REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL APPEAL NO. 94 OF 2013

ROBERT KILEL……..…1ST APPELLANT

JOSEPH WANJOHI GATERO……..2ND APPELLANT

VERSUS

REPUBLIC……RESPONDENT

RULING

The applicants have moved this court by notices of motion dated 31st July, 2013 and 2nd August, 2013 respectively seeking to be admitted to bail pending the hearing and determination of their appeals; it appears from the judgment against which they are appealing that they were charged with the offence of conspiracy to murder contrary to **section 224** of the **Penal Code. T**hey were tried, convicted and sentenced to five years imprisonment each in the **Chief Magistrates' Court Criminal Case No.1162 of 2010** at Nyeri.

Although the applicants filed separate appeals against the judgment, these appeals were consolidated and their applications were, therefore, heard simultaneously on 5th December, 2014.

Mr. Kimunya for the first applicant urged the court to allow the application mainly on two grounds; first, failure by the learned magistrate to recall the second prosecution witness for cross-examination prejudiced the applicant and for this reason, so I understood counsel to say, the applicant's appeal has high chances of success. Secondly, counsel argued that the applicant is the sole breadwinner of his family and that during his trial, the applicant was on bond and at no time did he ever abscond.

Mr. Muhoho for the second applicant argued on behalf of the second applicant that it was not established during the applicants' trial that there was any common plan between the appellants to commit the offence with which they were charged. Counsel also argued that the learned magistrate did not consider the applicant's defence in her judgment. He adopted the argument for the first applicant that failure by the trial court to recall the second prosecution witness prejudiced the appellants' cases. For these reasons, it was the counsel's view that the applicant's appeal has overwhelming chances of success and the applicant should be admitted to bail pending the hearing and determination of his appeal.

The state through Mr Njue opposed the applications; while the state counsel admitted that the second prosecution witness was not recalled for cross-examination as requested by counsel for the appellants during their trial, it is apparent that both the appellants cross-examined this particular witness before they engaged the services of counsel. The state counsel argued that though the application for recalling this witness was allowed, the witness could not be located for reasons given by the state.

It was also argued on behalf of the state that there was clear evidence at the trial that there was conspiracy between the accused persons to have the complainant killed.

In a nutshell, counsel argued that there is no indication that the appeal has overwhelming chances of success and neither are there any special circumstances that may warrant any of the appellants to be released on bail.

On the issue of the applicants having been on bail during their trial, counsel argued that circumstances drastically changed upon their conviction; the status of the applicants had since changed from being mere suspects to convicts and therefore the danger of their absconding was more real.

All that the applicants need to demonstrate in application such as the ones before court is that their appeal has high chances of success and if they are not released on bail, their appeal would be rendered futile to the extent that they will have either served the entire term of their sentence or a substantial part of it. The applicants must for example demonstrate, in this regard, that the appeal raises some substantial point of law whose determination is likely to be ruled in their favour. It has been held that where there is such a demonstration, the court will, in all certainty release the appellant on bail for it will not serve the interests of justice to keep him incarcerated in jail before his appeal is determined.

In the Court of Appeal decision of **Dominic Karanja versus Republic (1986) KLR at page 612,** it was held that where an appeal has overwhelming chances of success, there was no justification for depriving the applicant of his liberty.

Again in the Court of Appeal decision of **Jivraj Shah versus Republic (1986) KLR 605,** the court was also of the view that 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, then bail should be granted.

Considering the arguments by both counsel for the appellants and the state, two issues emerge; whether there was evidence of conspiracy and secondly, whether failure to recall the second prosecution witness prejudiced the appellant's case. In considering these issues this court is minded that all that it is concerned with at the moment is not the merits of their appeal, for that will be determined at the hearing of the appeal itself, but whether the resolution of these two issues is likely to be in favour of the applicants and therefore it can be said without any shadow of doubt that their appeal has overwhelming chances of success.

