



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEALS NO. 13, 14, 15 & 16 OF 2012**

**AND**

**IN THE MATTER OF APPLICATIONS FOR BOND PENDING APPEAL**

**FRANCIS OKOTCHI ..... 1ST APPELLANT/APPLICANT**

**FRANCIS KIPTUM ..... 2ND APPELLANT/APPLICANT**

**GODFREY KIPKEMEI ..... 3RD APPELLANT/APPLICANT**

**ISAAC NG'ANG'A ..... 4TH APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the Hon. Senior Resident Magistrate D. Alego in Eldoret Chief Magistrate's Criminal Case No. 7019 of 2009 delivered on 27<sup>th</sup> January, 2012)*

**RULING ON BAIL PENDING APPEAL IN CRIMINAL APPEALS NUMBER 13, 14, 15 AND 16 OF 2012 (CONSOLIDATED)**

The four Appellants were accused person in Chief Magistrate's Court at Eldoret **CRIMINAL CASE NO.7019 OF 2009 - REPUBLIC -VS- FRANCIS OKOTCHI, FRANCIS KIPTUM, GODFREY KIPKEMEI AND ISAAC NG'ANG'A.**

Upon their conviction by the trial court each of the Appellants separately filed the above referenced appeals. Francis Okotchi Chiboole filed Appeal No. 13 of 2012, Francis Kiptum filed Appeal No. 14 of 2012, Godfrey Kipkemei filed Appeal No. 15 of 2012 and Isaac Ng'ang'a Appeal No. 16 of 2012. For purposes of this ruling, I will refer to them as 1st, 2nd, 3rd and 4th Applicants.

Each one of them also separately filed the applications for bond pending appeal which were argued separately by each of the Applicants on the same date but will deliver a consolidated ruling. Although the respective files are contained in one bundle, it is not clear whether an order for consolidation of the respective appeals was made.

In respect of the 1st Applicant, the application is dated 2nd February, 2012, in respect of the 2nd and 3rd Applicants, their applications are dated 9th February, 2012 respectively and in respect of the 4th Applicant the application is dated 17th February, 2012. The 1st, 2nd and 3rd Applicants argued their applications in person while the 4th Applicant was represented by Mr. Njuguna Advocate. Mr. Mulati acted for the Respondent (State).

The applications were canvassed before me on 28th May, 2013. The 1st Applicant argued that his appeal has very high chances of succeeding. He submitted that, in respect of counts II and III the complainants did not identify him. He also stated that the charge sheet, was defective as he was charged with kidnapping with intent to murder yet none of the complainants testified that he intended to murder them. He stated that charges in counts II and III were drafted under the wrong provisions of the law.

The 1st Applicant also pleaded with the court to consider that he is a family man, with his elder son being in Form III. That the said child has had to drop out of school due to lack of school fees. He also urged the court to consider the fact that he has been in custody since the year 2009.

The 2nd Applicant also submitted that his appeal has very high chances of succeeding. In this respect, he submitted that none of the complainants identified him, that the prosecution did to disclose the motive of charging him. That crucial witnesses such as the arresting officer, did not testify, that court gave weight to the evidence of PW1 who knew nothing about the charges and that the charge sheet was defective as it did not adhere to the provisions of Section 258 of the Penal Code.

He further told court that before his arrest, he intended to join Eldoret Polytechnic and had undergone driving classes. He said he would abide with any conditions set by the court upon his release.

The 3rd Applicant also submitted that his appeal has high chances of succeeding. He stated that the prosecution evidence revealed variance between the date of his arrest and the date the offence was allegedly committed, that the charge sheet did not show the Police Occurrence Book (O.B) number and that no identification parade was done. He also urged court to consider that he takes care of his old parents and that he would wish to go and revive his business which has since his incarceration and imprisonment stalled.

