



**Lenolkulal & another v Republic (Criminal Appeal E092 of 2024)  
[2024] KEHC 10513 (KLR) (30 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10513 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E092 OF 2024  
DR KAVEDZA, J  
AUGUST 30, 2024**

**BETWEEN**

**MOSES KASAINI LENOLKULAL ..... 1<sup>ST</sup> APPLICANT**

**HESBON JACK WACHIRA NDATHI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicants have moved this court through Chamber Summons dated 29<sup>th</sup> August 2024 under Rule 3 of the High Court (Practice and Procedure) Rules “vacation rules” seeking to be heard during the current High Court vacation. The substantive application filed on even date is anchored on section 357 of the Criminal Procedure Code wherein the applicants seek to be released on bail pending the hearing of the application and their appeal.
2. The application is supported by the Affidavit sworn by their counsel Isaac Rene. The applicants aver that their appeal, against the conviction and sentence, passed in ACCR No. 3 of 2019 Republic vs Moses Kasaine Lenolkulal & 11 others has overwhelming chances of success as can be gleaned from the annexed Petition of Appeal wherein the applicants have enumerated nine (9) grounds of appeal to with;
  - a. The Learned Trial Magistrate erred in law and fact, in failing to find and hold that the letter dated 5th April, 2013 (Exhibit 238) by the 1<sup>st</sup> Applicant declaring interest in Oryx Service Station and Conflict of Interest Register (Exhibit 387) was lawful, sufficient and consistent with Article 73(2) of *the Constitution* of Kenya, 2010, Section 43 of the *Public Procurement and Disposal Act No 2 of 2005* (repealed) and Section 59(3) of the *Public Procurement and Asset Disposal Act*, 2015;



- b. The Learned Trial Magistrate erred in law and fact, in failing to consider a crucial and substantial fact that the County Government of Samburu indeed got value for its money, goods were ordered and indeed delivered, and that the Auditor General's Reports (Exhibits D1- 2(a)(b)(c)(d) and (e) confirmed this fact;
  - c. The Learned Trial Magistrate erred in law and fact, in failing to find and hold that there were inconsistencies and contradictions on the amounts set out in the charge sheet and the amounts extracted from the IFMIS platform;
  - d. The Learned Trial Magistrate erred in fact, in making a finding without any evidence on record whatsoever that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants herein divided the public funds allegedly unlawfully acquired by them in the sum of Kshs. 83,460,995.00; among other grounds.
3. It is further deponed that the 1<sup>st</sup> Applicant suffers from a repeated bout of hypertension and there is a high risk that the 1<sup>st</sup> Applicant being confined to jail could trigger rapid health deterioration and a life-threatening condition named pre-eclampsia. On the other hand, it is alleged that the 2<sup>nd</sup> Applicant suffers from Type 2 Diabetes with a complication of peripheral neuropathy and has been on treatment since the year 2023 hence his medical condition would certainly cause grave danger to his life if in detention while the Appeal is pending hearing and determination.
  4. The applicants further aver that they have at all times, complied with the Bail/Bond terms which had hitherto been affixed by the Trial Magistrate, have always presented themselves to the Court, and have demonstrated that they are not flight risks.
  5. I have carefully considered the grounds on the face of the application and the affidavit in support thereof. Noting that the applicants seek to be released on bail pending the hearing of their appeal, the court must examine whether the applicants have made out a case, prima facie, to warrant being released on bail at this stage. I say so because the applicants are prima facie convicts and their constitutional rights and freedoms are patently circumscribed by their conviction. The applicants do not enjoy the constitutional right to be presumed innocent which right is available to persons facing/awaiting trial in terms of Article 49(1)(h) of *the Constitution*.
  6. Further, I am mindful that the instant application has not been served and responded to by the State hence the court does not have the benefit of the respective parties' positions to the application. In considering this application, therefore, I am careful not to delve into the merits of the application to avoid foreclosing the right of response by the adverse party ultimately jeopardizing the hearing of the application on merit.
  7. In *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR, the court held that:-

