



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NUMBER 19 OF 2020**

**GIDEON MWINGA NDUNG'U.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. On 21/5/2020 the applicant Gideon Mwinga Ndung'u was found guilty and convicted of Robbery with violence under Section 296 (2) of the Penal Code. On 29/5/2020 he was sentenced to 25 years' imprisonment.

2. He filed an appeal on 15/6/2020.

3. He also filed an application for bail pending appeal brought under Section 356 and 357 of the CPC on the following grounds:-

*i. That the appeal has overwhelming chances of success.*

*ii. That no justification exists to deprive the appellant of her (sic) liberty while the appeal has overwhelming chances of success.*

*iii. That exceptional circumstances exist to warrant the appellant to be admitted to bail pending appeal.*

*iv. That the appellant may sever a substantial part of her sentence before the appeal is heard and determined.*

4. The application is supported by his affidavit sworn on 11/6/2020. Where he depones;

*i. THAT his appeal has overwhelming chances of success thus no justification exists to deprive me of my liberty while the appeal is pending hearing and determination for the reasons;*

*a. That his conviction on the identification evidence by PW 1 and PW 2 was manifestly unsafe as the learned trial magistrate prior to his conviction failed to rule out altogether the existence of mistaken identification on the part of the two witnesses in view of the prevailing circumstances at the scene of crime by the time of attack.*

*b. That the learned magistrate erred in law and facts for failing to warn himself as to the dangers of convicting in reliance on such identification evidence made under difficult circumstances.*

*c. That the learned trial magistrate erred in law and facts in failing to appreciate that the prosecution had failed to prove its case to the standard required in law that is, prove beyond reasonable doubt.*

*d. That the learned trial magistrate misapprehended the facts, applied wrong legal principles, and drew erroneous conclusion to the prejudice of the Appellant.*

*e. That the learned trial magistrate misdirected himself in law in that, he shifted the onus of proof from the prosecution to the Appellant contrary to the law.*

*f. That the learned trial magistrate erred in law and facts in convicting the Appellant whereas the Appellant's constitutional right to a fair hearing had not been afforded.*

*g. That the learned trial magistrate erred in law and facts in failing to take into account, and or failed to consider, and or failed give reason why he disregarded the Appellant's defence.*

*ii. THAT he prays that he be admitted to bail pending appeal as he may serve a substantial part of his sentence before the appeal is heard and determined while the appeal has overwhelming chances of success.*

*iii. THAT during his trial he was on bail and complied with the conditions imposed by the court.*

5. He relies on Nyeri HCCRA no. 2 of 2015 Peter Hinga Ngotho vs Republic.

6. Ms. Nyawira argued the application for the appellant applicant that the appeal has high chances of success. She submitted extensively on the grounds upon which the appeal had high chances of success and in particular the alleged flawed identification. That the appellant had been on bond during trial in subordinate court and never missed court.

7. The state through Ms. Wambui opposed the application through their Replying affidavit dated 25/6/2020 where it was deponed;

**4. THAT the applicant has not demonstrated that his intended appeal has overwhelming chances of success as the evidence on identification was watertight, which issue the trial court rightfully addressed. The said identification was not dock identification.**

**5. THAT no compelling reasons and exceptional circumstances have been adduced for granting bail.**

**9. THAT no anticipated delay will be occasioned to the appellant in as far as him serving a substantial part of his sentence before the appeal is heard and determined is concerned, as the proceedings are ready and the matter can be fixed for hearing at the earliest**

**10. THAT the Applicant during the trial though out on bond had the presumption of innocence.**

**11. THAT the Applicant after conviction lost that presumption of innocence.**

**12. THAT this Honourable Court has the discretion to allow the applicant's application only if convinced that he has demonstrated sufficient ground to be granted bail pending appeal which the applicant has failed to and the matter can alternatively be expeditiously heard and determined.**

8. She also argued that the applicant was properly identified. There was no risk of delay of the appeal as the proceedings and the Record of Appeal was ready and already served on parties.

-That having been on bail in subordinate trial was not one of the principles for granting bail pending appeal.

- That bail pending appeal is not constitutional right.

- that the offence committed was serious and by stander lost his life.

9. The issue for determination is whether in the circumstances of this case the application for bail pending appeal is tenable.

10. The application is premised on Section 356 of the Criminal Procedure Code provides;

**“The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.**

**If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the person”, and section 357 of the Criminal Procedure Code provides;**

**“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: Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.**

**If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted**

**therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.**

12. I did not find the case cited on eKLR but found the case **Francis Thutha Nyawira vs R [2019] eKLR** Where the court relied extensively on that case.

However, principles for Bail Pending Appeal are set out in **Jivraj Shah vs R [1986] eKLR**

***“...the principle consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If 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 for granting bail will exist”.***

13. I consider these principles together with the guidelines set out in **Peter Hinga Ngotho** to do with the character, antecedents, of the offender whether offence involved personal violence, the right and merit of the appeal, the possibility of delay of the appeal among others.

14. I sought a Pre Bail Report from Probation and after Care services. The social inquiry report came back with fears from the victims on the appellants release back to community so soon after conviction, those of the police for him being a flight risk due to the sentence meted out, and Probation and after care services not being able to guarantee that his release would not be free from repercussions due to the hostilities on the ground.

15. I have carefully considered the circumstances of this case.

The issue is whether the applicant has established grounds for bail pending appeal.

16. The applicant is serving a 25-year term of imprisonment for robbery with violence. A man died. Hence the fact of personal violence removes some marks from his application.

17. Any exceptional circumstances? None were demonstrated in the applicant's affidavit or arguments by counsel.

18. Any substantial legal issue demonstrated on the face of the appeal? Again none as demonstrated. Counsel's arguments were based on the applicant's attack on the evidence availed during hearing on identification. That is an issue well suited for arguments during the appeal.

19. Any risk of delay of the appeal? None at all. The appellant already has the Record of appeal which had already been served on the ODPP. The same can be heard without delay.

20. The appellant is serving sentence having been found guilty and convicted for robbery with violence. There is no presumption of innocence and however one looks at it he is a flight risk taking into consideration the nature of the offence and the sentence meted out.

The Applicant does not enjoy the constitutional right of presumption of innocence and it is his burden to demonstrate that the orders sought is merited.

I find that he has not done so.

I dismiss the application and direct the appeal be fixed for directions.

**Dated Delivered and signed at Nakuru this 8<sup>th</sup> Day of October 2020.**

**Mumbua T Matheka**

**Judge**

**VIA ZOOM;**

**Present:**

**Edna Court Assistant**

**Ms. Nyawira for Applicant**

**Applicant present**