On behalf of the 4th Applicant, Mr. Njuguna submitted that none of the 14 prosecution witnesses identified the 4th Applicant. He said that the 4th Applicant was convicted on Counts II and III in which he was charged with kidnapping with intent to murder and that none of the complainants in the two counts said they knew the 4th Applicant. He said that confession statements of 1st - 3rd Applicants did not implicate the 4th Applicant. That no evidence was adduced implicating the 4th Applicant who was arrested after being mentioned by his co-accused. That even then, none of he accused in their defence implicated the 4th Applicant.

Mr. Njuguna also submitted that the 4th Applicant is a father and husband and his family depends on him and urged the court to allow the application.

Mr. Mulati for the Respondent opposed the applications. He relied on a Replying Affidavit sworn by himself on 27th May, 2013. He submitted that there are no special circumstances that would warrant the court to grant the request sought by the Applicants. He stated that the Charge Sheet was not defective as the error in it pursuant to the provisions of Section 258 of the Penal Code was corrected on 26th November, 2009 when the Charge Sheet was substituted. He submitted that, although the identification parades did not produce any positive results, the 1st, 2nd and 3rd Applicants were convicted on strength of their confession statements which were admitted as exhibits. He conceded that the 4th Applicant was mentioned by his co-accused.

Mr. Mulati submitted that, although the Applicants were family men, had personal issues to take of and/or were of ill health, did not amount to unusual and exceptional circumstances that would warrant the court to grant them bail/bond. He urged the court to dismiss the applications.

In rejoinder, the 1st Applicant submitted that the confession statements were erroneously admitted. He said he recorded his statement in the absence of a third person and that they were all tortured when giving the confessions.

The 2nd Applicant denied that the Charge Sheet was amended. He submitted that, from the lower court proceedings, the confession is said to have taken place on 15th September, 2009, which was a date before his arrest. He also stated that they were not allowed a third person while recording their confessions as is provided by the law.

The 3rd Applicant on the other hand submitted that he never recorded a confession.

Mr. Njuguna submitted that a confession without corroborative evidence against a co-accused is not evidence. He stated that the 4th Applicant has no clue as to why he was arrested as the officer who arrested him did not testify. He urged court to look at the authorities he submitted on namely:-

**1. SIMON NJOGU GACHEWA & 2 OTHERS -VS- REPUBLIC - EMBU HC. CR. APPEAL NO. 102 OF 2011 - (2011) e KLR**

**2. ABDI MOHAMED AHMED -VS- REPUBLIC - NAIROBI HC. MISC. CRIMINAL APPLICATION NO. 474 OF 2011 (2012) eKLR**

**3. ABDULLAHI MOHAMED MOHAMUD -VS- REPUBLIC - NAIROBI HC. CRIMINAL MISC. APPLICATION NO. 663/2010 - (2012) e KLR**

The principles to be considered in an application for bail pending appeal are well set out 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."**

Again in JIVRAJI SHAH -VS- REPUBLIC (1986) KLR, 605, the Court of Appeal gave guidelines to be considered in an application for bail pending appeal as follows:-

**"1. The principles consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of appeal can fairly conclude that it is in the interest of justice to grant bail.**

**2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some 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, condition of granting bail will exist.**

**3. The main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued."**

As to whether the appeals have high chances of success, I take the following view;

In counts I, II and II, the four Applicants were jointly charged with robbery with violence contrary to Section 296 (2) of the Penal Code (count I) and kidnapping in order to murder contrary to Section 258 of the Penal Code (counts II and III).

In count IV, the 1st Applicant was charged with being in possession of Narcotic Drugs Contrary to Section 3 (1) (a) as read with Section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 and in count V, he was charged with being in possession of Government Stores contrary to Section 324 (2) of the Penal Code.