“The right to bail is provided under Article 49(1) of *the Constitution* but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored...”
  8. The Court of Appeal in *Jivraj Shah v Republic* [1986] eKLR held as follows: -

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it



is in the interest of justice to grant bail. If 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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v Republic* [1972] E A 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae.” (Emphasis added)

9. Further, the Supreme Court of Uganda in *Arvind Patel -vs- Uganda S.C Cr. Appeal No. 1 of 2003* set out the considerations for grant of bail pending appeal as follows:
  - a. Whether the applicant is or not a first offender;
  - b. Whether the offence of which the applicant is convicted involved personal violence;
  - c. The appeal must not be frivolous and have reasonable chance of success;
  - d. The possibility of substantial delay in the determination of appeal and;
  - e. Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.
10. Guided by the above instructive authorities, it is discernible that the arguability of the appeal and its reasonable chances of success intrinsically remain the paramount considerations in an application of this nature.
11. I have reviewed the grounds of the appeal as well as the judgement and sentence of the trial court. I find that the appeal raises fundamental and arguable questions of both law and fact which, upon hearing, may upset the findings of the trial court.
12. For instance, under count IV as highlighted in the introductory part of the trial court's judgment, the applicants were charged with unlawful acquisition of public property in section 45 (1) (a) as read with section 48 (1) of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 whose value is pegged at Kshs 84,695,996.55/=. The applicants were however sentenced to a mandatory fine of Kshs. 83,460,995.00 equivalent to twice the benefit after dividing the public funds unlawfully acquired between them.
13. Further, it is urged in the grounds of appeal that the County Government of Samburu indeed got value for its money, which is the subject and basis of the convictions of the applicants. To my mind, these are, among others, arguable and critical questions that the appellate court must grapple with which, if proved, are capable of assailing the findings of the trial magistrate thus rendering the appeal meritorious.
14. With regard to the health conditions of the applicants, I am guided by the holding of the Court of Appeal in *Epungure v Republic* (Criminal Appeal E015 of 2021) [2021] KECA 343 (KLR) and *John Koyi Waluke & another v Republic* [2020] eKLR where the court held that it does not amount to an unusual or exceptional circumstance as the applicant can obtain medical care from the prison facilities, and if need be, can be referred to government health facilities for further treatment. As such I reject the said grounds in their entirety.



15. The other issue raised was the legality of sentences imposed. It is trite law that sentencing is a discretion exercised by the trial court unless proved that it was arrived at after considering wrong principles. In arriving at this finding, I am guided by the holding in the case of *Ogolla S/O Owuor Vs Republic* (1954) EACA 270 Where the court stated that;

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”

16. I do not wish to comment on the legality of the sentence at this stage as it will prejudice the outcome of the main appeal. I leave the arguments of that ground for the main appeal.

17. I also note that the offences in question did not involve personal violence hence the applicants do not pose any risk to society or themselves.

18. In the premises, prima facie and in exercising my discretion, I make the following orders: -

- a. The application dated 29<sup>th</sup> August 2024 is certified as urgent.
- b. The 1<sup>st</sup> and 2<sup>nd</sup> applicants are each admitted to a bond of Kshs. 10,000,000/= with one surety of a similar amount.
- c. The applicants shall deposit in court their passports and or all travelling documents before being released.
- d. The application and petition of appeal shall be served upon the respondent within seven (7) days from the date hereof.
- e. Upon service, the respondent shall file their response within fourteen days.
- f. The deputy registrar shall ensure the original lower court file and certified record of proceedings are availed to the High Court at the earliest opportunity.
- g. This matter is fixed for mention on 31<sup>st</sup> October 2024 before the Presiding Judge, Milimani Anti-Corruption and Economic Crimes Division, and for further directions.

**RULING DATED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF AUGUST 2024**

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**D.KAVEDZA**

**JUDGE**

