



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL CASE NO.182 OF 2011

SIMON MBAABU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicants **Simon Mwangi Mbaabu** represented by Mr. Kariuki in HCCRA No.182 of 2011 and **Peter Wahiga Kabiru** represented by M/s Mwai in HCCRA No.181 of 2011 have come to this court seeking for orders that they be admitted to bail pending hearing and final determination of their appeals. They are also applying that their sentences in Nyeri Chief Magistrate's Criminal Case No.66 of 2010 be suspended pending the hearing and final determination of the appeal.

The application is grounded on facts that the appellants/applicants were charged on 30th December 2009 with the offence of robbery with violence contrary to section 296(2) of the Penal Code. They were convicted and sentenced to death on 18th August 2011 for the offence ,however, being dissatisfied with the judgment and sentence they lodged their respective appeals vide High Court Criminal Appeals No.181 of 2011 and 182 of 2011.

The appellants/applicants argue that their appeals have overwhelming chances of success and given the time it will take to hear the appeals, if successful, the appeals will be rendered nugatory.

Mr Mbaabu on his part asserts that he suffers from a chronic medical condition which requires specialized treatment and it is therefore in the interest of justice that the he be released on bond/bail to seek specialized medical attention pending hearing and determination of the said appeal.

The supporting affidavit was deponed by Simon Mwangi Kariuki, the applicants advocate who states that that he is an advocate of the High Court of Kenya retained by the appellant/applicant in High Court Criminal Appeal No 182 of 2011 to conduct the appeal therein on his behalf. He states that the applicant was charged with offence of robbery with violence contrary to section 296(2) of the penal code and was convicted of the offence and sentenced to death, however he is dissatisfied with the conviction and sentence and has lodged an appeal in this Honorable Court as appears in the petition of appeal and proceedings on record. He believes that the appeal has a high probability of success and is apprehensive that if not granted bail his appeal may be rendered nugatory should he succeed and furthermore was informed by the appellant which information he believed to be true that the applicant suffers from chronic headache and hypertension that requires him to seek specialized medical treatment not available at the prison and his health is likely to deteriorate if he continues to be incarcerated. Most importantly he undertakes that the appellant is committed to attend court when required if released on bail pending appeal.

When the matter came up for hearing, Mr. Kariuki appeared for Simon Mbabu whilst M/s Mwai appeared for Peter Wahiga Kabiru. Mr. Kariuki argued that the appeal has probability of success on the issue of identification. He argued that the identification parade which was conducted on the 13/1/2010 was not attended by the applicant as the persons who were members of the parade were not of his size, complexion and body type. He argues further that on cross-examination, PW6 at page 91 of proceedings admitted that there was only one identifying witness and that the same parade members were used. Moreover, the investigating officers were guiding them.

The offense took place on 15/10/2009 between Murang'a and Sagana and the vehicle used was KBB 653F. There was no evidence that the applicant and the co-accused were armed with dangerous weapons. The import of the evidence of PW1 was that the third accused person used a wheel spanner to cut his throat. Moreover that the iron bars and the handcuffs mentioned in the charge sheet were not mentioned by the witnesses. The applicants were arrested on 8/1/2010 in motor vehicle registration number KBK 280A, A Toyota Harrier and not the motor vehicle KBB 653F. They were arrested in Kitale whilst the offence took place in Murang'a. From Kitale, they were taken to Nakuru, Nairobi, Murang'a and then Nyeri. He argues that taking into consideration the time when the offence took place in October and when they were arrested in January, there is no cogent link in the evidence supporting the charges and the evidence produced during trial. Upon arrest, the vehicle registration No.KBK 280A was searched but no weapons were found. The only recovered item was a spent cartridge of an AK 47 rifle linked to the accused persons. Moreover police identification cards and pocket radio were recovered from the vehicle.

Mrs Mwai supported the arguments of Kariuki and asked the court to consider the application of her client alongside the application of Simon Mbaabu.

Mr. Makunja on his part opposed both applications and stated that the applicants were not convicted solely on identification parade. Furthermore, he argued that it is not possible that the applicants would have served a substantial part of their sentence if the appeal would be allowed and therefore prejudicing them. Lastly he argued that there are no special circumstances like medical demonstrated by the application and submitted that bond pending appeal is different from bail pending trial and warned us against wading into the appeal.

As submitted by the prosecution counsel, this court should not wade into the merits of the appeal but should consider the application on the basis of the likelihood of success of the appeal and any exceptional or unusual circumstances.

On the first issue of the likelihood of success, it is evident that the PW1 was attacked and violently robbed of his money and mobile phone all valued at Kshs.70,000/=. In his evidence in chief, he identified the two applicants as the persons who "arrested" him and bundled him into the car pretending to be policemen only to turn out to be robbers.

PW1 witnessed the kidnapping but did not witness the robbery. The vehicle used in the kidnapping had been hired by the 2nd applicant from PW4. The vehicle in which the applicants were arrested in Eldoret thus KBK 280A had also been hired by one of the applicants from PW4. As stated earlier this court resists any attempt to wade into the merits of the appeals that will be discerned during the hearing of the appeal.

The learned trial magistrate convicted the applicants and sentenced them to death. He analysed the evidence against the applicants and their defences and found the evidence against them overwhelming.

We have carefully considered the application for bail pending appeal and do find that the appellants have not demonstrated that the appeal has overwhelming chances of success as the trial court did not rely on identification alone as there was the evidence of the hired motor vehicle KBB 653F that was used in the kidnapping having been hired by the applicant in HCCRA No.181 of 2010. There is also the evidence of the recovered items. We do not agree with the submissions of Mr. Kariuki that the only available evidence was the evidence of the identifying witnesses.

On the other issue, no exceptional or unusual circumstance has been demonstrated by the applicants. The allegations by the applicant in HCCRA No.182 of 2010 that he suffers chronic illness is not sufficiently explained. Moreover, the applicants can seek for medical attention while in prison.

Ultimately, from the foregoing, the application is found without merit and is dismissed accordingly.

Dated, signed and delivered at Nyeri this 22nd day of January 2014

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE

Ruling is read in open court in the presence of the appellant and Mr. Njue for the state.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE