



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL CASE NO. 61 OF 2013

MARTIN GITONGA APPELLANT

versus

REPUBLICRESPONDENT

(arising from the judgment of J.N. Nyaga, Chief Magistrate

Nanyuki in Criminal Case No. 192 of 2011)

RULING

1. The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code and he pleaded not guilty to the same, was tried convicted and sentenced to suffer death. Being aggrieved with the said conviction and sentence filed this appeal.
2. On 7th June 2013 under certificate of urgency the applicant filed a notice of motion under section 356 and 357 of the Penal code to be released on bond pending the hearing and determination of the appeal.
3. It was grounded on the fact that the appellant being a first offender was unlawfully convicted and sentenced to death for an offence of robbery with violence whereas the evidence or record does not support the finding on the conviction and sentence. It was further stated that the appellant is able to provide a suitable surety and undertakes to prosecute his appeal without delay.
4. The application was supported by the affidavit of the applicant in which he deponed that under article 49(2)(h) of the constitution of Kenya 2010 he has right to be released on bond and that his appeal through the fourteen (14) grounds of appeal raises matters of law and facts which are weighty, profound and fundamental to the process of fair trial and his appeal has overwhelming chances or probability of success.
5. The application was opposed by the state through grounds of opposition filed on 3rd October 2013 that

a) The appeal has no overwhelming chances of success.

b) There are no exceptional or extraordinary circumstances to warrant bond or bail

c) The applicant is serving a lawful sentence which cannot be challenged.

6. When the application came up for hearing it was certified urgent and fixed for hearing for 29th September 2013 when Mr. Cheboi for the state submitted that the application should be heard by two judge since it is a serious matter while Mr. Abwuor for the appellant submitted that it was an application and not the appeal which must be heard by two judges.
7. It was therefore directed that the same be placed before two judges on 17th October 2013 and that

is the subject of this ruling in which we are called upon to determine whether the application for bond ought to be heard by two judge or one judge bench and whether the applicant should be admitted to bond pending appeal.

SUBMISSIONS

8. At the hearing before us Mr. Abwuor appeared for the applicant while Mr. Njue appeared for the state.

APPLICANT'S SUBMISSIONS

9. It was submitted that in an application of this nature there are two issues for determination.

i. Whether there is a high probability of the appeal succeeding.

ii. Whether there are special circumstance.

10. It was submitted that the appeal has high chances of success since the main ground of conviction was the doctrine of recent possession and that in the case of KANYI MWANGI v R the ground of appeal was that the defendant raised the defence of alibi which was not considered by the trial court and that when an accused raises the defence of alibi it is for the prosecution to prove that he was at the scene of the crime.
11. That section 235 of CPC provide for an alibi warning by the court to the accused to provide the name of the person and material he wishes to rely upon which warning was not given to the applicant and that it was fatal.
12. On the issue of the doctrine of recent possession it was submitted that it cannot be the only ground for convicting an accused person on the offence of robbery with violence and therefore it was unsafe to convict the applicant as per the authority of IBRAHIM LEKARTER v R COURT OF APPEAL CRIMINAL APPEAL NO. 52 OF 1997 since both the police and the court did not seek from the appellant where he got the trouser from.
13. It was submitted that there was inconsistency in the evidence tendered and that there was no identification parade conducted and the case of OUMA OBENJO v R. CR APPEAL NO. 402/2007 was relied upon.
14. On the issue of special circumstances it was submitted that the applicant might not be tried within reasonable time due to the congested court dairies and further that the applicant was on bond throughout his trial and the case of ANISA FARAJ v R CRIMINAL APPEAL NO. 17 of 2003 were relied upon where Sergon J quoted JOMO v R [1972]EA 476.
15. On the issue as to whether this application should be heard by one or two judge bench it was submitted that section 359 of CPC allows the same where the Chief Justice directs or the judge to who he give authority directs that it be heard by one judge.
16. It was further submitted that section 357 allows the High Court to admit a person to bail pending appeal and to suspend the sentence which position is supported by HALSBURY'S LAWS OF ENGLAND 4th edition 1367 where the power of a singe judge is stated.

RESPONDING SUBMISSION

17. On behalf of the Respondent Mr. Njue submitted that on the issue of whether the application ought to be heard by two or one judge bench article 47 of the Constitution only talks of bail pending trial and not appeal it was further submitted that the appeal does not have chances of success since the applicant was convicted on the basis of the doctrine of recent possession which circumstances were proved before the court that the property was stolen from the complainant and that it was found in the possession of the appellant.
18. It was submitted that the appellant defence was not believed by the trial court and that there are no exceptional circumstance to warrant the appeal being admitted to bond.
19. We shall therefore deal with the issue of whether the application of this nature should be handled by one or two judge bench and on this issue we agree with the submissions by Mr. Abwuor that

section 357 and 359 (1) allows the High Court to hear applications of this nature and other appeals by a single judge.

20. This position is further confirmed by HALYSBURY'S LAW OF ENGLAND 4TH EDITION PARAGRAPH 1367 which states that a single judge may exercise the following powers of the court of appeal.

(1) To give leave to appeal.

(2) To grant or revoke bail.

21. We take the view that the only requirement is for the judge to whom the application is placed and who has been given authority by the Chief Justice under section 359 to give direction on whether it be heard by one judge or two judge bench.
22. On the issue as to whether the appeal has an overwhelming chance of success and without going to the merits of the same we have looked at the evidence of P.W.1 PETER KINUTHIA WACHIRA that on 3rd February 2011 the appellant told him that he had tried to assist him when he was being beaten and that on 4th February 2011 he saw him wearing the trouser that he had carried in a paper bag at work and that he suspected the trouser was his (emphasis ours) and that he had heard the appellant talking during the robbery but under cross examination stated that he did not give the name of the appellant to the police and that he was unconscious when the trouser was being removed.
23. We have also looked at the evidence of P.W.3 SAMUEL MUGO SIMON who states that when the appellant was arrested at the gate with the trouser alleged to have been stolen from P.W.1 he stated that the trouser was his and that he was wearing another trouser inside the stolen one and that when they went to the appellant place no other alleged stolen items were found and the evidence of P.W.4 MUGABE NYAWACHA who took the report of the complainant and who confirmed under cross examination that the complainant did not know those who attacked him.
24. We have also looked at the appellants defence that the trouser which was removed from him was not produced in court and that he was wearing a pair of shorts when the trouser was removed from him which is corroborated by the evidence of P.W.4 and which contradicted the evidence of P.W.1 AND P.W.2 and P.W.3 and note that there were doubts in the prosecution case which makes this appeal arguable.
25. We are however not persuaded that there are any exceptional circumstance put forward by the appellant as his age and the length of time it might take to determine the appeal are not unusual circumstances to be considered.
26. Having found that the appeal is arguable we take the view that to hold the appellant in custody pending hearing and determination of the appeal while there is a possibility of the same succeeding would create injustice to the applicant and since the appellant was out on bond during the trial before the lower court and attended court throughout we shall therefore allow the application herein and now that the appellant has a sentence of death hanging on his head with order that the same be released on bond of Ksh. 100,000 with one surety .
27. We further order that during the period of the trial herein the appellant shall not leave the jurisdiction of this court without the written consent of the Deputy Registrar and shall attend mentions before the Deputy Registrar at least once after every 30 days with the first such mention being 3rd March 2014.

Delivered, dated and signed this 5th day of February 2014.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE

Mr. Abwuor for the appellant.

Mr. Cheboi for the state.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE