

KENYA / JUDGMENT

Evans Njenga Gitau v Republic

[2017] KEHC 9821 (KLR)

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COURT

High Court

CASE / FILE NUMBER

Criminal Appeal 98 of 2017

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 98 OF 2017

EVANS NJENGA GITAU....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application

The Applicant was the accused before the Chief Magistrate's Court at Kibera in criminal case No. 2239 of 2014. He was charged with three counts of robbery with violence contrary to Section 296(2) of the Penal Code. He was convicted accordingly and sentenced to death. He was dissatisfied with both the conviction and sentence and he preferred an appeal to this court. In the meantime he has filed the instant application vide a Chamber Summons dated 18th October, 2017. The same is brought under Section 357(1) of the Criminal Procedure Code and Article 50 of the Constitution. The main prayer sought is that he be admitted to bail pending the hearing and determination of the appeal. It is based on the main grounds that the appeal has a high chance of success and that the Appellant would be prejudiced if part or the whole of the sentence is served while the appeal is pending hearing.

The application is supported by an affidavit sworn by the Appellant in which he deposed that the appeal set out an arguable case that required to be heard expeditiously. He swore that his continued incarceration had caused great anxiety to his family and that the custodial sentence was harsh considering the fact that the entire case lacked merit. He cited that he was a case of mistaken identity. He deposed that the conviction was not based on any cogent or credible evidence.

Submissions

The application was canvassed before me on 20th November, 2017 with learned counsel, Mr. Mathenge representing the Appellant whilst learned State Counsel, Ms. Akunja acted for the Respondent. Mr. Mathenge submitted that the success of the appeal was based primarily on the identification element. He submitted that although PW2 and PW3 testified that they gave a description of the robbers to the police the same was not disclosed by the investigating officer. He submitted that the offence in question occurred at night and that nothing was recovered from the Appellant that connected him to the robbery. He submitted that the Appellant gave an alibi defence which the trial court failed to take into consideration. He concluded by stating that the Appellant was ready to abide by any conditions that the court would set for his release.

Ms. Akunja opposed the application. She submitted that this was informed by the fact that bail pending appeal is not an absolute right in that the Appellant was lawfully convicted. She submitted that the evidence on record was sufficient to warrant a conviction. More so, that the Appellant was identified by PW1 after he took off his mask. She submitted that the Appellant was arrested days after the robbery after a tip off by one of the victims who saw him at a local shop. She submitted that the Appellant's alibi defence was ousted by the prosecution evidence.

In reply, Mr. Mathenge, submitted that PW1 and PW3 testified that they had not met the Appellant which rendered their identification of the Appellant dock identification which could not be relied on. Further, the intensity of the light at, and its distance from, the scene were not described casting doubt on what enabled PW1 to identify the Appellant. For these reasons, it was the counsel's view that the appeal was likely to succeed and urged that the application be allowed.

Determination

As rightly submitted by counsel for the Respondent bail pending appeal is not an absolute right. The Applicant must demonstrate that the appeal has a high chance of success and that there exists unusual or exceptional circumstances to warrant the grant of bail pending appeal. See Trevelyan J. in *Somo v. Republic* [1972] EA 476. He delivered himself thus:

“It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed.”

In the instant application, the Appellant contends that the appeal will succeed on account that he was not properly identified. The case for the prosecution is that identification of the Appellant was at the locus in quo. The evidence of PW1 was that a man wielding a pistol wearing a mask took part in the robbery. That this man then took the mask off and gagged them. He identified this man as the Appellant. PW2's testimony concurred with PW1 with regard to the masked man who was wielding a pistol. He testified that this man took off his mask after a mattress caught fire. PW3 also testified to the presence of a pistol wielding masked man who removed his mask as they were carrying the items out of the house.

It is clear that the mattress fire incident is a crucial matter that the court must critically evaluate. PW2 testified that the man took the mask off due to the intensity of the smoke from the mattress fire. That the smoke was so intense it choked the robber. The mattress fire was only referred to by PW2 and PW3. PW1 did not comment on it. The witnesses all testified that the robbery took about 25 minutes and it is clear that the robber unmasked toward the end of the robbery which calls into question the amount of time he was under observation by the complainants.

Further, there were contradictions on the mode of the Appellant's arrest and the events leading to the same. PW1 testified that they met the two robbers seated at Gateke Road and that they called Ongata Rongai police station but no help was forthcoming. This led to him going to the police station where he got two officers who escorted him to the place where the robbers were and arrested the Appellant as the other robber had escaped. He left a colleague watching the robbers. PW2 testified that he recognized the robber when he took the mask off as a man who he knew around Rongai and that he led the police to arrest this man in question whom he identified as the Appellant. PW3 testified that she saw one of the robbers seated at a kiosk and alerted PW1 and PW2. They then called the police who arrested the Appellant.

From the above brief summary, it is clear that each complainant gave their account of how the Appellant was arrested which casts doubt on whether they were all referring to the Appellant. The arresting officers namely, PW4 and PW5 on the other hand gave differing accounts on how they arrested the Appellant. The contradictory nature of this evidence calls into question the culpability of the Appellant.

On the whole therefore, I find that the appeal, *prima facie*, is likely to succeed. On this ground alone, I allow the application. I admit the Applicant to cash bail of Ksh. 50,000/ pending the hearing and determination of the appeal. It is so ordered.

Dated and delivered at Nairobi This 6th Day of December, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Applicant present in person
2. M/s Sigei for the Respondent.

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