REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION APPLICATION NO. 109 OF 2015

JOSEPH MWATHI NYANJUI……APPLICANT

VERSUS

REPUBLIC……..……PROSECUTOR

RULING

By an Amended Chamber Summons dated 3rd June, 2015, the Applicant prays that he be released on bail/bond on such terms and conditions as may be stipulated by the court pending the hearing and determination of **Criminal Appeal No. 4 of 2015** pending before the Court of Appeal, Nairobi. The application is brought under **Articles 49(1)(h) 48,50 and 159** of the **Constitution** and **Section 357(1), 356(1) and 361(6)** of the **Criminal Procedure Code**. Basically, the application is premised on grounds that there are compelling reasons to have the accused granted bail, that the Constitution guarantees all suspects bail unless there are exceptional reasons to warrant the exercise of discretion in favour of denial of bail and more importantly, that the pending appeal has an overwhelming chance of success.

The background to this application is that the Applicant was charged before the Senior Principal Magistrate, Limuru Law Courts with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** and an alternative charge of handling stolen property.

He was convicted in the main count and sentenced to suffer death. He preferred an appeal before the High Court at Nairobi, being **Criminal Appeal No. 4 of 2013, Joseph Mwathi Nyanjui vs Republic**. The appeal was dismissed by learned Mwongo and Achode, JJ who found that the prosecution had tendered overwhelming evidence against the Applicant. The Applicant was further dissatisfied with the judgment of the learned Judges and preferred an appeal before the Court of Appeal being, Appeal No. 4 of 2015. In the meantime, pending the hearing and determination of the appeal before the Court of Appeal, he has moved this court in the instant application.

The application was canvassed before us on the 27th October 2015. Learned counsel Mr. Wandugi represented the Applicant whereas Ms. Atina appeared for the Respondent. Mr. Wandugi heavily relied on the argument that the pending appeal has an overwhelming chance of success in urging us to find for the Applicant. He submitted that under **Section 356 and 361(6) of the Criminal Procedure Code** this court has jurisdiction to hear and determine the application. He urged us as well to invoke the provisions of **Article 49 (1) (h)** of the **Constitution** which entitles a suspect to bail. He submitted that the principles governing the grant of bail pending the hearing of an appeal are clearly set out in the case of **MOTICHAND VS REPUBLIC [1972] E.A, 399** in which it was stated that all that the Applicant required to demonstrate was that he had a good appeal with a probability of success. In this respect, Mr.

Wandugi submitted that both **Sections 200 and 211 of Criminal Procedure Code** were not complied with by the trial court. With respect to **Section 200**, we discerned that he was referring to Sub-section (3) thereof. He argued that when a succeeding magistrate took over the conduct of the trial, he/she did not inform the Applicant of his right to recall any witnesses for purposes of re-hearing their evidence. According to Mr. Wandugi, this is a concern that was raised in the first appeal by the counsel then representing the Applicant but the court did not address it in its judgment. In like manner, the trial court blatantly ignored compliance with **Section 211 of Criminal Procedure Code** notwithstanding that it put the Applicant to defence and that he proceeded to give it on a sworn statement. Mr. Wandugi further submitted that the learned trial magistrate who finalised the trial failed to evaluate the defence of the Applicant which was lengthy but was mentioned in a mere statement in the judgment. He submitted that the High Court also failed to consider the failure by the learned magistrate to evaluate the defence of the Applicant. On exceptional circumstances, Mr. Wandugi submitted that the Applicant is not a flight risk. He was a Kenyan with a family. He stated that the Applicant was in court at the time of hearing of this application and that he was willing and ready to abide by any conditions the court gave for the granting of bail. He also urged the court to consider that the Applicant has been in prison since the month of February, 2015.

Learned State Counsel Miss Atina for the Respondent opposed the application. She conceded to the jurisdiction of this court to hear and determine this application. She then argued that the appeal has no chance of success. On whether **Section 200** of the **Criminal Procedure Code** was complied with, she submitted that this was not an issue that was raised before the High Court and could not therefore be argued at this point in time. She submitted that although it was contained in the submissions of the Applicant, the Court of Appeal can only determine matters of Law. On **Section 211**, she submitted that the same was not at all raised before the High Court and so will not be argued before the Court of Appeal. On whether the Applicant's defence was considered, she submitted that this was adequately done. She referred us to page 45 (printed) of the proceedings which vindicated her position in that regard. On whether there obtains exceptional circumstances, Ms Atina urged us to dismiss the application because that was not a point urged in the supporting affidavit to the application. In any event, the Applicant was sentenced to death, which sentence cannot be carried out until and after the he has exhausted all rights of appeal. She further urged the court to note that the Applicant was not granted bail pending the hearing and determination of the appeal before the High Court, hence, he was at a flight risk. Furthermore, the Applicant was convicted by a competent court with jurisdiction and that conviction remains until it is upset by another court.

Suffice it to say, learned counsel Mr. Wandugi, in addition to the case of **MOTICHAND VS REPUBLIC [1972] E.A., 399** referred us to a ruling of Hon. Mbogholi, J on an application for bond pending appeal before the High Court, **REBBECA MWIKALI NABUTOLA VS REPUBLIC** consolidated with **DUNCAN MURIUKI KAGUURA VS REPUBLIC AND ONG'ONG'A ACHIENG VS REPUBLIC MISC. CR. APPLICATIONS NO. 445, 448 AND 452 OF 2012**. In that ruling, the Applicants were granted bail pending appeal majorly on ground that the trial magistrate who took over the conduct of the matter after another magistrate did not comply with both **Sections 200 (3)** and **211 of the Criminal Procedure Code**. We shall comment on this authority hereafter in this ruling.

