



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 78 OF 2019

RICHARD KIILU.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant vide Chamber Summons application dated 22<sup>nd</sup> May, 2019 sought bail pending the hearing and determination of the instant appeal. He based this application on the grounds that the appeal had high chances of success and that he is likely to serve a substantial part of the sentence by the time the appeal is heard and determined.
2. The Appellant was charged alongside another with one count of robbery with violence contrary to **Section 296(2) of the Penal Code** and two counts of stealing contrary to **Section 268(1) as read with Section 275 of the Penal Code**. He was convicted of the charge of robbery with violence and acquitted of the second and third counts. His co-accused absconded.
3. The Appellant's counsel, Mr. Makori submitted that the appeal had high chances of success. It was his submission that the identification was marred by irregularities. He pointed that the identification parade was conducted after the Appellant had taken plea which rendered it faulty.
4. Mr. Makori, submitted that there were no compelling reasons to deny the Appellant bail. It was his submission that the Appellant was ailing, was a Kenyan citizen with fixed abode, had not absconded while on bail in the trial and was at the risk of serving a substantial part of the sentence before the appeal was determined.
5. Counsel for the Respondent, Miss Nyauncho, argued that the identification parade was not necessary. Her view was that the **PW1** identified the Appellant to the police who arrested them. The witness had therefore known the Appellant prior to the identification parade and as such the parade served no purpose. She additionally argued that the Appellant and his co-accused had been the subject of a mob beating pursuant to another alleged M-Pesa theft. It was therefore her submission that that the identification parade was of no value. In effect, she submitted that the identification of the Appellant was direct and not faulty. Her view was that the Appellant was properly convicted.
6. In an application of this nature, the court is enjoined to determine whether the appeal has high chances of success or there exists any unusual or exceptional circumstances to warrant the grant of bail pending appeal. (**See Jivraj Shah v Republic (1986)e KLR**). Under the first limb, a perusal of the evidence on record suggests that there is doubt as to the whether there was positive identification of the Appellant owing to the circumstances of his arrest. This is a matter that drives me to think that the appeal has a high chance of success. I will however not reevaluate it at this stage for fear that I may preempt a proper analysis of the evidence at the hearing of the appeal.
7. Under the second limb, the fact that the Appellant has a fixed abode and did not abscond do not constitute an unusual or exceptional circumstances to warrant the grant of bail pending appeal. This is in view of the fact that the Appellant remains convicted and must serve the full sentence unless or until the conviction and sentence are set aside by a competent court, See **Dominic Karanja v R (1986) e KLR**). Also the fact of the Appellant's illness is also not unusual as his illness can be taken care of in the prison.
8. I have also noted that **Section 211 of the Criminal Procedure Code** may not have been complied with, an observation that is likely to render the entire trial fatal. In addition to the fact that the Appellant may not have been properly identified drives me to conclude that the appeal, *Prima facie*, has a high chance of success. It is therefore a case that merits the grant of bail pending the hearing and determination of the appeal. I admit the Appellant to a cash bail of Ksh. 100,000/.

DELIVERED AND DATED THIS 31<sup>ST</sup> DAY OF JULY 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Makori for the Appellant.

2. Miss Akunja for the Respondent.