Lifede v Republic (Criminal Appeal E003 of 2024)
[2024] KEHC 13351 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13351 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E003 OF 2024

JN KAMAU, J

OCTOBER 29, 2024

BETWEEN

PATRICK LIFEDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (SPM) delivered at Hamisi in Senior Principal Magistrate's Court in Criminal Case No 35 of 2021 on 13th June 2023)

RULING

1. In his Notice of Motion dated 28th December 2023 and filed on 15th January 2024, the Appellant herein sought orders for him to be subjected to a Mental Assessment Test before a competent Public Health Facility and a report be filed before the commencement of his appeal herein. He also sought to be granted bail/bond pending the hearing and determination of his appeal.

2. The said application was supported by his affidavit and that of one Ebby Kavurani. Both affidavits were sworn on 28th December 2023.

3. The Appellant averred that although not yet medically proved, he was a victim of some form of mental disorder since his early life to date as attested by her sister, the second deponent herein. He stated that his continued imprisonment in his current mental status was prejudicial to his health and constitutional rights. He contended that as a matter of law, in the preliminary stage of a case, the court ought to determine whether he was fit to stand trial and that therefore it would be prudent that this court determine his mental status as a matter of caution and law before the commencement of the appeal herein.

4. He further stated that his appeal had a high chance of success being that part of it raised valid issues on the Trial Court's lack of jurisdiction in hearing and determining his case.

5. He was categorical that he had never absconded from court proceedings since commencement and determination of his case at the Trial Court. He pointed out that the *Constitution* provided him an opportunity to equal benefit and access to the law.

6. The second deponent averred that she was the Appellant's sister. She reiterated his averments that he was born with a mental illness that was yet to be ascertained and that he had never been subjected to a mental assessment test in his lifetime because of the societal stereotype pressure that existed in their environment. She urged the court to subject the Appellant to the said test to put rest to the thorny issues.

7. The Appellant's Written Submissions were dated 1st July 2024 and filed on 16th July 2024. Despite having been given ample time to file its submissions, the Respondent did not file any Written Submissions. This Ruling herein is therefore based on the Appellant's Written Submissions only.

Legal Analysis

8. The Appellant submitted that Section 358(1) of the *Criminal Procedure Code* underscored this court's jurisdiction to allow additional evidence in the nature of production of a Mental Assessment Report to form part of the Record of Appeal.

9. To support his application, he relied on the cases of *Elgood v Regina* (1968) EA 274 and *R v Parks* (1969) All ER at page 364 where the common thread was that the guiding principles in admitting additional evidence were that the evidence that was sought to be called had to be evidence which was not available at the trial, it had to be relevant to the issues, it had to be credible in the sense that it was capable of belief and that the court would after considering the said evidence proceed to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.

10. He also placed reliance on the case of *LO v Republic* [2019]eKLR where the court held that there was no prejudice that was likely to be occasioned to the respondent or victim of the offence and hence admitted additional evidence. He submitted that the issue of the Mental Assessment was not available during trial although it ought to have been considered by the Trial Court due to the sentence nature of the offence and his demeanour during trial.

11. He contended that one's mental status was a critical element in legal proceedings and transactions as it touched on the legal capacity of an individual affected. He added that it further went into the issue of the court's jurisdiction should one lack the legal capacity to stand trial. He pointed out that despite his mitigation, the Trial Court imposed a twenty (20) years imprisonment on him which he termed as inordinately long sentence. It was his contention that the Trial Court lacked territorial jurisdiction to determine his case.

12. He urged the court to grant the order sought as the Prosecution and the victim would neither suffer any prejudice should the same be granted.

13. Section 11 of the *Penal Code*, Cap 63(Laws of Kenya) states that there is presumption of sanity as regards all persons. It provides as follows: -

> " Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved" (emphasis court).

14. In the same vein, Section 12 of the *Penal Code* states that:-

> "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission, he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission".

15. Having said so, the mental assessment of an accused person is important pursuant to the provisions of Sections 11 and 12 of the *Penal Code*, save that it could be ascertained if was required in evidence. The purpose of a mental assessment report, was inter alia, to determine whether the accused was mentally fit to understand, or appreciate the charges and/or information and then stand trial.

16. The requirement that an accused be fit to stand trial arose out of a concern in the common law that, criminal trials be fairly conducted. Indeed, insanity was a defence to any criminal charge. It was a defence, if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind so as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.

17. This court had due regard, to the case of *Leonard Mwangemi Munyasia v Republic* [2015]eKLR, where the Court of Appeal held that in such a case, the medical history of the accused person among other factors ought to be considered.

