REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL 663 OF 2010

ABDULLAHI MOHAMED MOHAMUD ……..APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 256 of 2010 in the Principal Magistrate's Court at Mandera – Mr. Richard Odenyo (PM) on 18/11/2010)

RULING

1. **Abdullahi Mohamed Mohamud,** the appellant herein was tried and convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** by the learned Principal Magistrate at Mandera law courts. He was sentenced to suffer death as by law prescribed. Being aggrieved by the conviction and sentence the applicant filed appeal number 663 of 2010.

2. While the appeal is pending the applicant has filed a Notice of Motion under **Section 357(1)(2) Criminal Procedure Code** and **Article 49(1)** of the **Constitution** praying that the court be pleased to admit him to bail pending the hearing and determination of the said appeal on such terms as the court deems fit.

3. The grounds of his application are that the application raises substantial points of law with overwhelming chances of success and that the subordinate court misapprehended the facts and misdirected itself on the major legal principles to the prejudice of the applicant. Learned counsel also urged that bail is a constitutional right and there is no compelling reason why the applicant should not be released on bail pending the determination of his appeal.

4. On the overwhelming chances of success Mr. Mochache, the learned counsel for the applicant urged that the three eye witnesses, **PW1, PW2, PW3** and **PW4** gave different accounts of the weapon the applicant was said to have been carrying at the material time.

5. Second, that there was no evidence of the light that enabled the witnesses to identify the applicant since the offence was said to have occurred between 7.30 p.m. and 8.00 p.m. Third, that the witness who actually arrested the applicant did not testify to connect the applicant to the weapon that was recovered from the applicant at the time of arrest and that which was produced in evidence. Fourth, that the first

three witnesses were minors and should have been interviewed before their testimony was taken, and lastly that the language used in court during the trial was Kiswahili and it was not indicated that the appellant understood the language.

6. Mr. Muriithi learned counsel for the applicant conceded the application even as he submitted that the application had been brought under the wrong provisions of the law. The application was brought under **Article 49(i)(h)** of the **Constitution** which applies to persons awaiting trial and not those who had already been convicted like the applicant.

7. Mr. Muriithi conceded that there were contradictions in the evidence as to the nature of the weapon said to have been used during the robbery as well as whether the complainant was injured in the attack or not. The learned state counsel also conceded that the circumstances of identification were not favourable. Lastly he urged the court to find that **PW1, PW2** and **PW5** who were primary school pupils in class six and seven respectively were minors and that therefore voire dire examination should have been conducted before their testimony was taken.

8. The principles to be considered in an application for bail or bond pending appeal are now settled. In the case of **Jivraj Shah vs. Republic [1986] LLR 605,** the Court of Appeal stated *inter alia* that

"1. The principle 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, conditions of granting bail will exist.

3. The main criteria is that there is no difference between overwhelming chances of success and a 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."

From the submissions of both counsels, and without delving into the merits and demerits of the application, we are satisfied that the appeal has overwhelming chances of success. We therefore allow the application for bail pending the hearing and determination of the pending appeal.

The applicant's bond is set at Kshs.200,000/= with one surety of like amount.

SIGNED DATED and **DELIVERED** in open court this ***16th*** **day** of ***May*** **2012.**

F. A. OCHIENG **L. A. ACHODE**

JUDGE **JUDGE**