



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CRIMINAL APPLICATION NO. 118 OF 2015

GODWIN VEDASTO MWISIGWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By Chamber Summons dated 10th of April 2015 brought under section 357 of Criminal Procedure Code and all Enabling provisions of law the applicant herein prays that he be granted bail pending the hearing and determination of High Court Criminal Appeal No. 19of 2015. The Application is premised on grounds that the appeal has high chances of success, that the applicant shall abide by any conditions the court shall grant, that the applicant is likely to have served the sentence by the time the appeal is heard and determined thereby rendering the appeal nugatory and that it is in the interest of justice to grant the order sought.

The application is supported by the affidavit of the applicant sworn on 10th of April 2015. It reiterates the grounds on which the application is premised.

The application was canvassed by way of filing written submissions. Those of the applicant are dated 5th May 2015 and were filed on his behalf of Messers Mulanya and Maondo advocates. In brief it is submitted that the appeal has high chances of success. Specifically that the learned trial magistrate erred in law in his application of the doctrine of recent prosecution. It was submitted that sufficient evidence was not tendered to support the said doctrine hence the trial court misdirected itself in upholding the evidence for the prosecution in that respect. It was also submitted that the complainant who testified as PW1 did not identify the appellant as the person who robbed him and the identification having not been proved, it followed that the stolen goods could not be traced to the appellant. Further it was submitted that PW4 who was the arresting officer was given names of some suspects but that of the appellant did not feature. Again, the evidence traced to the telephone used did not also link the applicant to the offence. The applicant's counsel also poked holes in the evidence of the witnesses whom he said gave contradicting evidence which broke the chain that would have linked the applicant to the offence. The Court was referred to the case of **Samuel Ndirangu Mbugua Vs. Republic (2006)eKLR** in which it was held that:

“For the doctrine of recent possession to apply, the prosecution must prove that the stolen item was found in the possession of the appellant. They must also establish that the said stolen item was found in possession of the appellant so soon after the item had been stolen from the complainant. The presumption that the appellant was involved in the robbery where the item was stolen would only apply if the appellant fails to give a satisfactory explanation of how he came into possession of the said stolen item”.

According to the applicant, he gave a satisfactory explanation of how he acquired the phone and in any event the same was recovered after a long period of time since the commission of the offence. His case was that he was a third user and not the thief. His further case was that the said phone was in the actual possession of one Teresia Nyambo keeven after money was sent from it.

In an apparent concession, the respondent in his written submissions dated 13th of May, 2015 submitted that the prosecution did not discharge its burden in proving that the applicant was guilty of the offence of robbery with violence contrary to section 296 (2) of the Criminal Procedure Code. On the issue of handling stolen property the respondent submitted that the appellant was accused erroneously and ought not to have been convicted. His further submission was that the learned trial magistrate wrongly applied the doctrine of recent possession thereby arriving at a finding that the applicant was culpable. It was the opinion of the respondent that the applicant has a high chance of succeeding in his appeal.

Having considered the application and the respective submissions I take the following view of the application. It is trite law that for an application of bail pending appeal to succeed the applicant must demonstrate that the pending appeal has a high chance of success and that there are exceptional and unusual circumstances warranting the granting of bail. See Ademba Vs. Republic(1983) KLR, 442 in which the court held, Inter alia, that;

1. **Bail pending appeal may only be granted if there are exceptional or unusual circumstances.**
2. **The likelihood of success in the appeal is a factor taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.**

In the instant case, I have had the advantage of going through the record of proceedings before the trial court. I am in total agreement with both the learned counsel for the applicant and the respondent to the extent that the applicant has an arguable appeal with a chance of success. I am however hesitant to evaluate the evidence for the likely event that I may determine the appeal in the ruling. However I would wish to point out the main reason that the applicant was linked to the charge was his possession with the stolen item. The evidence adduced linking him to that item was not satisfactory thus lending the prosecution inadequate in discharging its burden to the required standard.

The Court was also urged to determine the application in favour of the applicant because if he is not released on bail, is likely to have served the sentence by the time the appeal is heard and determined. However, in my candid view this is not a principle consideration in an application of this nature. If this factor were to be considered in favour of the applicant the Court would have to relook at the circumstances of the entire case which in its totality the appeal ought to succeed. See the case of Jivraj Shah – Vs- Republic (1986) KLR 605. It was held that:

“If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist”.

In the instant case, the appellant was convicted for the main charge of robbery with violence and was sentenced to death. The judgment was delivered on the 21st January 2015 and so the appellant has been in prison for about 5 months. The death sentence is indefinite and so the appellant cannot claim he will have served the same by the time the appeal is heard and determined. It is only that I have upheld that the same is likely to succeed that I will find for him, otherwise the latter ground cannot bail him out.

In the upshot, the application succeeds and the same is allowed. The applicant shall execute a bond of Ksh.500,000/= (five hundred thousand) with one surety of similar amount to be assessed by the Deputy Registrar of this Court.

DATED and DELIVERED at NAIROBI this 25th Day of May, 2015.

G. W. NGENYE–MACHARIA

JUDGE

In the Presence of:-

1. **Ombasaholding** brief for **Mulanya**, for the Applicant.

2. **M/s Nyauncho**, for the Respondent.