We first admit to our jurisdiction in hearing this application guided by **Section 361(6) of Criminal Procedure Code** which provides that:

> ***"When an appeal under this section is pending, a judge of the High Court may grant bail to a convicted person who is a party to the appeal."***

Section 357(1) of the Criminal Procedure Code on which the Applicant also relied is only applicable before an appeal to the Court of Appeal is filed. In the instant case, the appeal before the Court of Appeal has already been filed and so this provision cannot be invoked. For avoidance of doubts, we restate the same as under;

> ***"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 the 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"

Article 49(1) (h) of the Constitution is only applicable to an arrested person whose trial is still pending. That is why the preamble of that Article is "***Rights of arrested persons***." It cannot be invoked when a person has gone through the full throttle of a trial and has filed an appeal. In the latter case, the principles governing the grant of bail have been set by case law as we shall demonstrate hereunder.

Section 361(1) notwithstanding, the Court of Appeal has severally also entertained similar applications and the case law in this field is very rich. It is in fact the Court of Appeal that has set the precedent in the principles to be followed in granting of bail pending appeal both in the High Court and the Court of Appeal. Such case law include but is not limited to **ADEMBA VS REPUBLIC [1983] eKLR, BONIFACE NGANGA VS REPUBLIC [2008] eKLR, SIMON MWANGI KIRIKA VS REPUBLIC [2006] eKLR and JIVRAJ SHAH V REPUBLIC [1986] eKLR**. In the **ADEMBA** case, it was held 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 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."

In the **JIVRAJ SHAH** case, it was held that:

1. ***The principle 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 interests of justice to grant bail.***
2. ***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.***
3. ***The main criterial 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 same principles were reiterated in the case of **MUTUA VS REPUBLIC [1985] KLR 497** in which it was held as follows.

1. ***The main problem was whether the appeal had overwhelming chances of success for if it did not, then this court would not grant bail pending the appeal by virtue of the Court of Appeal Rules Rule 5(2)(a).***
2. ***The test was whether there were exceptional or unusual circumstances, the most important ground being whether the appeal had overwhelming chances of being successful.***
3. ***It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the Applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.***
4. ***There was no overwhelming probability that the sentence would be reduced since the appellate court could not deal with the issue of sentence, and on the other grounds, it was not apparent as matter of law that the appellant would succeed."***

In the present case, learned counsel Mr. Wandugi for the Applicant pegged the success of the pending

appeal on non-compliance by the trial court of both **Sections 200(3) and 211 of the Criminal Procedure Code**. With respect to **Section 200(3)**, he argued that the issue was brought up before the learned judges who heard the first appeal in the Applicant's submissions but the judges failed to make a finding on it. His case was that this being issues of law, it would be entertained by the Court of Appeal. He submitted that as was held in the case of **MOTICHAND VS REPUBLIC (SUPRA)** all that the Applicant was required to demonstrate was that on a balance of probability, the pending appeal had a chance of succeeding. In that case, it was held that;

> ***'It is sufficient of the appellant to demonstrate a probability of success on appeal rather than an overwhelming probability of success."***

Our candid view in light of the learned counsel Mr. Wandugi's argument is that if we were to address the issue of whether or not our fellow judges addressed themselves on the issue of the non-compliance with **Section 200**, we would be sitting on appeal of their judgment. This is a court of concurrent jurisdiction which is not conferred with the jurisdiction to sit on its appeal. More importantly, we are hesitant to evaluate that issue because the concurrent court did not address it in its judgment. As such, the issue of whether or not the pending appeal has merit shall be decided by the Court of Appeal. This applies to the matter of whether or not **Section 211** was complied with. We now revert to the case of **REBBECA MWIKALI NABUTOLA & OTHERS (SUPRA).** In that case, the learned judge Mbogholi went into details in evaluating several decisions of the Court of Appeal on how **Sections 200 and 211** have been applied. We note from those decisions that that court has delivered inconsistent decisions on that issue. Given this scenario and taking into account the record of the trial court, which made statements that the provisions had been complied with, we think that it is only the Court of Appeal that would substantially come up with a finding on the merits and demerits of the arguments made herein. That is to say, we cannot predict what decision that court will come up with regarding the application of those two provisions. We need not belabour any further on this point save to add that it appears to us that the aspect of non-compliance with **Section 211** was not addressed before the judges who heard the first appeal.

On exceptional and unusual circumstances obtaining, Mr. Wandugi submitted that the Applicant is a family man hence not a flight risk. He also submitted that the Applicant was ready to abide by any conditions of bond it granted. However, as was held in the case of **KARANJA VS REPUPLIC (1986) KLR 612,** the previous good character of a person and any hardship facing him and his family do not constitute exceptional circumstances that would warrant grant of bail pending appeal. The court in that case also observed that a solemn assertion by an Applicant that he will not abscond if released, even if he is supported by sureties is not sufficient ground for releasing a convicted person pending appeal. Suffice to say, we bear in mind that the Applicant was convicted by a competent court which had jurisdiction and not unless the conviction and sentence are set aside, he remains a convict. We then hold that the reasons advanced are not exceptional circumstances that would bail him out.

On the whole, it is our view that this application has no merit and the same is hereby dismissed.

DATED and **SIGNED** this **4TH** day of **November, 2015**.

HON. L. KIMARU

JUDGE

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. Mr. Wandugi for the Applicant

2. M/s Atina for the Respondent