



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 48 OF 2018**

**IBRAHIM NAMU NJERU.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This is a ruling on the appellant's application for bail pending appeal dated 29<sup>th</sup> May 2019. The applicant was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code by Senior Principal Magistrate Runyenjes. He then lodged this appeal challenging the entire judgment.

2. It is the applicant's contention that his appeal has a high probability of success and that it is in the interest of justice that his application be allowed considering the likelihood that he will serve many years in prison before his appeal is heard. The applicant further states that no prejudice will be occasioned on the prosecution if he is admitted to bail pending appeal.

3. In rejoinder, the respondent, through their counsel, Ms. Mati, opposed the application on the grounds that the appellant was rightfully convicted and that the applicant has failed to demonstrate how his appeal had a high chance of success. It was further deponed that it was unlikely that the applicant shall have served a substantial term before the appeal is heard and that the retributive purpose for the sanction set for the offence of Robbery with violence would not be served if the applicant was let out on bail pending appeal.

4. The parties agreed to dispose of the appeal by way of written submissions.

**B. Applicant's Submission**

5. It was submitted that the court should rely on the case of **David Waweru Mugure v Republic [2018] eKLR** where the court considered the conditions to be fulfilled to warrant grant of bail pending appeal.

6. It was submitted that the court should be guided by the case of **Charles Mukabi v Republic [2016] eKLR** where the appellant had raised an alibi defence in the trial court, the court held inter alia *that the appellant had demonstrated that the appeal was not only arguable but one that raised a substantial point of law with a probability of success.*

7. Further, it was submitted that owing to the case backlog at Embu High Court, the applicant was at risk of serving a substantial part of the sentence before his appeal was determined. The applicant also relied on the case of **Gerald Macharia Githuka v Republic [2004] eKLR** where the court held inter alia *that no one should be punished without the benefit of due process including the right to exhaust the right to appeal and as such incarceration before trial or pending hearing of an appeal cuts against this principle...*

8. The applicant also relied on the case of **Elijah Gichangi v Republic [2017] eKLR** the application for bail pending appeal was allowed on the ground that the said appeal had chances of success.

**C. Respondent's Submissions**

9. The respondent submitted that the appeal did not have overwhelming chances of success as alleged by the applicant as the failure by the prosecution to call a police informer did not render the case weak as the testimony of the informer was not necessary in the circumstances of the case because PW1, PW2 and PW3's testimony was sufficient to prove the charge of robbery with violence. Reliance was placed on the case of **John Otieno Juma v R (CAR 214/2009)**.

10. It was also submitted that where an accused person was found in possession of recently stolen property, in the absence of any reasonable

explanation, a presumption of fact arose that he was either the thief or the recipient and in the absence of evidence to rebut this presumption, the trial magistrate was within law to convict the applicant and as such it was highly unlikely that the appeal would succeed.

11. The respondent submitted thus that the application for bail pending appeal should be denied.

#### **D. Analysis and Determination**

12. Having carefully considered the application and the oral submissions of the parties I find that the only issue for determination is **whether the Appellant should be granted bail pending appeal.**

13. Section 357 of the Criminal Procedure Code provides for admission to bail or suspension of sentence pending appeal. It states at sub section (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.’*

14. The applicant has filed an appeal. I reiterate the words of the Court in **Gerald Macharia Githuka v Republic Criminal Appeal No. 119 of 2004**, that;

*“The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle...”*

15. This is the essence of the right to bail pending appeal where the applicant has fulfilled the requisite conditions, despite losing the presumption of innocence.

16. Once a trial court has made a determination and found an accused guilty of the offence, he is no longer considered innocent for his guilt has already been established. In this regard, if such a convict dissatisfied with the outcome, his recourse is to appeal against the decision.

17. Consequently, the conditions applicable for bail pending trial and bail pending appeal are different. After trial and conviction, an accused is no longer be presumed as innocent and bail is no longer an automatic right. Such an applicant must demonstrate that his appeal has overwhelming chances of success to be entitled to bail pending appeal. Of course, there may be other considerations such as poor health of an applicant which the prisons authorities may not be able to deal with in prison or that the sentence is too short that by the time the appeal is concluded, the term may have been served.

18. In the case of **Jivraj Shah v Republic [1986] KLR 605**, the Court of Appeal held: -

*“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 the court can fairly conclude that it is in the interests 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 an account of some substantial point of law to be urged, and the sentence or substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.”*

19. In **Dominic Karanja v. Republic [1986] KLR 612** the Court of Appeal also held: -

*“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] EA 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.”*

20. Article 49 (1) (h) provides that “an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.” The Bail and Bond Policy Guidelines provide at that with respect bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.

21. In this case the applicant argued that the appeal has overwhelming chances of success. The applicant’s advocate filed a petition of appeal dated 20<sup>th</sup> December 2018 in which he raises eight (8) grounds for appeal. It is trite law that it is not for the court to delve into the merits of each ground but it should suffice that all the grounds are examined, and a conclusion is made that *prima facie* the prospects of success are dim or high. I have carefully examined the grounds of appeal raised by the applicant. I have also carefully perused the proceedings and Judgment in **SPMCC Runyenjes Criminal Case No. 341 of 2015** and note that the petition of appeal rests on the ground that the trial court convicted the applicant without the prosecution proving its case beyond a reasonable doubt.

22. Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant, and the public interest on the other. *On the one hand it is the duty of the court to ensure that crime where it is proved, is appropriately punished, this is for the protection of society; on the other hand it is equally the duty of the court to uphold the rights of persons charged with criminal offences, particularly the*

*human rights guaranteed under the constitution.* This position was expressed by the court of appeal in **Gerald Macharia Githuku v Republic [2007] eKLR.**

23. Further I have examined the grounds of appeal and in my view they are not frivolous. In an application of this nature, an applicant is required to satisfy the existent of one or a combination of the conditions mentioned in the earlier cited authorities. It is the applicant's argument that his appeal is likely to take a long time before it is determined. This has not been confirmed or substantiated. Is there a possibility that by the time the appeal is heard and determined, he may have served a substantial part of the sentence? The applicant was sentenced to death in this case. I am aware that for the last twenty years execution of death sentence has not been executed. This country is moving toward re-thinking death sentence. As such I find no possibility that the applicant will be executed before his appeal is heard and determined.

24. The court must also consider the nature and gravity of the offence as well as the sentence imposed. The applicant was convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code and was sentenced to death on 10/12/2018. This was after the mandatory nature of death sentence had been declared unconstitutional in the Supreme Court Petition of **Francis Karioko Muruatetu and Another v R. [2017] eKLR.** This leads to the conclusion that the trial magistrate to have imposed the death sentence, there must have been aggravating circumstance in the commission of the offence.

25. Having considered the serious nature of the offence, the severe sentence provided for by the law and the unlikelihood of execution of the sentence imposed, I am of the considered view that this application has no merit and is hereby dismissed.

26. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for State/Respondent**

**Ms. Mutegi for Andande for Applicant**

**Applicant**