



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NUMBER 11 OF 2020**

**PETER MBAABU MUTEMBEI.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON BAIL PENDING APPEAL**

1. The appellant/applicant was jointly charged with offence of **Robbery with Violence Contrary to Section 295 as read with 296 (2) in Nakuru Chief Magistrate's Criminal Case Number 3101 of 2012** together with one Morris Mbugua Mutugi.
2. The matter had a long and tortuous journey in the Subordinate Court, as the applicant herein was held at Kamiti Maximum Prison, Nairobi while the 1<sup>st</sup> accused was held here in Nakuru Main Prison, and as a result, the matter failed to take off many times. It was alleged that the applicant had another matter in Nairobi.
3. The matter finally took off before the learned trial magistrate *Hon. J Mwaniki*, but he was transferred before he would complete the matter. When *Hon. F. Munyi* took over the matter, the accused persons sought for a *de novo* trial. The same was allowed. On 6th May, 2020; the Applicant was convicted for the offence of **Robbery with violence contrary to section 295 as read with section 296(2) of the Penal code** and sentenced to serve life imprisonment.
4. The Applicant vide undated Notice of Motion brought under **Section 357 of the Criminal Procedure Code Cap. 75 and Articles 27, 49 (h), 50(1), 165(3) (9) and 259 of the Constitution** seeks for bail pending appeal.
5. The court in case of **Somo vs Republic [1972] EA** observed that in an application of this nature the presumption of innocence does not apply as the appellant is presumed to have been properly convicted until the appellate court determines otherwise. It is also presumed that the appellant has been properly sentenced. The considerations in an application for bail pending appeal are thus different from those applicable to an application for bail pending trial.
6. The application is premised on grounds that the Applicant was charged, convicted and sentenced to life imprisonment by the Chief Magistrate's court on 6<sup>th</sup> May, 2020 in Criminal Case Number 3101 of 2012. He was aggrieved by the lower court's decision and filed an appeal before this court praying for his conviction to be quashed and sentence set aside. He avers that the appeal has overwhelming chances of success as it raises weighty issues of law and facts that the trial court failed to consider and that this court is vested with powers under **Section 357 of the Criminal Procedure Code** to grant the Appellant bail pending appeal. That the respondent will not suffer any prejudice if he will be released on bail as he pledges to abide by all the terms and conditions of this court.
7. The applicant also avers that he has served a considerable portion of the sentence and the reversal of the decision sought will undo the damage he will have suffered as a result of incarceration and that his health continues to deteriorate as a result of deplorable conditions in prison. He is a family man with school going children and the sole bread winner of his young family.
8. The application is supported by his affidavit sworn on unknown date reiterating the above grounds.
9. The respondent did not file any response to the Applicant's Application.
10. This issue for determination is Whether the appellant's application has met the threshold for granting of bail pending appeal. **Section 357 of the Criminal Procedure Code** provides as follows:

**“(1) After the entering of an 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”

11. The court in the case of Jivraj Shah vs Republic[1986] eKLR laid down the principles for granting bond pending appeal as follows;

“(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.

(2) If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

(3) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

12. In the case of Chimambhai vs Republic 1971 EA 343 J. Harris made another observation in such an application when he said;

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...”

13. Under **Article 49 of the Constitution of Kenya** an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proved guilty, unlike a case where one is already convicted.

14. In the above cases, the courts also held that anticipated delay in the hearing of the appeal, together with other factors may be grounds for grant of bail pending appeal.

15. In Dominic Karanja vs Republic (1986) KLR 612, the Court of Appeal stated *inter alia*:

“(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;

(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;

(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;

(d) .....