With regard to counts I, II, III, one basic ingredient of identification needed be proved. Evidence on record demonstrates that all the four Applicants were not positively identified. As fate has it however, the confession statements of the 1st and 2nd Applicants were admitted as P. Exhibits 4 and 3 respectively. As to the manner in which they were recorded, whether the laid down procedure in recording them was followed, it is my view that that should be left to the court that will hear he appeal. It is not therefore true that the 3rd Applicant recorded a confession or was implicated by his co-accused. His conviction would be basically founded on positive identification by the prosecution witnesses which is lacking. No wonder, all the Applicants were acquitted in count I for lack of identification. Any other implicating evidence against the 3rd Applicant would be by either strong circumstantial evidence or a confession statement, of which none exists. And if any circumstantial evidence exists, it is too remote as to found concrete evidence against him.

It is my considered view in the circumstances that the 3rd Applicant has an arguable appeal with a likelihood of success.

As regards the 4th Applicant, it is clear that he was arrested after he was mentioned by his co-accused. The assertion is not corroborated by any other evidence. In the same vein, the confession statements of the 1st and 2nd Applicants made no reference to the 4th Applicant as an accomplice. It is trite law that even if the confession statements of 1st and 2nd Applicants implicated the 4th Applicant, they must be corroborated by other material evidence. Such corroborative evidence in the instant case is lacking. I am doubtful what in the circumstances drove the police into arresting the 4th Applicant save on ground of mere suspicion.

The consideration as to whether an appeal has high chances of succeeding is not of paramount importance in an application of this nature. But if court were to find that the appeal is likely to succeed, 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.

I think this position obtains in respect to the 3rd and 4th Applicants.

As for the 1st and 2nd Applicant, I am hesitant to analyse the evidence tendered against them as this may pre-empt the pending appeal. They have submitted that they have personal issues they would wish to look after if granted bail. The 1st Applicant argued that he has a family he fends for

and that one of his sons has dropped out of school due to lack of school fees. The 2nd Applicant argued that before he was arrested he intended to join Eldoret Polytechnic College.

However, as held in **DOMINIC KANAYA -VS- REPUBLIC (1986) KLR, 612**, "the previous good character of the Applicant and the hardships, if any, facing his family were not exceptional and unusual factors ....."

Again in **ADEMBA -VS- REPUBLIC (Supra)**, the family and personal difficulties that an Applicant faces are not factors to be considered in an application of this nature.

Moreover the provisions of Section 357 (1) of the Criminal Procedure Code are not framed in mandatory terms. The court must carefully consider the merits of each individual case in determining whether an Applicant deserves to be granted bail pending appeal. In this regard, I add, that the mere fact that an Applicant can afford the terms of bail to be set by the court, is also not a good reason to avail him/her bond pending appeal.

I have noted that, as rightly submitted by Mr. Mulati for the Respondent, the prosecution amended the charge sheet on 26th November, 2009. A copy of amended sheet reflecting the date of the amendment is contained in a draft record of appeal. Unfortunately, the marked Record of Appeal contains only one page of the amended charge sheet, yet the latter should reflect five (5) counts.

In the previous charge sheet, count II was brought under S. 285 of the Penal Code. But upon the amendment, the correct section of the law (S. 258 of the Penal Code) was written.

In this regard, the charge sheet was neither defective nor did it quote the wrong provisions of the law.

I direct the Deputy Registrar to ensure that the Record of Appeal is properly compiled so as to contain the complete charge sheet and the same should be served upon the Applicants and Respondent before the hearing date.

Taking into account the submissions made before me and the cited case law by Counsel for the 4th Applicant, I dismiss the applications for the 1st and 2nd Applicants. I do however find that, prima facie, the 3rd and 4th Applicant's appeals have high chances of success. I allow their applications accordingly. Each one of them will execute a bond of Ksh. 1 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 7th day of August, 2013.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

1st Appellant/Applicant present in person

2nd Appellant/Applicant present in person

3rd Appellant/Applicant present in person

Mr. Wanyonyi holding brief for Mr. Njuguna for the 4th Appellant/Applicant

Mr. Wainaina for the State/Respondent