18. The mental status of the accused at the time of commission of the offence was certified by the psychiatrist at the time of mental assessment. It was based on the history given by the accused including any previous treatment records. It had to be availed before plea was taken.

19. There was nothing in the Trial Court proceedings that showed the Appellant raised the issue of his insanity before taking plea or raise it as his defence or at the time he was mitigating as he had contended. The proceedings indicate that the plea was read to him and he pleaded "Not Guilty". He did not ask the Trial Court to refer him for a mental assessment to be done before or during the trial.

20. Whereas ordinarily a mental assessment was conducted before a person charged with murder stood trial, the absence of such an assessment per se could not invalidate a criminal trial, especially where the trial court had no reason to doubt that the accused person was of sound mind. Needless to say, the Appellant herein was charged with the offence of defilement which by practice did not require the assessment of his mental status before plea taking and trial.

21. The onus therefore lay on him to request for a mental assessment as the same was not conducted as a matter of course at the time of taking plea. This was the entry point for him to have sought to be referred to a mental assessment as he had complained of having had the mental condition from his early years. In the circumstances the Trial Court could not be faulted to have proceeded on the presumption of sanity as per Section 11 of the *Penal Code*.

22. The above notwithstanding, the Supreme Court of Kenya set out guidelines for the admission of additional evidence before appellate courts in *Hon Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR, as follows:-

    a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

e. the evidence must be credible in the sense that it is capable of belief;

f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. where the additional evidence discloses a strong *prima facie* case of willful deception of the Court;

i. the court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful.

j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

k. the court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

23. In a nutshell, the upshot of the aforesaid decision was that an application seeking to produce additional evidence on appeal was not automatic and that an applicant had to lay basis for the same to be obtained and produced before the appellate court. The appellate court was enjoined to exercise its discretion with caution to avoid an appellant re-litigating his or her case to have a second bite at the cherry after failing in its case in the trial court.

24. This court found and held that the present application was an afterthought. He and his sister were aware of the purported illness since his early childhood and did nothing to bring it to the attention of the trial court. The Appellant was therefore estopped from relying on his mental condition during trial as a defence.

25. The issues he had raised in his present application could be considered in the substantive appeal. Indeed, the appellate court had power to order a re-trial if it was satisfied that there had been a miscarriage of justice.

26. The Appellant alluded to an illness without ascribing a name to it. This court could not therefore be certain if he acquired it, if at all, after he was incarcerated. There was a risk of the appellate court arriving at a wrong analysis if it ordered for a mental assessment at this stage to determine the appeal herein without having a reference point.

27. Having considered the application and the facts of the matter and the guiding principles cited above, this court did not find his prayer seeking to be allowed to produce additional evidence at this appellate stage to have been merited.

28. Turning to the issue of bail/bond, this court noted that the Appellant did not submit on the same. Be that as it may, it considered the principles of granting bail/bond pending appeal that were laid down in the case of *Jivraj Shah v Republic* [1986] eKLR. These were that:-

    1. There must be in existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.

    2. 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

29. Having said so, granting of bail/bond pending appeal was at the discretion of the appellate court. As was stated in the case of *Daniel Dominic Karanja v Republic* [1986] eKLR, availability of sureties, ill health, suffering of a convict's family were not grounds for the granting of bail pending appeal. However, the anticipated delays in hearing an appeal, the length of the sentence, whether or not the applicant had pleaded guilty and/or admitted the offence and option of a non-custodial sentence were factors that an appellate court could take into account when considering an application for bail/bond pending appeal.

30. At this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. It should only be concerned with the question of whether or not the appeal would be rendered nugatory if bail/bond pending appeal was not granted.

31. Notably, the Appellant herein was found guilty of a sexual offence. The offences under the *Sexual Offences Act* have no option of a fine which would prejudice an applicant if his or her appeal was found to have been successful as he or she would ordinarily have served a prison term despite having had an option of a fine.

32. Although he did not submit on the issue, this court nonetheless found and held that the Appellant herein failed to demonstrate that exceptional circumstances existed to warrant him being grant bail / bond pending appeal. The fact that he attended trial without absconding were not sufficient reason for him to be granted bail/bond pending the hearing and determination of the Appeal herein.

33. It was therefore the considered view of this court that this was not a suitable case for it to exercise its discretion and grant the Appellant bail/bond pending the hearing and determination of the Appeal herein.

Disposition

34. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 28th December 2023 and filed on 15th January 2024 was not merited and the same be and is hereby dismissed.

35. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF OCTOBER 2024

J. KAMAU

JUDGE