16. The **Bail and Bond policy guidelines** page 27 paragraph 4.30 provides that *the burden is on the convicted person to demonstrate that there is an overwhelming chance of success.*

18. The appellant averred that his appeal has high chances of success. No submissions were made to this end.

19. The Appellant was sentenced to serve life imprisonment on 6<sup>th</sup> May 2020 hence there is no likelihood of him having served a substantial part of the sentence before his appeal is heard and determined. However, there is high likelihood that his appeal will be disposed off expeditiously by this court noting that the lower court’s proceedings and the judgement have already been availed.

20. On the aspect of demonstration of exceptional or unusual circumstances, I observe that, the Appellant attached medical documents to show that he is ill and in need of urgent medical attention.

21. The courts have often held that hardship exceptional or unusual circumstances or illness would not constitute a reason for the granting of bail because there are medical facilities both in prison and when need be, out of prison where the Appellant can be attended to.

22. In Mutua vs Republic, [1988] KLR 497 the Court of Appeal stated thus:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

23. This case presents **exceptional or unusual circumstance upon which this court, in the interest of justice cannot grant him bail.**

24. The record shows that on 14<sup>th</sup> January 2017 when the applicant herein was released on bond with a surety. This, from the record, was following his application for the same from the High Court on account of sickness.

25. Upon release he never showed up after that and the matter was delayed for almost two (2) years. His surety was arrested on 14<sup>th</sup> February 2017 and spent four (4) months in custody, and was released on bond thereafter so as to produce the applicant. He was only able to get the applicant arrested on 27<sup>th</sup> August 2018 when he was produced in court.

26. The record is telling. All the time the applicant was missing the case for the co-accused had stalled. In fact, the court had given the appellant consideration because he was said to be unwell, ailing and requiring medical treatment. At one point his co-accused is on record telling the court that he was suffering in custody, yet his co-accused was at Industrial Area Remand “pretending to be sick”.

27. The surety is on record on oath that he had to look for the applicant through the criminal networks he learnt about while in custody. He laid a trap for the applicant as he was going to commit another crime, while on bond, and that it is only through the appellant’s criminal networks that he was able to get him and to have him arrested. After eight (8) years of having this matter in court, most of which was caused by the absence of the applicant, the trial court was able to finalize the trial. The trial court had to do an extraordinary thing. At the time this applicant showed up, the matter had reached defence hearing. The learned trial magistrate resisted all efforts to delay the trial further, expedited the hearing of the witnesses in the case for this applicant, and took their defence statements at the same time. The learned magistrate had to write two separate judgments.

28. There is nothing on record to show the applicant’s explanation as to where he was all the time the court was looking for him. There is nothing to show that he refuted his surety’s statement that he had caught the accused in the act of committing another crime, that the accused told him that he had paid some people money to make his case disappear. These are all statements made on oath by the surety and which the applicant did not controvert. Clearly he is a person who will go to any length to subvert the course of justice. For the avoidance of doubt I reproduce those proceedings here:

*“PROPOSED SURETY NATHAN JAREMIA NANDWALI SWORN STATES; I wish to stand surety for Peter Mbabu Mutembei. I know him very well. I worked with his father in the police force between 1992 and 1994. We were in Isiolo. I know that the bond is for Kshs. 300,000/-. I tender title deed for my parcel of land in Bahati. Which is registered on Bahati/Kabatini block 1/13591 measuring 50 x 100 valued at Kshs. 1,000,000/=. It was valued at Kshs. 800,000/=. I know my obligations on a surety. I know the consequences if he does not show up. I will ensure that he attends court and I will always avail myself.*

