Mwiti v Cabinet Secretary Ministry of Environment and Forestry (Kenya) & another; Director of Public Prosecutions (Interested Party) (Constitutional Petition E013 of 2022) [2022] KEHC 12530 (KLR) (4 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12530 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CONSTITUTIONAL PETITION E013 OF 2022

EM MURIITHI, J

AUGUST 4, 2022

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDERARTICLES 22 (1) OF THE CONSTITUTION OF KENYA, 2010ANDIN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2,10,27,29, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010ANDIN THE MATTER OF THE UNITED NATIONS UNIVERSAL DECLARATIONS OFHUMAN RIGHTSANDIN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLESRIGHTSANDAND IN THE NATTER OF SECTION 140 (B) OF THE ENVIRONMENTMANAGEMENT AND COORDINATION ACT 2015ANDIN THE MATTER OF CRIMINAL CASE NO E071 OF 2022 AT THE CHIEFMAGISTRATE COURT AT ISIOLOANDIN THE MATTER OF MISC CRIMINAL APPEAL NO E010 OF 2022 AT THE HIGHCOURT OF KENYA AT MERUAND IN THE MATTER OF PETITION FOR DECLARATION OF HUMAN AND PEOPLE RIGHTS

BETWEEN

JOSHUA MWITI .... APPLICANT

AND

CABINET SECRETARY MINISTRY OF ENVIRONMENT AND FORESTRY (KENYA) .... 1ST RESPONDENT

ATTORNEY GENERAL .... 2ND RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... INTERESTED PARTY

RULING

1. This court has previously considered the principles applicable in applications for bail post-conviction. [Not necessarily bail pending appeal; it could, as here, be bail pending the hearing and determination

of an application, petition or other proceedings launched after the conviction of the application in a criminal trial].

2. In Machakos Hc Cri Appeal No 56 of2015, *Peter Wanjohi Njiraini v R*, this court examined the principles for the grant of bail pending appeal as follows:

> " Principles for the grant of bail pending appeal
>
> 3. Article 49 (1) (h) provides as one of the rights of arrested persons –
>
> > " (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."
>
> 4. Although the applicant's right to presumption of innocence has been extinguished by his conviction by the trial court, the right to bail pending trial must meaningfully be taken to be co-extensive to the criminal trial process, which includes appeal. However, in determining whether there are compelling reasons for refusal of bail, the fact that the applicant is now a convict must be taken to be a compelling reason in that a convicted person is likely to abscond because his guilt has already been established and certainty of punishment which has already been imposed.
>
> 5. In *Boke Chacha v Republic*, Kisii HC Cri Appeal No 244 of 2012, I considered the principles for the grant of bail pending appeal
>
> > " "According to authorities on bail pending appeal, bearing in mind that the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal, the criteria for consideration is:
> >
> > a. Whether there exists exception or unusual circumstances which justify grant of bail in interests of justice. See *Jivraj Shah v R*(1986) KLR 605.
> >
> > b. Such exceptional circumstances exist where the appeal has overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard. See Jivraj Shah, supra; *Mutua v R* (1988) KLR 497; and *Somo v R* (1972) EA 476.
> >
> > c. The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See *Dominic Karanja v R* (1986) KLR 612.
> >
> > d. A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not

> sufficient ground for releasing a convicted person on bail pending appeal. See *Dominic Karanja*, supra."

Application of Principle to the present case

3. The court has considered application for bail pending determination of the petition herein after the applicant has been convicted in a criminal trial appeal on the principles set out above. The primary consideration applicable to this matter is that the applicant may serve his full sentence of imprisonment for 12 months, with default sentence to the fine of Kshs 2,0000,000/= imposed by the trial court before this court is able to hear and determine the petition herein challenging the provision of law under which the penalty was imprisonment.

4. The petitioner was charged with three counts, respectively for the offences of:

   I. Being in possession of illegal alcoholic drinks contrary to section 27)(1) (b) as read with sub-section 4 of the *Alcoholic Drinks Control Act* No 4 of 2006.

   II. Being in possession of uncustomised goods contrary to section 200 (a) (III) as read with section 210 and 213 of the *East African Community Customs Management Act 2004*.

   III. Using Plastic Flat bags and Plastic carrier bags contrary to a measure Banning use of Plastic Flat bags and plastic carrier bags prescribed under Gazette Notice No 2356 and 2334 as read with section 140 (b) of the *Environmental Management and Coordination Act* No 5 of 2015 cap 387 Laws of Kenya.

5. He was on February 10, 2022 convicted by the trial court on his own plea of guilty for the offence among others of and sentenced to "a fine of 100,000 in default to serve one year imprisonment. For count 2, the accused to pay a fine of 15,000 in default to serve 2 months' imprisonment. For count 3, the accused to pay a fine of 2,000,000/= in default to serve 1 year imprisonment."

6. Upon application for revision, this court quashed the conviction in count II of the charge sheet. At the time of the ruling on the application herein, the petitioner is serving time for the default sentence in count I and III. He has been in custody close to 6 months, and therefore, has only three months to go before completing the default sentence in count. I. There is already a decision of this court declining to interfere with the sentence in count I. Indeed, the petition only relates and seeks relief in relation to the penalties under count III.

