REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYACRIMINAL REVISION

HIGH COURT CRIMINAL APPEAL NO.332 OF 2015

JOHN KIMITI KIMANI *ALIAS* WAMJOMBA……..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENTS

RULING

By way of Notice of Motion dated 6th August, 2015, the Applicant prays that he be released on bail/bond pending the hearing and determination of Criminal Appeal No. 124 of 2015. It is premised on the grounds that the Applicant is likely to have served a substantial part of the sentence by the time the appeal is heard and determined and that the learned magistrate erred in convicting him when there was an error apparent on the record.

The application is supported by the affidavit of Peter GichehaKamau, counsel for the Applicant sworn on 26th August, 2015. He deponed that the Applicant who was charged with robbery with violence was convicted of a lesser offence of causing grievous harm and sentenced to the two years imprisonment. According to the counsel, the Applicant attended the trial faithfully after being granted a bond of Kshs. 500,000/=. He further deponed that, based on the Petition of Appeal in Criminal Appeal No. 124 of 2015, it is deemed that the Applicant's conviction was based on errors apparent on the record. Finally, he stated that it is only fair to grant the applicant bond/bail as he shall have served a substantial part of the sentence by the time the appeal is heard and determined.

The Applicant's counsel filed written submissions dated 16th October, 2015. It was submitted that the evidence of the prosecution witnesses did not support a conviction. From the particulars of the charge sheet, the assault weapons were named as rungus and an iron bar but none of the witnesses made reference to the rungus.

He pointed out that the identification of the Appellant was not full proof since the attack was committed at night. The prosecution witnesses gave contradictory evidence with respect to how PW1 was accosted and attacked. According to PW1, he identified the Appellant from lights of passing motor vehicles but the learned magistrate in his judgment pointed out that PW1 identified the Appellant through lights coming from both PW1 and the Appellant's motor vehicles. Further, the only witness who allegedly witnessed the attack was PW3 whose evidence contradicted that of PW1 and 5 regarding the number of people who came out of the Appellant's motor vehicle and attacked PW1. In his judgments, the learned magistrate stated that PW2 and 3 witnessed the attack whereas PW2 only adduced hearsay evidence. It was also clear that PW4 who arrived at the scene and took PW1 to hospital found the Appellant whom he knew and the conductor at the scene. There was therefore the possibility that it is PW4 who gave thename of the appellant to PW1 at the hospital as the person who had attacked him. Counsel further pointed out that PW1 contradicted his evidence with respect to the manner in which he was attacked. In

his evidence in chief, he testified that he was blocked by the Appellant but in cross-examination, pointed out that the Appellant's motor vehicle was parked in the middle of the road ata junction. PW3 on the other hand testified that she saw PW1's motor vehicle that had been blocked by the Appellant'smatatu.

Finally, counsel argued that the prosecution failed to call crucial witnesses. PW1 had testified that his vehicle was driven from the scene by his cousin, one Ndonye, upon being given keys by a police officer. Those two witnesses were never called to testify, whose evidence would have been crucial in shedding light on what actually transpired at the scene.

The application was opposed. Learned counsel Ms. Aluda submitted that the appeal had no chance of succeeding. Her case was that the Applicant was successfully identified. The complainantledthe police to arresting him. He was a driver of a matatu which had stalled on the road. The Applicant was a motorist and on approaching the Applicant's vehicle, the Applicant together with others beat him up which incidence was witnessed by PW1 and 3. There was lighting from other motorists which led to PW1 recognising the Applicant. She further submitted that the Applicant himself had indicated that PW1 was injured at the scene only to back track that his injury was as a result of a fall. Finally, she submitted that at the hearing of the appeal the Respondent shall seek enhancement of the sentence since the same was not commensurate with the injuries that PW1 suffered. The latter sustained a broken leg which had to be fitted with metals in the process of treatment.

I have accordingly appraised myself with the application and the rival submissions by both parties. The case of **JIVRAJ SHAH VS REPUBLIC [1986] KLR 605 AT PAGE 606** sets out the principles that the court must consider in granting bail/bond pending the hearing of an appeal as follows:

> ***"There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that theprincipal consideration is if there exists 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 in law to be argued, and that sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in Somo vs Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, Daniel Dominic Karanja vs Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal pleading Evidence and Practice, 41st Edition page 783, paragraph 7-86."***

In the present case, the attack of PW1 was witnessed by PW3 who clearly saw the attackers asthey beat him up. PW2 arrived at the scene immediately after the incidence. Further, PW1 clearly saw the persons who attacked him as people who hailed from his area. He recognised them through sufficient light of oncoming motor vehicles. He was also able to give the names of the attackers to the police when he reported the incidence. In all, it is my view that the identification of the Appellant was by recognition and that the circumstances of such identification were sufficient despite the difficult circumstances as it was at night.

I agree with the Applicant that the sentence was short being two years imprisonment andthat,*prima facie,* is likely to have served a substantial part of it by the time the appeal is heard and determined. However, the test as to whether the orders sought shall be granted not withstanding these prevailing circumstances is whether the appeal has a high chance of succeeding. On my consideration of evidence on record and from my above observation, I do not think that the appeal stands a chance in succeeding.

In the result, this appeal fails and the same is dismissed without orders as to costs.

DATED AND DELIVEREDTHIS 29TH DAY OF OCTOBER, 2015

G. W. NGENYE – MACHARIA

JUDGE

In the present of:

1. Mr. G. Kamau for the Applicant
2. M/s Aluda for the Respondent