, 2022**

BETWEEN

RAMADHAN HAMISI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the conviction and sentence arising from the judgment of the Hon. E. Keago (CM) delivered on 28th February, 2022 in Machakos Criminal Case No.276 of 2018 Republic –vs- Ramadhan Hamisi and Masingu Swale)

RULING

Background

1. The Appellant herein Ramadhan Hamisi and another were jointly charged with two Counts of Robbery with violence contrary to Section 296(2) of the *Penal Code*.

Count I: Particulars being that on May 23, 2018 at Machakos Town with Machakos County jointly while armed with dangerous weapons namely an axe and a toy pistol robbed Kenney Musau Ndisya cash kshs 20,600/- and at the time of such robbery hit the said Kenney Musau Ndisya with a fist.

Count II: Particulars being that on May 23, 2018 at Machakos Town with Machakos County jointly while armed with dangerous weapons namely an axe and a toy pistol robbed Beatrice Kathina Peter cash Kshs 89,000/- and mobile phone Huawei valued at Kshs 8,500/- and at the time of such robbery threatened to use actual violence against the said Beatrice Kathina Peter.



Trial Court Proceedings

2. The Prosecution called a total of five (5) witnesses in support of its case and the Trial Court made a Ruling on case to answer on July 27, 2021 and placed the accused persons on their defence.
3. The two accused persons gave sworn testimonies without calling any witnesses.
4. The Trial Court delivered its judgment on February 28, 2022 and convicted the two accused person under Section 215 of the [Criminal Procedure Code](#). On February 28, 2022 the Trial Court sentenced the two accused persons to hang.

Petition Of Appeal__:

5. Aggrieved by the conviction and sentence of the Trial Court Ramadhan Hamisi (the Appellant herein) filed his petition of Appeal dated March 16, 2022 stating as follows;
 - a. That the Trial Magistrate erred in law and in fact in failing to appreciate that the prosecution failed to discharge, beyond reasonable doubt, the burden of proof that lay squarely on it.
 - b. That the Trial Magistrate misdirected himself in finding that the Appellant was positively identified at the scene of the alleged crime.
 - c. That the Trial Magistrate erred in finding that the ingredients for the offence of robbery with violence had been sufficiently proven by the prosecution.
 - d. That the Trial Magistrate misdirected himself on placing reliance on the identification parade report that was inaccurate and biased.
 - e. That the Trial magistrate erred in failing to find that the identification was not positive.
 - f. That the evidence adduced was contradictory and insufficient, which contradictions the Trial magistrate ought to have resolved in favour of the defence.
 - g. That the trial was unfair and contrary to the constitutional principles and the plausible defence of Alibi put up was dismissed.

Notice Of Motion

6. The Appellant/Applicant herein filed his Notice of Motion dated March 28, 2022 seeking the following orders;
 - a. (Spent)
 - b. That this Court be pleased to grant the Appellant/Applicant reasonable and favourable bond/ bail terms pending the hearing and determination of the Appeal proffered herein.
 - c. That this Court be pleased to stay and/or suspend the sentence imposed herein, pending the hearing and determination of this appeal.
 - d. That this Court be pleased to grant any other orders it may deem fit and reasonable to grant in the interest of justice.
7. The application is supported by the Supporting Affidavit sworn by Kibet Kirui on March 28, 2022 deposing as follows:-



- a. That the Applicant was tried, convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* by the Chief Magistrate E H Keago sitting at Machakos on the February 28, 2022 in Machakos Cr Case No 276 of 2018 – *Rep vs Ramadhan Hamisi & Anor*.
- b. That the Applicant being dissatisfied with the whole judgment has filed an appeal before this Court challenging the whole conviction and sentence.
- c. That the said appeal is arguable with overwhelming chances of success.
- d. That the said appeal raised serious grounds for appeal which when canvassed will likely quash the conviction and sentence and set aside the judgment delivered on February 28, 2022.
- e. That given the time it will take to hear and determine the Applicant’s appeal, if successful, the appeal will be rendered nugatory.
- f. That the Applicant is the sole breadwinner of his young family and therefore his being incarcerated pending the hearing and determination of the appeal will leave his family destitute and desperate.
- g. That the Applicant is not a flight risk and has demonstrated his adherence to Court directions by attending all the mentions and hearings at the Subordinate Court.
- h. That no person shall be prejudiced should the orders sought herein are granted.

Replying Affidavit

8. The Respondent filed their Replying Affidavit sworn by Martin Mwongera stating as follows;-
 - a. That the state opposes the application for bond pending Appeal on ground that the Appellant/Applicant has not demonstrated that his appeal has any chances of success.
 - b. That the assertion that his appeal has high chances of success can only be proved at and upon the full hearing of the Appeal herein. Consequently the prayer for bail pending appeal on grounds that his appeal has high chances of success is misconceived, unmerited and premature and therefore it should not be granted.
 - c. The solemn assertion by the Applicant that he will not abscond if released on bond, even if supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

Written Submissions

Appellant’s/applicant’s Submissions Dated July 26, 2022

9. The law governing proceedings relating to bail pending appeal is anchored under Section 357 of the *Criminal Procedure Code* which provides that:-

“Sub-Section (1)

After the entering of the Appeal by a person entitled to appeal, the High Court, or the Subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties’, or, if that person is not released on bail, shall at his



request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”

