REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 114 OF 2012

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 96 OF 2013

ELIUD MUREGA MUGWIKA…….1st APPELLANT/APPLICANT

BENJAMIN MULEI MUTINDA…….2ND APPELLANT/APPLICANT

MARY MUKULU KITUKU……..3RD APPELLANT/APPLICANT

KIOKO NGOTHO…….4TH APPELLANT/APPLICANT

AUGUSTINE MUOKI MUASA.....5TH APPELLANT/APPLICANT

VERSUS

REPUBLIC ……....RESPONDENT

RULING

1. The applicants/appellants filed an application dated **16th December, 2013** seeking bail pending appeal. in the 1st and second count, all the five (5) accused persons were charged as follows:-

Count 1 –Robbery with violence contrary to **Section 296(2)** of the **Penal Code.** Particulars being that on the **18th** day of **February, 2010** at **Masii Township, Machakos District** within **Eastern Province,** jointly with others not before court, while armed with dangerous weapon namely a pistol, robbed **Joseph Mwaulu David** off cash **Kshs.100,000/=** and **one (1)safaricom phone(Kabambe) S/No. 3217800733372** valued at **Kshs. 3,000/=** and at or immediately before or immediately after the time of such robbery, threatened to use personal violence against the said **Joseph Mwaulu David.**

Count II

Kidnapping with intent to confine contrary to **Section 259** of the **Penal Code.** Particulars thereof being that on the **18th** day of **February, 2010** at **Masii Township, Machakos District** within **Eastern Province,** the five (5) appellants with other not before court kidnapped and wrongly confined **Joseph Mwaulu David** with intent to rob the said **Joseph Mwaulu David.**

The third and fourth counts were in respect of the 1st accused who was charged thus:-

Count III: Being in possession of Government Stores contrary to Section 324(3) of the Penal Code. Particulars thereof being that **19th** day of **February, 2010** at **Komarock** junction, **Tala township** in **Machakos District** within **Eastern Province,** He unlawfully had in possession one (1) police pocket phone NEC SRP 529, Three (3) police hand cuffs and one (1) handcuff key being the property of Kenya Police, suspected of having been stolen or unlawfully obtained.

Count IV: Personating a Police Officer contrary to section **105(b**) of the **Penal Code.** Particulars thereof being that on the **19th** day of **February, 2010** at **Masii Township, Machakos District** within **Eastern Province** falsely presented himself to be a person employed in the public service namely police officer and assumed to arrest **Joseph Mwaulu David.**

2. They were tried and acquitted on the first count. They were however, convicted on counts 2, 3, and 4 and sentenced as hereunder;-

Count 1I- Each accused was sentenced to serve three (3) years imprisonment.

Count III – accused 1 - one (1) year imprisonment

Count IV- accused 1 - three (3) months imprisonment.

It was ordered that sentences in regard to Accused 1 do run concurrently.

3. Having preferred an appeal they aver that it has a high chance of success; the offence they were convicted of are bailable and if not released on bail they will end up serving a substantial part of their sentence, rendering the appeal nugatory.
4. The application is opposed by the State on the grounds that being convicts the applicants cannot be presumed to be innocent; the appellants have not demonstrated that their appeal has a high chance of succeeding and there are no exceptional circumstances to warrant the applicants being released on bail.
5. The threshold for granting bail pending appeal is laid out in various cases.

In the case of ***Jivraj Shah versus Republic [1986] KLR 605*** the Court of Appeal held that;-

> "***i). The principal 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 an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist."***

6. In another case ***Dominic Karanja versus Republic (1986) KLR 612,*** the Court of Appeal considered conditions which an applicant for bail pending appeal should satisfy before the application can be granted. The court held that:-

a. ***The most important issue was that, if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.***
b. ***The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health perse would also not constitute exceptional circumstances where there existed medical facilities for prisoners.***
c. ***A solemn assertion 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".***

7. I have perused the lower court file and the judgment thereof. There is absolutely nothing peculiar

that would make this court conclude that the appeal has a high chance of succeeding.

8. There is also no existence of exceptional circumstances that would make the scale of justice tilt in favour of the applicants.
9. With additional human resource at this station, the case will be heard on priority basis, therefore, it cannot be asserted that a substantial part of sentence will be served prior to the appeal being heard and determined.
10. From the foregoing the application lacks merit. It must fail. Accordingly it is dismissed.
11. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **9TH** day of **SEPTEMBER, 2014.**

L.N. MUTENDE

JUDGE