REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 93 OF 2012

EDWARD NDUNGU NGUGI .... APPELLANT/APPLICANT

VERSUS

REPUBLIC …... RESPONDENT

(Being an appeal from the Judgment and sentence of Hon. A. Alego (Principal Magistrate) in Eldoret Chief Magistrate's Criminal Case No. 538 of 2012 delivered on 18th May, 2012)

RULING

By Notice of Motion dated 16th October, 2013, the Appellant Edward Ngugi Ndungu prays that he be released on bail with or without sureties pending the hearing and determination of the appeal.

The application is premised on grounds that;

(a) The Appellant was convicted on 18th May, 2012 of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

(b) The evidence tendered does not support the charge.

(c) The Appellant is dissatisfied with the conviction and sentence.

(d) The charges are defective.

(e) The Appellant's appeal raises fundamental issues and its apparent sentence is based on flawed proceedings.

(f) The sentence is unconstitutional in the circumstances.

It is further supported by the affidavit of Joseph Mbugua Kimani, the advocate having the conduct of this appeal on behalf of the Appellant, sworn on 16th October, 2013. In summary, the Applicant states that his appeal has high chances of success. Among the grounds of appeal raised is that the plea was not taken in a manner prescribed by the law. He also deponed that the Appellant's family members have promised they will ensure the Appellant attends court whenever he is required.

In addition, counsel for the Applicant filed written submissions dated 26th February, 2014. He submitted that the charge sheet was defective. In this respect, he stated that in the charge sheet the complainant is named as Victoria Wakhungu who testified as PW1. But in her evidence PW1 did not give an indication that on the material dates, he was robbed of any money. Instead, it is PW3 who testified that the stolen money belonged to her. In this respect, the trial court ordered that the

said money be released to PW3.

He thus submitted that the evidence tendered did not support the charge and so the conviction was erroneous.

He further submitted that the elements of the offence of robbery with violence were not proved. He stated that nothing was stolen from the complainant. That further, the prosecution failed to call the husband of PW3 who would confirm whether the money stolen from PW3 belonged to her or her husband.

In addition, he submitted that the Appellant was not properly identified as no identification parade was conducted.

Learned counsel referred the court to a ruling in **ELDORET HIGH COURT CRIMINAL APPEAL NO. 98/2012 – GLADYS NJERI WAWERU -VS- REPUBLIC** in which a similar application was allowed in similar circumstances as in the instant case.

Learned state counsel, Mr. Munene, opposed the application. He submitted that the Applicant had not demonstrated any unusual and exceptional circumstances to warrant the granting of bail pending appeal.

He submitted that the Applicant had also not demonstrated that the appeal had high chances of succeeding. He stated that the charge sheet was not defective. That PW1 did not testify as the complainant but the care-taker of the premises. That although the stolen properties belonged to her employer, she is the one who was attacked and lost the items.

Mr. Munene referred the court to the case of **FRANCIS OKOTCHI & 3 OTHERS -VS- REPUBLIC (2013) e KLR**.

He also submitted that the Appellant was properly identified in the identification parade.

He stated further that the medical examination report produced by the doctor attested to the fact that the complainant was injured – hence the use of violence which is a main element of the offence of robbery with violence.

Mr. Munene also submitted that the stolen items were recovered in the presence of PW4, a police officer. He urged the court to dismiss the application.

I have accordingly considered the application and the respective submissions. There are only two main considerations in this application;

(a) Whether the Applicant has demonstrated any unusual or exceptional circumstances that would warrant the granting of bail pending appeal.

(b) Whether the appeal has high chances of succeeding, which is a major consideration in granting the prayers sought.

With regard to point (a), the only issue raised in the Supporting Affidavit is that the Appellant's family members will ensure that the Appellant avails himself in court if he is released on bail. This statement is construed to mean that the Appellant can afford any terms of bail/bond that may be imposed, and so attendance of the court is a matter of course.

