



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 285 OF 2013

DAVID WILLIAM TETTAPPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1210 OF 2011 in the Chief Magistrate's Court at Nairobi – Mr. K. W. Kiarie (C.M.) on 27/6/2013)

RULING

1. This is a Chamber Summons dated 28th August 2013 brought under **Article 49(1)(h)** of the **Constitution** and **Section 349 & 357** of the **Criminal Procedure Code**. The applicant **David William Tett**, seeks to be admitted to bail pending the hearing and determination of the Appeal that he filed following his conviction on three counts in **Cr. Case no. 1210** of **2011** at the Nairobi Chief Magistrate's Court.
2. In the said **CM Cr. Case No. 1210 of 2011**, the applicant was tried and convicted in three counts for the offences of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to suffer death in count 1 as by law prescribed, while the sentences in **count 2** and **count 3** respectively were left in abeyance.
3. The grounds of the application as appears on the face thereof are first, that the applicant has an arguable appeal with high chances of success, second, that he suffers from poor health, and has family responsibilities, and further that he is ready to abide by any terms this court may deem fit to set for bond.
4. Mr. Odawa learned counsel for the applicant reiterated the grounds set out in paragraph 3 above. He submitted further that the applicant was entitled to bail pending appeal since the offence of robbery contrary to **Section 296(2)** of the **Penal Code** was bailable under **Article 49(1)(h)** of the **Constitution** like all other offences.
5. On whether the applicant's appeal was arguable and had chances of success, Mr. Odawa urged that the prosecution's evidence was riddled with inconsistencies. Instances of such inconsistencies included questions such as whether the robbers were the applicant's friends or enemies, who paid the applicant's medical bill, whether **PW1**'s phone rung during the robbery, what was the number of robbers, whether the safe keys were availed to the robbers, how many robbers lay dead outside

the house in the end and what the colour of the get-away car was.

6. Mr. Odawa further contended that the appellant's conviction was based on a petty family feud, that there was no proof of ownership of the exhibits recovered and lastly, that the trial court failed to consider the appellant's defence. Mr. Odawa also stated that the applicant was not a flight risk since he is a Kenyan Citizen and an established family man whose family lives in Nairobi.
7. Mr. Odawa pointed out that the applicant was out on bail during his trial and had attended all court sessions without fail. His health was also said to have deteriorated while in prison so that he was in need of constant medical care. At the very least it was argued that granting the applicant bail would help decongest the prison. Mr. Odawa relied on three authorities being **Cr. Appeal No. 64 of 2004**, **Cr. Appeal No. 93 of 2006** and **Cr. App No. 7 of 2010** in which, the court quashed the convictions of the appellants because the main witnesses contradicted themselves.
8. In response learned counsel Mr. Kabaka opposed the application on behalf of the state, stating that the prosecution discharged its obligation conclusively. He urged the court to find that the appeal is not likely to succeed, and that there are no exceptional circumstances to warrant the appellant being admitted to bail pending appeal, considering that he is serving a very long sentence.
9. Mr. Kabaka also argued that the applicant was a high flight risk since he had already been convicted of a capital offence which carried a mandatory death penalty, and that his alleged ailments were not supported by any medical evidence. In rather strong language Mr. Kabaka contended that Mr. Odawa's ground that the court should release a person convicted of a felony on bail pending appeal because it would decongest the prison was misplaced and ridiculous.
10. The main issue for determination in an application such as the one before us is whether the appeal has overwhelming chances of success. If it does not then this Court would not grant bail pending appeal. This principle finds expression in the case of **Mutua v Republic [1988] KLR 497**, in which Platt, Apaloo JJA and Masime Ag JA held that:

“The test was whether there were exceptional or unusual circumstances, the most important ground being whether the appeal had overwhelming chances of being successful”.

We therefore perused the lower court record including the judgment of the trial court to establish whether the appeal could be said to have overwhelming chances of success.

11. In exercising our discretion, we bear in mind that when the applicant was convicted by a competent court he lost the presumption of innocence conferred on him by the Constitution and that during the hearing of the pending appeal the burden will be upon him to show the court that the conviction was wrong. - See the case of **Isaack Tulicha Guyo vs. Republic, Court of Appeal, Nairobi Criminal Appeal No. 16 of 2010**;
12. Solemn assertions by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal. The previous good character of the applicant and the hardships, if any, facing his family are not exceptional or unusual factors either. The intended appeal must in itself be shown to have overwhelming chances of success. See – the Court of Appeal decision in **Dominic Karanja v Republic [1986] KLR pg. 612**.
13. A copy of the memorandum of the intended petition of appeal was not annexed to this application to enable us to assess the grounds of appeal for chances of success thereof. We have however, perused the lower court proceedings and without pre-empting the intended appeal we find that on the face thereof it cannot be said that the appeal has overwhelming chances of success. There is also no overwhelming probability that the sentence will be served before the appeal is heard since the appellant was sentenced to death.

For the foregoing reasons, we find that the application before us is lacking in merit and decline to grant it. The application is dismissed.

SIGNED DATED and DELIVERED in open court this **13th** day of **May 2014**.

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A. MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE