



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 13 OF 2020

PERMUIA OLE ROBIA

KUPERE OLE MAITEI

KUTEREI OLE KUYAN MAITEI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The appellants herein were charged with two counts of robbery with violence contrary to section 296(2) of the *Penal Code* and an alternative charge of handling stolen goods contrary to section 322(2) of the *Penal Code*. in Mavoko Chief Magistrate's Court Criminal Case No. 783 of 2013. After hearing, the trial court found the appellants guilty of the two offences of robbery with violence as well as the offence of handling stolen property. For the two counts of robbery with violence they were sentenced to 30 years each while for the alternative count they sentenced to 4 years each. The said sentenced were directed to run concurrently.

2. This ruling arises from the Notice of Motion dated 18th March 2020 by which the appellants seek that they be admitted to bail pending appeal. Although it is stated that the application is supported by affidavit sworn by all the appellants, there is only one affidavit filed with the application and it is sworn by **Permuia Ole Robia**, the 1st appellant, in which he deposes that the appeal has high chances of success based on his petition. It was deposed that the prosecution's case was not proved beyond reasonable doubt and that the sentence imposed was excessive in the circumstances. Further, he stated that he never absconded trial in the lower court and that he never collected his security in the lower court and was ready to abide by any conditions this court may impose.

3. In the submissions filed on behalf of the appellants, it was submitted that it was erroneous for the appellants to have been convicted in the principle offence and in the alternative as well. Further the exhibits were not in line with the particulars of the offence; the appellants were denied the right to an advocate during mitigation and sentencing; the appellants were convicted on a defective charge since the particulars disclosed murder as opposed to robbery with violence; identification was not as per the required standards and that the defence of the appellants was never considered by the Court.

4. In opposing the application, it was submitted by the Respondent that the applicants appeal does not have any overwhelming chances of success as alleged since the prosecution tendered a water tight case and proved their case beyond any reasonable doubt. Since the applicants were found in possession of recently stolen property, in the absence of any reasonable explanation, a presumption of a fact arose that they were thieves or the recipients. And in the absence of evidence to rebut this presumption, the court was within the law to convict the appellants and as such it is highly unlikely that the appeal would succeed. The prosecution witness no. 2 positively identified the appellants at the scene off the crime and at the identification parade as the ones who violently robbed him. Pw2 identified the appellants as their torches were well lit and they shove touches on his face and legs so he was able to see the appellants and identify them. Actual violence was subjected to the victims of the crime during the robbery. PW2 was beaten using clubs on his back and he sustained serious injuries and a P3 form was produced in court.

5. In support of its case the Respondent relied on the case of **Jivraj Shah vs. Republic (1986) KLR 605** and **Paul Kanai & Another vs. Republic (2017) eKLR**.

6. In the Respondent's view, there are no exceptional circumstances brought forward by the applicants to warrant bond pending appeal. The application for bond pending appeal was brought under certificate of urgency on the premise that the applicants were sick and in need of urgent medical attention. The applicants have not attached any medical documents to the supporting affidavit to prove this. And in any event

that they are unwell, the prisons department are well equipped with medical facilities which offer their services free of charge. It was submitted that the applicants are flight risk and there is a likelihood for them to abscond as they are serving many years in prison based on the case of **Dominic Karanja vs. Republic [1986] KLR 612.**

7. It was submitted that the court's conviction and sentence of the applicants was proper and very lenient in view of the offence committed by the applicants. The court took into consideration the circumstances which the offence was committed and the court noted that the offence was aggravated and indeed a life was lost. The applicants have been confirmed to be dangerous to the society and the court should not take chances by releasing them on bond.

8. In light to the foregoing, it was contended that the applicants had not raised sufficient grounds to warrant bail pending the intended appeal and the court was urged to dismiss the application.

Determination

9. I have considered the application and the affidavits both in support thereof and in opposition thereto as well as the submissions made.

10. Article 49(1)(h) of the Constitution provides that:-

An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

11. However, a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the *Criminal Procedure Code* provides as follows:

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.

12. It was therefore held in **Masrani vs. R [1060] EA 321** that:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

13. I therefore agree with the position in **Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR** where it was held that:

“The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R [1966] KLR 605*, the principle considerations for granting bail pending appeal were stated as follows:

(1) Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.

(2) It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.”

14. This position was restated in **Mutua vs. R [1988] KLR 497**, in which the Court of Appeal stated:

“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.”

15. In **Jivraj Shah vs. Republic [1986] KLR 605; [1986] eKLR**, the Court of Appeal held that:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 argued, 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. The decision in *Somo v Republic* [1972] E A 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of 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. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”

16. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the Court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

a) Whether the appeal has overwhelming chances of success. See *Ademba vs. Republic* [1983] KLR 442, *Somo vs. R* [1972] EA 476, *Mutua vs. R* [1988] KLR 497;

b) There are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion. See *Raghibir Singh Lamba vs. R* [1958] EA 37; *Jivraj Shah vs. R* [1986] eKLR; *Somo vs. R* (supra); *Mutua vs. R* (supra);

c) There is a high probability of the sentence being served before the appeal is heard. See *Chimabhai vs. R* [1971] EA 343.

17. What constitute exceptional circumstances were dealt with in *R vs. Kanji* [1946] 22 KLR, where **De Lestang, Ag.J** (as he then was) held that:

“The appellant’s appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admit to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail.”

18. According to **Trevelyan, J** in *Somo vs. R* [1972] EA 476:

“...the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance.”

19. Good character alone, however, it was held in the same case:

“can never be enough. There is nothing exceptional or unusual in having such a character.”

20. The rationale for considering the chances of success of the appeal was given in *Somo vs. R* (supra) at page 480 as follows:

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”

21. In this case, I have no difficulty in finding that the appellants’ appeal is not frivolous. This is due to the fact that the Appellants were not only convicted and sentenced on the main counts but were similarly convicted and sentenced on the alternative count.

22. That however is not the only matter for consideration since even if the Court agrees with the Appellant on that issue only, it would not amount an exceptional circumstance. As was stated in *Somo vs. R* (supra) the fact that the appeal is not frivolous is of no consequence on its own in support of the application though the fact that it is thought to be frivolous, on the other hand, is for consideration in favour of its rejection.

23. As regards ill-health, it was held by the Court of Appeal in *Daniel Dominic Karanja vs. Republic* [1986] eKLR that:

“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. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see *Somo v Republic* [1972] E A 476. A 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. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of illhealth arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.”

24. In light of the foregoing I find no merit in this application. Let the applicants expedite the process of the hearing of their appeal.

25. This ruling has been delivered by Skype videolink due to the restrictions occasioned by COVID 19 Pandemic.

26. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 16th day of June, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngetich for the Respondent

Applicant in attendance via Skype

CA Geoffrey