10. That the salient legal principles for consideration before release of a convicted person on bail pending appeal are; the Court must have jurisdiction to grant bail; exercise of this jurisdiction is discretionary; character of the Appellant; whether the Applicant is a first offender; Appeal is not frivolous and has reasonable chances of success; possibility of substantial delay in the determination of the appeal; existence of exceptional circumstances and, whether the Applicant complied with bail terms during trial and pending appeal.
11. Reliance was made in the Ugandan Court case of *Arvind Patel vs Uganda, Supreme Court (At Mengo)* Criminal Appeal No 1 of 2003 where the Court relied on the above principles to release the Applicant on bail notwithstanding that both the High Court and Court of Appeal had confirmed the conviction.
12. Also the cases of *Peter Hinga Ngatho vs Republic* [2015] eKLR, *Rebeca Nabutola v Republic* [2012] eKLR and *Dominic Karanja v Republic* (Supra) the Court of Appeal set out guiding principles for grant of bail pending appeal as;
 - i. The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances,
 - ii. The previous good character of the applicant,
 - iii. Solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.
13. The Appellant raised two issues for determination;
 - i. Whether the Applicants appeal raise overwhelming chances of success
 - ii. Whether there are exceptional or unusual circumstances to justify the Applicant’s release on bail.
14. On the 1st issue on whether the Applicants appeal raises overwhelming chances of success it is further submitted that the burden of proof has to come from the prosecution and the prosecution has the obligation to clear any doubt beyond all reasonable doubt. In this case the prosecution did not adduce evidence cogent enough to prove the charge beyond reasonable doubt as is the standard in criminal offences. The identification parade allegedly conducted did not meet the threshold as set out in the Police Standing Orders as the Appellant herein was not based on the procedures and the two separate identification parades, he was placed in the same position leading to the same outcome of being improperly identified.
15. On the second issue on whether there are exceptional or unusual circumstances to justify the Applicant’s release on bail, the Appellant cited the case of *Jivraj Shah vs Republic* [1986] eKLR where the Court considered the exceptional circumstances of the Appellant since he was a young burdened with the obligations of taking care of his sick wife and children as well as his ageing parents who depended on him. Also in the case of *Arvind Patel vs Uganda* SC Cr Appeal No 1 of 2003 where the Court considered the following during the determination; the character of the Appellant, whether the Applicant is or not a first offender; the Appeal must not be frivolous and has reasonable chances of success; the possibility of substantial delay in the determination of the appeal; and whether the applicant complied with bail conditions granted before the Applicant was convicted during the pendency of the appeal.



16. It is submitted that it is evident that the applicant has met the threshold as espoused in the aforementioned case.
17. It is further submitted that the applicant need not demonstrate all the conditions for admission to bail pending appeal but having satisfied a combination of two or more conditions sufficiently qualifies him to admission to bail pending appeal see the case of *Samuel Macharia Njagi vs Republic* and *Arvin Patel vs Uganda* SC Cr Appeal No 1 of 2003.

Respondents Submissions Filed On 29/06/2022

18. Section 357 (1) of the *Criminal Procedure Code* provides admissions to bail pending appeal, it states that:-

“After the entering of the Appeal by a person entitled to appeal, the High Court, or the Subordinate Court which convicted or sentenced that person, may order that he be released on bail with or without sureties’, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”

19. Reliance was made in the case of *Jivraj Shah vs Republic* [1986] 605 where the Court considered the laid down the principles as follows;-
 - i. that the principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which this Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.
 - ii. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.
 - iii. the main criteria is that there is no difference between overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”
20. The assertion that the applicant has high chances of success can only be proved at and upon the full hearing of the appeal herein. Consequently the prayer for bail pending appeal on grounds that his appeal has high chances of success is misconceived, unmerited and premature and therefore it should not be granted.
21. It is finally submitted that the Appellant’s/applicant’s application be dismissed in its entirety.

Determination

22. This Court is to determine grant of bail pending appeal under Sections 356 & 357 of CPC.
23. Section 123 of CPC provides terms of granting bail or bond generally as follows;
 - (1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and



is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

- (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
- (3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.

24. Section 123A of CPC provides for Exception to right to bail

- (1) Subject to Article 49(1)(h) of the *Constitution* and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—
 - (a) the nature or seriousness of the offence;
 - (b) the character, antecedents, associations and community ties of the accused person;
 - (c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;
 - (d) the strength of the evidence of his having committed the offence; (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—
 - (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
 - (b) should be kept in custody for his own protection.

25. Taking into account the issues to be considered before granting bail/bond pending appeal, the Applicants/Appellants have not established any special, exceptional or unusual circumstances this Court should consider or take into account in granting bail/bond pending Appeal.

26. Secondly without getting into merits and/or demerits of the appeal the Applicants/appellants have taken issue with identification at the scene of the robbery with violence, arrest and conduct of the identification parade. This Court has restrained itself from addressing these pertinent issues in advance of the appeal. Consequently, the Court cannot at this juncture predict the success or otherwise of the pending appeal. Of course the appeal is not frivolous, possibility of substantial delay in the determination of the appeal shall be midwived to ensure expedited proceedings and determination of the appeal.

Disposition

1. At this juncture bail pending appeal is denied in the absence of sufficient grounds /evidence to warrant the same.
2. The intended appeal shall be expedited to avert any prejudice that maybe occasioned to the Applicants / appellants.
3. Parties/Counsel to take directions at earliest convenience.



**DATED, DELIVERED & SIGNED AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE).**

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

RAMADHAN HAMISI - APPELLANT

MWONGERA - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