I have had the opportunity to read the record of the trial court; according to the complainant's testimony, he was led by one **Musa Kipruto (PW3)** to one **Ali Mohamed Muya (PW2)** who had been tasked by the first appellant to eliminate the complainant. According to this witness, Ali was to be paid Kshs. 5,000/= for the job and that he had already received Kshs. 1,000/= as a down payment. As Ali was briefing the complainant, the first applicant called Ali on his phone asking him how far he had gone with the plan to eliminate the complainant. He told the court that the first applicant had even identified him to Ali. The complainant reported the issue to the police.

When **Ali Mohammed (PW2)** testified, he informed the court that he had indeed been approached by the second applicant with whom he had been working for about seven years; the second applicant told him that the first applicant wanted the complainant killed. When Ali enquired about the payment for the job, the second applicant told him that he could take him to the first applicant to negotiate this payment. Later, the second applicant actually led him to the first applicant who confirmed to him that he wanted someone killed because he was disturbing him. After agreeing on the payment, the first applicant made some deposit and promised to point out the man Ali had been detailed to kill. Rather than kill the complainant, Ali informed **Kipruto (PW3)** about the plot to kill the complainant; it is then that **Kipruto (PW3)** went to inform the complainant and even introduced him to Ali.

The police laid a trap to arrest the first applicant; the plan was that the complainant was advised to disappear after which **Ali (PW2)** would inform the first applicant that he had eliminated him and

therefore he wanted the balance of the price. This balance was going to be paid at a particular place where the police would be waiting. As agreed, the first and second appellants came and were arrested at the rendezvous with the money that was supposed to have been paid to settle Ali's balance of the price for eliminating the complainant.

From the material before me, I am not satisfied that, with this sort of evidence it can be said with any certainty that the legal question of whether there was or there was no conspiracy to kill the complaint will be resolved in favour of applicants or any of them; in other words it cannot be conclusively said that the appeal has overwhelming chances of success by reason of lack of evidence to establish conspiracy between the applicants. That is all I am inclined to say at this point on this issue.

The next question is the recalling of the second prosecution witness; counsel for the applicants did not indicate under which provision of the law the witness was recalled for re-examination but the state counsel drew the attention of this court to **section 150** of the **Criminal Procedure Code;** that section provides as follows:-

150. Power to summon witnesses, or examine person present

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

It would appear that the discretion to recall a witness under this section is vested in the trial court except that whenever the court finds it necessary to recall and re-examine a witness then the prosecutor or the counsel for the accused shall have the right to cross-examine such a witness.

In the trial against the applicants, the court exercised this discretion at the instance of the counsel's application and recalled the second prosecution witness for cross-examination; it would appear that the reason for recalling this witness was merely because at the time he testified, the applicants had not engaged the services of counsel who thought that they should cross-examine him when they ultimately came on board.

There is evidence that the second prosecution witness was cross-examined by the applicants themselves before they engaged their counsel. There is also evidence while the court acceded to their counsel's application to recall the second prosecution witness, this witness could not be found and therefore was not available for cross-examination.

If the counsel's right is restricted to cross-examination of a witness whenever he is recalled by the court I am unable to see how an accused person's trial would be prejudiced if such a witness has not appeared and re-examined by the court. The applicants would probably have had a case if they would have been denied the right to cross-examine a witness who had been recalled and re-examined by the court; however, this is not the case here.

I am not satisfied, as was said in the case of **Jivraj Shah versus Republic (supra),** the appellants' appeal raises a substantial point of law whose determination will probably will be ruled in their favour. There is no indication that their appeal has overwhelming chances of success.

There is also no evidence that there are exceptional circumstances that would warrant the appellants being released on bail pending the determination of their appeal. Although the state counsel alluded to this ground in his submissions, neither counsel for the applicants pursued this ground in their submissions

despite the fact that medical documents were attached to the affidavit in support of the second applicant's application purporting to demonstrate that the applicant was suffering from some sort of disease. Though counsel did not pursue this point, it has been held elsewhere in the Court of Appeal that sickness *per se* cannot constitute special circumstance and in any event prison authorities are in a position to provide the requisite medical facilities.

In the final analysis, I do not find any merit in the applicant's applications and I hereby dismiss them. It is so ordered.

Dated, signed and delivered in open court this 6th day of March, 2015

Ngaah Jairus

JUDGE