REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 56 OF 2015

JACKSON KIBOR CHERONO ……….……..………….................…. APPELLANT

VERSUS

REPUBLIC …………………….....…………………….............…… RESPONDENT

RULING

1. The appellant *Jackson Kibor Cherono* was tried and convicted of the offence of robbery with violence contrary to *Section 296(2)* of the *Penal Code*. He was sentenced to suffer death.
2. He was aggrieved by his conviction and sentence. He thus proferred an appeal to the High Court. While waiting for the hearing of his appeal, the appellant through his advocates *Ms Marube & Company Advocates* filed a notice of motion dated 19th October 2015 seeking that he be admitted to bond pending the hearing and determination of his appeal.
3. The application is premised on two grounds: that the appeal has overwhelming chances of success and that the applicant shall suffer irreparable damage if the orders sought are not granted. It is supported by an affidavit sworn by the appellant's counsel Mr. *Nteng'a Marube* on 19th October 2015. The deposition in the supporting affidavit mainly re-iterates the appellants claim that his appeal has high chances of success.
4. During the hearing of the application on 17th December 2015, learned counsel Mr. Marube in a bid to demonstrate that the appeal has high chances of success submitted that the appellant's conviction was solely based on his alleged identification by the prosecution witnesses during the robbery particularly PW2, PW3 and PW8; that the evidence of his identification was weak and unsatisfactory; that the said identification basically amounted to dock identification which was baseless in law; that the learned trial magistrate erred in not interrogating the circumstances surrounding the alleged identification and thus wrongly convicted the appellant. He therefore urged the court to allow the application.
5. The application is contested by the State. In opposing the motion, Learned Prosecuting Counsel *Miss Karanja* submitted that the appellant's conviction was sound in law as in her view, he was positively identified by PW2 and PW3 during the robbery; that the appellants appeal did not have any chances of success and that there were no exceptional circumstances that would warrant the appellants admission to bond or bail pending his appeal.
6. I have considered the application, the grounds cited in the petition of appeal; the rival submissions by learned counsel; the proceedings before the lower court and the authorities relied upon by Mr. Marube in support of the application. Having done so, I take the following view of the matter.
7. Under the provisions of *Section 357* of the *Criminal Procedure Code*, the court has wide discretion in deciding whether or not to release a convicted person on bond pending the determination of an appeal. This discretion must however be exercised judicially in accordance with the law and the circumstances of each case.
8. In considering an application such as the one before the court, the court must always bear in mind

that unlike an accused person, an appellant does not enjoy the presumption of innocence which is guaranteed by the Constitution. That presumption is removed immediately an accused person is convicted of a criminal offence by a competent court. This is informed by the presumption that an appellant had been properly convicted by the lower court and this presumption remains until the conviction is overturned or set aside on appeal. It is for this reason that an appellant is required to demonstrate that his appeal has high or overwhelming chances of success before the court can exercise its discretion in his favour by admitting him to bond pending an appeal. Another consideration the court may take into account which is secondary to the appellant's obligation to establish that his appeal has high chances of success is whether the applicant has shown that there are special or exceptional circumstances in his case that warrants his admission to bond pending appeal.

9. The above two principles have been established in a long line of authorities. It suffices to cite just two of them. In *Dominic Karanja V Republic (1986) KLR 612*, the Court of Appeal held *inter alia* as follows:-

> ***''The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances…"***

Similarly in ***Somo V Republic (1972)EA 476*** ,the Court when ruling on a similar application stated *inter alia* that ***"the most important ground is that the appeal has an overwhelming chance of being successful: in that case there is no justification for depriving the applicant of his freedom".***

10. In this case, as stated earlier, the application is mainly anchored on the ground that the appellant's appeal has high chances of success as in the appellant's view, the circumstances surrounding his alleged identification were not conducive to a positive and correct identification of the robbers and that therefore, his conviction was wrong.
11. I have read and analysed the evidence adduced before the lower court and the judgment of the learned trial magistrate. Without making any findings, I have noted that PW2 and PW3 stated in their evidence that they were able to see and identify the appellant clearly both during the robbery and later at an identification parade. In my view, the question of whether their identification of the appellant was positive and reliable or weak and unsatisfactory as submitted by the appellant or whether the learned trial magistrate interrogated the circumstances under which the alleged identification was made before convicting the appellant are questions which can only be answered by the judge who will hear and determine the appeal. I cannot at this stage delve into these issues at length for fear of pre-empting or prejudicing the hearing of the appeal. On my part, I can only say that the appeal raises a substantial point of law which is arguable but I am not convinced that the appeal has overwhelming chances of success. The appellant has thus failed to meet the threshold required for grant of bond pending appeal. The application is accordingly dismissed.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 26th day of January, 2016.

In the presence of:-

The Appellant

…………………………………… for the Appellant

…………………………………… for the Republic

……………………………………. Court Clerk