7. If the applicant serves the sentence in full, his petition herein challenging the validity of the penalty from the offence he was convicted, shall be rendered nugatory and no compensation without further litigation is possible for the injury occasioned, in the meantime, by the imprisonment on an invalid penalty.

8. If the provision of the penalty were declared invalid, an extrapolation of the principle of *nulla poena sine lege* (no penalty without law) would require that the applicant be spared for having to serve and suffer the penalty while its validity is under consideration.

9. It is not accurate as urged in the respondent's grounds of opposition that "the applicant's appeal was similarly heard by this honourable court of competent jurisdiction which later dismissed his appeal." What the court dismissed was a revision on sentence and, significantly, ruled, at paragraph 11 of the

ruling of June 9, 2022 in Meru HCCR Revision NoE010 of 2022, as regards the penalty herein challenged that:

> " 11. The sentence of a fine [of] of Ksh 2,000,000/- imposed on the accused on the third count appears excessive having regard to the fact that the accused was found in possession of only ten (10) packets of plastic bags. However, as the court has not been served with an argument on the minimum mandatory [nature] of section 140 of the *Environmental Management and Coordination Act 2015* it is not appropriate to make a determination."

The court does not consider that any notion of *res judicata* arise.

10. The court accepts the principal ground of opposition by the DPP that "section 140(b) of the E*nvironmental Management and Coordination Act* has not yet been declared unconstitutional and is still legal." The court finds this argument well suit for the main petition but not the interlocutory application for conservatory order herein. The question at this stage is whether it is just to have the applicant serve in full the penalty, which though legal at this stage is challenged for invalidity in the petition before the court. It is the irreversibility of the situation that must drive the conscience of the court.

11. In explaining the nature of a conservatory order, the Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Civil Application No 5 of 2014, [2014] eKLR, {para. 86} that -

> " "Conservatory orders bear a more decidedly public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders therefore are not, unlike interlocutory injunctions, linked to such private party issue as "the prospects of irreparable harm" occurring during the pendency of the case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

12. "Consequently", as this court held in KBT HC Pet. No 3 of 2018, *Hon Benjamin Koech v Baringo County Government & 3 Others*, "in determining whether to grant a conservatory order, the respective parties' cases must be examined through the prism of constitutional order and public interest and involve a weighting of the merits of either causes."

13. Of course, there is the principle of presumption of constitutional validity of the enacted law. However, so that a citizen is not punished on a law that eventually is invalidated by the court, the hearing of the petition challenging the law must be expedite to hearing. There is, therefore, urgency in the hearing and determination of the petition herein for a resolution on the validity of the impugned statute.

14. In the meantime, a conservatory order is appropriate in the particular case to avoid punishment. It is the same consideration on principle for the grant of bail pending appeal: that an offender may not serve in full the very punishment which he challenges before the higher court (constitutional court in this case) which may overrule the penalty, if not the conviction altogether.

15. The stay of the penalty, however, applies only to these proceedings and not to all proceedings at large as the circumstances of such other cases are unknown to the court, and the penalty may well be justified on the facts of the cases. Only in the case before the court where the penalty appears to have been imposed as a minimum sentence as provided in the subject provision of law. The principle of presumption of

validity of statute will apply to support the continued application of the provision until it is otherwise declared to be invalid.

16. Because of the possibility of full service of the penalty imposed herein for the default of payment of the fine, the court shall grant the petitioner/applicant bail pending hearing and determination herein of the petition as a conservatory order in the interest of justice of the particular case. The possibility of remedy of damages as suggested by the DPP in response to the application is, of course, no answer to a claim that the petition, if the petition successful, shall be rendered nugatory. I consider that liberty does not commensurate with monetary damages.

17. Finally, the DPP made a chilling submission by ground No 7 of the grounds of objection as follows:

> "7. That the petition would not be rendered nugatory as even if the petition were to succeed, it would not operate retrospectively and as such, the petitioner/applicant would not benefit from such declaration of unconstitutionality."

18. This court did not get full arguments on the point but it is the very thing that happened when the Supreme Court declared the mandatory death sentence in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR unconstitutional and invalid, and the matter was "remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment." Imagine if the DPP had opposed any stay of execution of their death sentence, saying that the petitioners would not benefit from a declaration of invalidity! While the court will decide the petition upon full hearing, it is incumbent, at this stage, to "uphold the adjudicatory authority of the court" and hold the ground so that the question whether the sentence is valid and whether declaration of invalidity affects the petitioner's sentence is determined.

19. The court has also considered that the petitioner has substantially served the default sentence of twelve months (1 year) in count No I having been in prison custody for six months since February 10, 2022. The court also notes that the petition is already set for hearing directions on September 28, 2022, and a decision of the maters raised in the Petition shall come forth shortly.

ORDERS

20. For the reasons set out above, the court grants the petitioner/applicant bail pending the hearing and determination of his petition herein. The terms of bail shall be that the petitioner who is now a convict and not entitled to the presumption of innocence shall execute a bond in the sum of Kshs 500,000/= with one (1) surety, or a cash bail of the same amount.

    Orders accordingly.

DATED AND DELIVERED THIS 4TH DAY OF AUGUST 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. M. Ashaba, Advocate for the Petitioner/Applicant.

Ms. B. Nadwa, Prosecution Counsel for the DPP.

Mr. Gitonga E.K. Advocate for NEMA, the Interested Party