#### **After the accused absconded**

*I am Nathan Jeremia Nandwa. I stood surety for the 2nd accused person sometimes in December or January. I made the decision to do the same as his close people approached me he was very sick. He had undergone 2 – 3 surgeries while in custody at Kenyatta National Hospital. He had internal bleeding. Though I did not know him. I used his close people to make the decision that I now regret. I have gone through a lot of problems. I was put in for 4 good months. This court had refused to place me on bond. I pleaded with this court that I had gathered some developments to enable me get the accused. I kept on posting this court on various developments. Last time I informed the court that he was in Namanga. While at Namanga I was able to get a link on his ailment criminal network. On Monday this week I received very positive information from his confidant that he was planning to travel from Nairobi to Eldoret to go and commit crime. He has asked his confidant to help him get contact to his prospective victim. He wanted the victim to be a pastor. I didn’t have any pastor in Eldoret. I created one. Through his confidant, I was able to provide the confidant with the contact of the pastor I had created. The accused communicated with the alleged pastor and they arranged a meeting. The accused person spent Tuesday in Eldoret and they communicated and agreed to meet on Wednesday. I passed the information to the investigating officer in this matter who at Nairobi at the time. I looked for an alternative and I was able to contact CID officer Mr. Aden. Through the DCIO Eldoret arrangements were made to have the accused meet the victim who was the alleged pastor. An ambush was arranged. The accused in company of a lady and a man proceeded to Valley Hotel in Eldoret where they were arrested by the team that was sent by the DCIO. My created pastor was released. The 3 were escorted to Eldoret Police Station where they spent the night. The DCIO had requested for documentary evidence and I sent warrant of arrest by way of whatsapp. Later in the day I came to court and requested for a mention and a production order to have the holding authority produce the accused. Later the DCIO confirmed that they had arrested the correct person.*

*Yesterday I went to the DCIO and informed him of the developments in Eldoret and he authorized the investigating officer and another officer to accompany me to Eldoret for purposes of bringing the accused person. The accused was handed over to the investigating officer yesterday and the accused was brought to Nakuru Police Station awaiting production before this court.*

*I humbly pray to this court to let me withdraw as a surety and I wish to add that the accused person ought not to be allowed to subject any other person to what I have gone through. I have spent money and resources over the matter. I pray that my title deed and that of my surety be released to the depositors.*

*On our way back from Eldoret the accused made very wild allegations against officers in Nakuru and also against this Honourable Court. He said he gave money to a judicial officer who promised that the accused was to get his freedom and this matter would be brought to an end somehow. He complained that he used a lot of money to buy his freedom. In that reason, the accused qualified to remain in custody until the case is determined.*

*Accused 2: As we were travelling yesterday, there is a bag that was left in the vehicle that we were in. The bag had my medicine. My life depends on those medicines. I pray that I may be detained at Nakuru Police Station as I wait to be given my chance to respond.*

*Prosecutor: No objection.*

Court: Mention on 20th August 2018. Accused 1 to be remanded in custody at Nakuru Police Station.

**RULING**

*I have considered the application made by the 2nd accused. He be allowed to seek another surety, and the response by the prosecution. I note that the 2nd accused was released on bond on 5th January 2017 after he presented his surety on 4th January 2017. Following his release, he did not return to court until he was arrested by his surety in Eldoret, allegedly where he had gone to commit crimes. I find that there are serious compelling reasons as to why he could not be released on bail/bond and as such he shall be remanded in custody pending the hearing and determination of the case."*

29. It is this same applicant who has come before me on the same grounds of illness to seeking him bail pending appeal.

30. He was only sentenced on 6<sup>th</sup> May 2020 to imprisonment for life.

31. The applicant's previous conduct while on bond for similar reasons does not place him in a good place, to warrant the exercise of this court's discretion in his favour.

32. The applicant has been in custody since the time he was arrested after absconding from bond. He has received treatment while in custody. Treatment is available to him while in custody.

33. There is no risk of his serving his sentence before the appeal is heard and determined. Let him prosecute his appeal.

34. Application denied.

**DATED, DELIVERED AND SIGNED VIRTUALLY THIS 22ND DAY OF DECEMBER, 2021.**

**Mumbua T. Matheka**

**Judge**

**In the presence of:-**

Court Assistant Lepikas

For state: Ms. Murunga N/A (with notice)

For accused: Mr. Mong'eri N/A

Accused present virtually