It must be borne in mind that the mere fact that an Appellant can afford the terms of bail would not, of itself, be a consideration in granting bail pending appeal. It does not amount to an exceptional or unusual circumstance that would move the court to determine the application in his favour.

The Appellant must always bear in mind that he has been convicted by a competent court, that he is serving a sentence and unless that conviction is quashed or the sentence set aside, he remains a guilty person.

May I now address myself on the issue of the merit of the appeal.

The Applicant herein was the 2nd accused, and jointly with another, namely Gladys Njeri Waweru, were said to have violently robbed Victorina Nakhungu.

The said Victorina Nakhungu testified as PW1. She stated that was a house help to Margaret, her employer. She narrated how, when she was sweeping the house heard people talking inside the house. On proceeding to the sitting area she met the Appellant who is a brother of her employer. He was in the company of the 2nd accused. The Applicant then pretended that he had been sent by his sister, PW1's employer to the house to do repairs. And after collecting a plank of wood, he attacked PW1, beat her up until she lost consciousness.

PW3, Margaret Ndungu Muthamba, confirmed that PW1 was her employee. She also testified that she was not in her house when the robbery took place. However, all the items were stolen from her house, namely the money in the form of US Dollars, Uganda Shillings and Chinese Yen.

I must point out that the fact that it is PW1 who was in the house when the robbery took place made her the special owner of all the properties that were in PW3's house. Therefore, it was proper and quite in order for her to be named as the complainant in the charge sheet. To this extent, I hold that there is no contradiction in the evidence of the two witnesses. Again, in this respect, the evidence of PW1 and PW3 cannot be said it does not support the charge sheet. This also applies in the argument that the charge is defective. It is not defective on account of this argument; that PW1 was named as the complainant as opposed to PW3.

On identification, it is clear from the evidence of PW1 that she knew the Applicant prior to the date of the robbery. She described her as a brother to PW3. Indeed, both PW1 and the Appellant were acquaintances. This is demonstrated by the fact that when the Applicant entered into the house, he asked PW1 to prepare tea for them. PW1 was thus no stranger to the Applicant. For this reason, the identification of the Applicant by PW1 was by recognition. And there was therefore no need for an identification parade in his respect; and none, of course, was conducted.

The identification parade was only done in respect of the 2nd accused by PW5. Since the 2nd accused is not the Applicant herein, I do not wish to evaluate the merits of the said identification parade.

On the whole, it is my view that, on the grounds submitted by the Applicant, the appeal stands very remote chances of succeeding.

I do not however wish to touch on other areas raised in the grounds of appeal so as not to preempt the findings of the court upon the full hearing of the appeal.

In the result, the Applicant fails to meet the threshold of the factors for consideration in an application for this nature as was held in the case of **JIVRAJI SHAH -VS- REPUBLIC (1986) KLR, 605**, cited in my own ruling in the case of **FRANCIS OKOTCHI & 3 OTHERS -VS- REPUBLIC (2013) e KLR** and also in **ELDORET HIGH COURT CRIMINAL APPEAL NO. 98/2012 – GLADYS NJERI WAWERU -VS- REPUBLIC** in which the cases of **ADEMBA -VS- R (1983) KLR, 414** and **MUTUA -VS- R (1985) KLR, 497** are cited as giving the guidelines for consideration in an application for bail pending appeal.

In the **JIVRAJI SHAH -VS- REPUBLIC**, the Court of Appeal said as follows;

"1. The principles 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 interest of justice to grant bail.

2. 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, condition of granting bail will exist.

3. The main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal which could results in the appeal being allowed and the prope approach is the consideration of the particular circumstances and weight and relevance of the points to be argued."

In the end, this application lacks merit and I dismiss it accordingly.

DATED and **DELIVERED** at **ELDORET** this 5th day of June, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Kimani for the Applicant/Appellant

Mr. Mulati for the Respondent/State