



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO. 78 OF 2016**

**MUCHOKI MURIUKI ..... APPELLANT**

*Versus*

**REPUBLIC ..... RESPONDENT**

*and*

**CRIMINAL APPEAL NO. 77 OF 2016**

**PETER NGOTHO NDUATI ..... APPELLANT**

*Versus*

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Both the appellants **PETER NDUNGU NDUATI** and **MUCHOKI MURIUKI** were convicted before the Nanyuki Chief Magistrate's Court on the **offence of robbery with violence**. They were sentenced to death on the **20<sup>th</sup> October 2016**. They have filed their respective appeals against conviction and sentence. Before the hearing of that appeal they have sought by their respective chamber summons application dated 25<sup>th</sup> October 2016 that they be granted bail pending the hearing of their appeals. The main ground upon which they seek to appeal against conviction and sentence is that the prosecution failed to meet the standard of prove in criminal trial and that the prosecution failed to adduce evidence of key witness. Since they were tried together in the lower court and have made similar applications for bail, I have decided to make one ruling in respect to the bail application.

2. The learned counsel Mr. Mutembei for both the appellant eloquently argued the application supporting his submissions with legal authorities. I am indeed grateful for his industry in that regard.

3. The application was opposed by the Senior Principal Prosecuting Counsel Mr. Tanui who confirmed as has been submitted by Mr. Mutembei that the appellants throughout their trial before the Chief Magistrate's Court were on bail and did not abscond until the day they were convicted. The argument however raised by Mr. Tanui which I think will be the basis of my decision is that there is no delay being experienced in the Nanyuki High Court in respect of matters that come before the court. Mr. Tanui rightly stated that matters can be heard in the shortest time possible.

4. **Section 357** is the section that entitles an appellant court to grant bail pending appeal. Subsection 1 provides as follows:

**“After 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.”**

5. The jurisprudence that has applied in respect of application for bail pending appeal has pointed to the need to ensure the appellant does not serve the entire of his sentence as he is awaiting his appeal to be heard. I have been assisted by the authorities of the High Court which I shall consider in this ruling. In the case of **DENNIS YOBESH OMBOGO and ANOTHER vs REPUBLIC (2014) eKLR** Justice **Sitati** in discussing the principles that should guide a court in certain application had this to say:-

**“In the case of *Jivraj Shah –vs- Republic (1980)KLR 605*, the Court of Appeal set out the parameters to be considered by an appellate court in applications for bail pending appeal:-**

***a. The principal 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.***

***b. 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.***

***c. 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.***

In the case of **Ademba –vs- Republic (1983) KLR 442**, the Court of Appeal 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 to be 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.”***

6. Justice Lesiit in the case **MUNJIA MICHUBU vs REPUBLIC (2014) eKLR** also faced with a similar application stated thus:-

**“6. Unlike an application for bail pending trial where the applicant has a constitutional right to be considered innocent until proved guilty (*Article 49 of the Constitution*) an applicant for bail pending appeal stands on the premise that is he has already been found guilty on the offence. In an application for bail pending appeal the principal consideration is whether the appeal has a likelihood of success (*ADEMBA VS REPUBLIC 1983 KLR PG 442 SOMO VS REPUBLIC 1972 EA 476*. The other considerations are whether there exist exceptional circumstances that would justify the applicant being granted bail pending his appeal the other grounds upon which bail may be granted is where there is an anticipated delay in the hearing of appeal which ground should be considered together with other factors which constitute good grounds for granting bail pending appeal. (*See Chimambhai 1971 EA 343*)”**

7. I am also guided by the case of ***Chimambai versus Republic 1971 EA 343*** where the court held:

***i. anticipated delay in the hearing of the appeal together with other factors constitute good grounds for granting bail pending appeal. (R. v. Akbarali Juma Kanji).***

7. As stated earlier the principal consideration in an application such as this is that a party should not serve his or her sentence while waiting for the appeal to be heard. That long delay is not applicable in respect to Nanyuki High Court. At the time of reading this ruling the appeal has already been admitted for hearing and the only thing that stands in the way of hearing that appeal is the availability of the learned counsels in the matter.

8. In the end the chamber summons dated 25<sup>th</sup> October 2016 is dismissed on the ground that this court is ready and willing to hear this appeal in the shortest time possible subject to the availability of learned counsels.

**DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF NOVEMBER 2016.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: Muchoki Muriuki .....

Appellant: Peter Ngotho Nduati .....

For the State: .....

**COURT**

Ruling delivered in open court.

**MARY KASANGO**

**JUDGE**