REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 174 OF 2012

DISHON MURILA MAALIMA ..... 1ST APPELLANT/APPLICANT

MOSES CHIMAKILE WEBUKE ..... 2ND APPELLANT/APPLICANT

VERSUS

REPUBLIC …..... RESPONDENT

(Being an appeal from the Judgment of the Hon. Dolphina A. Alego (Principal Magistrate) in Eldoret Chief Magistrate's Criminal Case No. 3007 of 2011 delivered on 19th October, 2012)

RULING

By Notice of Motion dated 5th November, 2012 brought under Section 357 (1) of the Criminal Procedure Code read with Article 49 (h), 50 (2) (b), (g), (h) and (q) of the Constitution and all other enabling provisions of the law, the Appellants/Applicants, in the main, pray that they be admitted to bail/bond pending the hearing and determination of the appeal.

On the face of it, the application is based on the following grounds:-

1. That the trial court convicted the appellants in Eldoret Criminal Case No. 3007 of 2011 for the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code hence sentencing them to hang.

2. That the Appellants are aggrieved by both the conviction and sentence of the trial court.

3. That the Appellants have therefore lodged an appeal against the said conviction and sentence which appeal has overwhelming chances of success.

4. That the Applicants are reasonably apprehensive that the hearing and final determination of the Appeal is likely to take long and thus will be prejudicial to the applicants.

5. That the applicants' health is quickly deteriorating since their committal to jail.

6. That the Applicants have been bonded during trial in the Chief Magistrate's Court Criminal

Case No. 3007 of 2011 and have never jumped bail during trial proceedings.

7. That the Applicants are ready and willing to abide by any reasonable terms attached to their release.

8. That the Appellants are men of good character and first offenders and they are anticipating delay in hearing of the appeal hence the need for them to be granted bail.

9. That the appeal has overwhelming chances of success as the trial court did not take into account the shortfalls or hitches in the prosecution case more especially convicting the Appellants in absence of crucial witnesses, for example, the Investigation and P3 form.

10. That the Appellants stand to suffer irreparable damage if this application is not heard expeditiously and the orders herein granted as prayed.

11. That it is in the interest of justice that this application be allowed as prayed.

12. That this application is made in good faith and without any undue delay.

It is further supported by two affidavits, separately sworn by the Applicants on 5th November, 2012.

Each supporting affidavit is a duplication of the other.

In summary, the Applicants depone that they were each convicted of the offence of robbery with violence and sentenced to hang. That they were granted bond pending trial before the Magistrate's Court and they did not abscond from the trial. That their appeal has high chances of success, mainly because crucial witnesses such as the arresting and investigating officers and the clinical officer never testified before the trial court. That their continued stay in prison has caused them mental anguish and, finally that they are ready and willing to abide with any conditions and terms set by the court if released on bail.

The State/Respondent did not file any response to the application, but chose to reply orally.

The application was canvassed before us on 11/4/2013.

The Applicants were represented by learned counsel, Mr. Omboto and the Respondent by learned counsel, Mr. Mulati.

Mr. Omboto submitted that the appeal has high chances of success. He stated that the trial court, in convicting the Applicants, failed to take into account the hitches and/or discrepancies in prosecution evidence. He submitted that the investigating officer and the clinical officer who examined the complainant after the attack did not testify. He said that such evidence of the clinical officer would have proved the existence of injury sustained by the complainant.

He further submitted that the Applicants had never absconded from or deliberately failed to attend court throughout the trial.

Mr. Omboto referred us to three authorities namely:-

1. **BWANEKA -VS- UGANDA (1967) EA. 768**,

In which it was held that the failure to call either the investigating or arresting officer was fatal to the prosecution's case.

2. **KISUMU HIGH COURT CRIMINAL APPEAL NO. 157 OF 2007 – PIUS ISAYA**

He submitted that this appeal was allowed on ground that the investigating officer did not testify before the trial court.

3. **KISII HIGH COURT CRIMINAL APPEAL NO. 120 OF 2008 – JAMES LESHOO SOKOME -VS- REPUBLIC**,

In which the court held that the Appellant was wrongfully convicted because a P3 form was never produced in court and there was no evidence that the Appellant had been treated anywhere or had sustained injuries.

Mr. Mulati, for the Respondent on the other hand argued that the appeal has no chances of succeeding. He argued that it was not that the prosecution closed its case without calling relevant witnesses, but that the prosecutor applied for an adjournment as he did not have his file in court. That that application for adjournment was declined by the court as a result of which he was compelled to close his case.

He submitted that all the ingredients in an offence of capital robbery were proved by the testimonies of PW1, 2, 3 and 4.

In reply, Mr. Omboto for Applicants, argued that, the State having conceded that both the investigating and arresting officers did not testify, was a clear testimony that the appeal would succeed.

He further submitted that the ingredients of the offence of capital robbery under section 296 (2) of the Penal Code were not proved by the prosecution.

From the onset, we would like to point out that, under Article 49 (1) (h) of the Constitution, the right to bail is availed to an accused person where trial is pending as opposed to an Appellant who is already serving sentence.

