



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 172 OF 2019

JACKSON NTHENGE WILLY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. He was convicted with robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars were that the Applicant along with two other co-accused, on the 7th of November 2013 at around 3.05 pm at Elpaso in Kajiado North District, within Kajiado County, being armed with a dangerous and offensive weapon namely a pistol, jointly robbed Janet Gesare Kshs. 50 000 and at the time of the said robbery, threatened to use actual violence on the said Janet Gesare. He was sentenced to serve 7 years imprisonment.

2. He was aggrieved by the decision and preferred an appeal. He sought and appeal through a petition of Appeal filed on 7 August 2019. He further filed this application on the 9th August, 2019 by way of Chamber Summons in which he seeks to be released on bail pending the hearing and determination of the appeal.

3. The Applicant made oral submissions through learned counsel, Mr. Awino. Counsel submitted that the application has high chances of success on account of lack of sufficient identification evidence. It was his submission that the trial court relied on findings of an identification parade that was improperly conducted. He submitted that the parade consisted of clean and smartly dressed people in the midst of the Applicant who was dirty having been in custody for five (5) days. It was also his submission that the complainant in this charge, PW3, did not identify the Applicant. Further, that the other key witness in this charge, PW2, also did not identify the Applicant. It was the submission of counsel that there was no evidence that monies had been lost. This was because the complainant failed to demonstrate that the amount of money she had in the shop was stolen as she did not present a register showing MPESA transactions..

4. The Respondent through Mr. Momanyi submitted the Applicant had failed to demonstrate that the appeal had high chances of success. He submitted that the Applicant had been positively identified as the ordeal took place at 3.00 pm in broad day light. Further that an identification parade was conducted in which PW1 positively identified the Applicant. Counsel added that the elements of the offence were proved. Lastly, that the fact that the Applicant was out on bond during the trial was not a ground for consideration for grant of bail pending appeal.

5. Case law that guide the court in an application of this nature is rich. In the case of **Jivraj Shah V R (1986)** KLR the Court of Appeal held that:

“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.”

6. It is also settled that bail pending appeal is not an absolute right. The Applicant must demonstrate that the appeal has a high chance of success and that there exists unusual or exceptional circumstances to warrant the grant of bail pending appeal. See **Trevelyan J. in Somo v. Republic**[1972]EA 476. He delivered himself thus:

“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 an overwhelming probability that it will succeed.”

7. It is the duty of this court to interrogate the record of the trial court to be satisfied that the appeal has high chances of success on a substantial point of law and fact. In this application, the Applicant submitted that identification was faulty and contradictory. He specifically pointed to a faulty identification parade. He took issue with the manner in which the parade was constituted and further that the key witnesses in the robbery were unable to identify him. As to the constitution of the parade, he submitted that he had been in custody prior to the parade for five days and that he was dirty thereby making it possible for a witness to single him out. That the other members of the parade were brought from outside the cell and were smartly dressed and clean.

8. A look at the trial court record shows that PW1 drove the three accused persons to the scene of robbery. The Applicant and the 2nd accused left the car into PW3's shop leaving the 1st accused and PW1 in the car waiting. Shortly after, there were screams from PW2 and PW3 after PW3's shop was robbed. Simultaneously, the Applicant and the 2nd accused returned to the car running. They then ordered PW1 to drive off. Under these circumstances there is *prima facie* evidence that the Applicant participated in the robbery. He was subsequently identified in a parade by PW1.

9. As to the credibility of the parade, is an issue the court hearing the appeal will further interrogate. As at now, I have not deduced any fault in the manner the parade was conducted.

10. Counsel for the Applicant also argued that the appeal was likely to succeed on account that nothing was demonstrably stolen. It was his submission that there was no proof that the complainant lost the monies alleged. I agree that nothing was adduced in evidence to demonstrate that anything was stolen. However, this does not lessen the fact that a robbery took place. There is no hard rule that theft of goods must be established by production of the stolen goods. The court will further reevaluate this evidence at appeal hearing.

11. Finally, it was the submission that the Applicant deserved bail because he did not abscond trial yet he was on bond. It is trite law that the good conduct of a person during trial does warrant him to be released on bail pending appeal. The rationale to this is that he has already been convicted by a competent court and he remains as such unless the conviction is set aside. The Applicant stands out in this position; he must serve the sentence unless his appeal succeeds.

12. I accordingly find the application without merit and I dismiss it.

Dated and delivered this 26th day of September, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Owino for the Applicant.*
2. *Mr. Momanyi for the Respondent.*