



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 41, 42 AND 43 OF 2014

GODANA MAMO.....1ST APPELLANT

GUYO ELLE.....2ND APPELLANT

GODANA ADANO.....3RD APPELLANT

VS

REPUBLIC.....RESPONDENT

RULING

The applications dated 29.10.2014 by way of Notice of Motion seek orders of bail pending hearing and determination of the appeals in **Cr Case No. 41/2014 Galgalo Mumo V. Republic. Cr.42/2014 Guyo Elle V. Republic and CRA 43/2014 Godan Adano V. Republic.** The Applicants were convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code and were sentenced to suffer death in respect of the 1st count. The applications were supported by the applicants’ respective affidavits in which they urge that their appeals have overwhelming chances of success because the convictions were based on circumstantial evidence there having been no eye witness to the crime; that the only witness who could have shed light on the case by name Yatan was stood down and never recalled to complete his testimony and that the trial court ignored the expert evidence as it did not confirm whether or not the bones that were recovered were those of an animal or a human being. Mr. Omari counsel for the applicants further urged that the ingredients for the offence of robbery with violence were not proved. He urged that the applicants are over 70 years old and will attend court if required to do so.

Mr. Mwenda the other counsel appearing for the appellants added that the trial court relied on an inadmissible confession made to the investigation officer and the chief; that the goats allegedly recovered were never positively identified as belonging to the complainant and that the doctrine of recent possession was not established; that if the confessions are removed from the record there is no other evidence to connect the applicants with the offence.

Mr. Mungai the learned counsel for the State in reply, submitted that in order to prove that there are overwhelming chances of success; the applicant needs to raise a substantial point of law which if heard, will tilt the appeal in favour of the appellant. Counsel agreed with submissions by the appellants’ counsel on the issue of recent possession and section 25A of the Evidence Act on confessions that confessions should not be made to an investigation officer but another independent witness. He left the other issues to the discretion of the court.

This application was brought pursuant to section 357 and 348 of the CPC and Article 49(1) (b) of the Constitution.

In respect of Article 49(1) (b) of the Constitution, it is my view that it deals with rights of arrested persons awaiting trial. I see nothing which would entitle a person who has been tried and convicted by a subordinate court to invoke the said provision. The applicants have been convicted and cannot rely on the said Article.

The law in respect of an application for bail pending appeal is well settled. First, an applicant must show that the appeal has overwhelming chances of success; secondly an applicant must show the existence of exceptional or unusual circumstances upon which the court can rely to find that it is in the interest of justice that bail be granted.

In **Jivraj Shah Vs R (1986) KLR 605**, the court held inter alia

“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.”

The grant of bail pending appeal is a discretionary power to be exercised by the court judicially taking into account all the relevant principles and the fact that there is a presumption that once a person is convicted, he was properly convicted see **Mundia V. Republic (1986) KLR 623**.

I have considered the grounds upon which the application is based, first that the conviction was based on an inadmissible confession; that there was no eye witness but that the court relied on circumstantial evidence; that the doctrine of recent possession was not proved and lastly that the offence of robbery with violence was not proved. In my view, it is not enough for the applicants to raise arguable points. As to whether or not the recovered animals were identified and whether the ingredients of an offence of robbery with violence was proved, these are arguable points that have to be determined at the hearing of the appeal. As to the confessions, even if the evidence of the investigation officer was wrongly admitted as a confession, it is my view that on the examination of all the evidence adduced in the trial court, the confession is not the only evidence that the conviction was premised upon. All the above issues go to the merit of the appeal.

As regards the ground that the applicants are aged over 70 years and will not fail to attend court, that it is not a ground upon which bail pending appeal is granted. In addition, no records of the age were availed. A person facing a death sentence whether young or old may be tempted to take flight if released pending appeal knowing that if the court were to dismiss the appeal he would have to go back to prison. The age of accused is not a special and exceptional circumstance to warrant the applicants being admitted to bail.

Having carefully considered all the grounds and the evidence on record in totality and taking precaution not to delve into the merits or demerits of the appeal, I am persuaded that the appeal does not have overwhelming chances of success.

In the end I come to the conclusion that the applications lack merit and the applicants should prepare their records of appeal so that the appeals can be admitted for hearing to be determined at once. The applications are hereby dismissed.

DATED SIGNED AND DELIVERED THIS 2nd DAY OF FEBRUARY, 2015

R. P .V. WENDOH

JUDGE

Mr. Omari for Appellants

Mr. Mungai for State

Jane Court Assistant

Appellants present

R. P .V. WENDO H

JUDGE