Further, Article 50 (2) (b), (g) and (h) relate to the rights of an accused person to a fair hearing. Sub-Article 2 (q) provides for a review of a conviction.

In the case at hand, the application neither relates to a determination as to whether the Applicant was accorded a fair hearing nor for a review of the conviction or sentence before the trial court. Therefore, the provisions under the Constitution cited by the counsel for the Applicants do not apply in this application.

It is also our view, from the foregoing, that the Constitution has not envisaged a situation in which Appellants are entitled to bail. In considering applications for bail to persons already serving sentence or otherwise have been convicted, courts have been guided by principles laid by courts of high jurisdiction. Suffice it to say though, this court, on its own, has the discretion to consider each case on its merit upon evaluation of reasons advanced in the application.

Having said that, we may summarize the basis upon which this application is brought into three as hereunder;

1. That the appeal has high chances of success.

2. That the Applicants, having not absconded from the trial, will abide with the terms of bond that this court may set.

3. That the Applicants' health is deteriorating whilst in prison and therefore deserving of the request made.

It is also important to point out that, Section 357 (1) of the Criminal Procedure Code which provides that:-

"**(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 ….....**"

is not framed in mandatory terms.

Therefore, it is up to this court to consider the merits of the arguments made before it in determining whether the Applicants deserve to be granted bail pending appeal.

The principles to be considered in granting bail pending appeal were well enunciated in the case of **ADEMBA -VS- R (1983) KLR, 442** and **MUTUA -VS- R (1985) KLR, 497**.

In the **ADEMBA** case, 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 Mutua case, court held as follows:-

"1. The main problem was whether the appeal had overwhelming chances of success for if it did not, then this Court would not grant bail pending the appeal by virtue of the Court of Appeal Rules, rule 5 (2) (a).

2. The test was whether there were exceptional or unusual circumstances, the most important being whether the appeal had overwhelming chances of being successful.

3. It must be remembers that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the Applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.

4. There was no overwhelming probability that the sentence would be reduced since the Appellate court could not deal with the issue of sentence, and on the other grounds, it was not apparent as a matter of law that the Appellant would succeed."

In the instant case, it has been submitted that the failure to call the investigating officer and the arresting officer rendered a fatal blow to the prosecution's case.

Whereas it is not obvious that the failure to call either of the witnesses may be fatal to a prosecution's case, court must take into consideration what evidential value such witnesses would offer. In this regard, we raise such pertinent questions as; on what basis were the Applicants arrested? Who reported the robbery and to whom? What report was given? What were the findings of the police upon investigations?

These answers in our view can and could only be answered by either the arresting or the investigating officer.

The failure to have them testify, whether deliberately or by default left such a huge gap in the prosecution's case that cannot be filled by any decorative words in this appeal.

Moreso, we note, contrary to what the trial court noted in its judgment, the P3 form was not produced by the complainant as an exhibit. The complainant testified as PW1 and he only identified the P3 form.

The said P3 form could only be produced by the investigating officer (by consent of the defence) or the medical officer who filled it. Unfortunately, none of these was a prosecution witness.

We wish to add, though, that whilst it is not mandatory that assault or use of force in an offence of capital robbery be proved by way of a P3 form, in this case, PW1 was issued with the document, which according to him was filled by a medical officer. Therefore, it is only through the production of the same that he would have proved that he sustained injuries.

Under section 296 (2) of the Penal Code, the use of force by wounding, beating, striking or use of any other personal force to a person is a core ingredient that must be demonstrated and proved to warrant a conviction.

It is our view that this ingredient was not proved by reason stated above, and as well, it rendered the prosecution's case irredeemable.

Following the two decisions we have cited above, in considering whether an appeal has high chances of success, it must be demonstrated, prima facie, that prosecution's case was hopeless and that the conviction was based on insufficient evidence and/or the trial court misdirected itself in law and facts adduced before it.

We think that this position obtains in this appeal.

On the good character of the Applicants, in **SOMO -VS- REPUBLIC, (1972) EA, 476-481**, it was held that the fact **"that Appellant is of good character, that the appeal has been admitted for hearing ….. are not exceptional or unusual circumstances."**

Also in **DOMINIC KANAYA -VS- REPUBLIC (1986) KLR, 612** the learned Judges said:-

"**The previous good character of the Applicant and the hardships, if any, facing his family were not exceptional or unusual factors ….**"

On the health of the Applicants, it has been argued that since their conviction, their health has deteriorated. Matters of health, constitute issues of the welfare of an individual. They are also not exceptional and unusual circumstances as to warrant the granting of bail pending appeal – See **MUTUA -VS- REPUBLIC (SUPRA).**

From the foregoing, we do find, prima facie, that this appeal has high chances of appeal.

In the result, we allow the application. Each of the Applicants shall execute a bond of Ksh. 1,000,000/= (one million) with one surety of a similar amount. The sureties shall be assessed by the Deputy Registrar of this Court.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 6th day of June, 2013.

HON. JUSTICE FRED A. OCHIENG

JUDGE

HON. LADY JUSTICE G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

…..... for the Applicants/Appellants

..... for the State/Respondent