Shifuma v Republic (Criminal Appeal E127 of 2022)
[2022] KEHC 16066 (KLR) (Crim) (29 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16066 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E127 OF 2022

LN MUTENDE, J

NOVEMBER 29, 2022

BETWEEN

PATRICK MUNYASA SHIFUMA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant/appellant was charged with one (1) count of trafficking in narcotic drugs contrary to the *Narcotics and Psychotropic Substances Act* (Act); four (4) counts of trafficking psychotropic substances contrary to the Act; three (3) counts of being in unlawful possession of part 1 poisons contrary to section 26(2) of the *Pharmacy and Poisons Act*; carrying on the business of a pharmacist in unregistered premises contrary to section 23 (6) of the *Pharmacy and Poisons Act;* and, two (2) counts of making documents without authority contrary to section 357 (a) of the *Penal Code*.

2. Having denied the charges, the applicant was taken through full trial, acquitted of other counts but convicted on counts (1), (2), (3), (4), (6), (7) and (9), Particulars of the stated charges that were framed as follows:

   Count 1: On November 4, 2017 at house no 304 in Umoja Inner core jointly with others not before court trafficked by storing a narcotic drug namely DF118 Dihydrocodeine 9000 tablets with market value of 690, 867/= in contravention of the Act.

   Count 2: On November 4, 2017 at house no 304 in Umoja Inner core jointly with others not before court trafficked by storing methylphenidate 6,240 tablets value 384,800/= in contravention of the Act.

Count 3: On November 4, 2017, at house no 304 in Umoja Inner core, jointly with others not before court trafficked by storing dormicum midazolam 960 tablets of value 84,000/= in contravention of the Act.

Count 6: On November 4, 2017, at house no 304 in Umoja Inner Core, jointly with others not before court, was unlawfully found in possession of Part 1 Poison namely, Ketamine to wit8950 vials with a Market value of ksh 1,852,650/- in contravention of the said Act.

Count 7: On November 4, 2017, at house no 304 in Umoja Inner core was unlawfully found in possession of part 1 poisons namely ketamine 4,270 tablets with market value 883,890/= in contravention to the Act.

Count 9: On November 4, 2017 at house no 304 in Umoja Inner Core, he was found carrying on the business of a pharmacist in the place not registered by the Pharmacy and Poisons Board, otherwise than in accordance with the provisions of the *Pharmacy and Poisons Act*.

3. In the result the applicant was sentenced as follows: -

Count 1: To serve 7 years imprisonment, and, in addition to pay a fine of Kenya Shillings Two Million (ksh 2,000,000/-) and, in default to serve 12 months imprisonment.

Count 2: To serve 7 years imprisonment, and, in default to pay a fine of Kenya Shillings One Million (ksh 1,000,000/-) and, in default to serve twelve (12) months imprisonment.

Count 3: To serve 3 years imprisonment, and, in addition to pay a fine of ksh 250,000/=, and in default to serve twelve months (12) months imprisonment.

Count 6 and 7: To pay a fine of Kenya Shillings Eighty Thousand (Ksh 80,000/=), and in default to serve twelve (12) months imprisonment for each count, as per section 28 of the *Penal Code*.

Count 9: To pay a fine of Kenya Shillings Two Hundred thousand (ksh 200,000/=), and, in default to serve 12 months imprisonment.

4. Aggrieved, the appellant appealed, and also filed an application for bail pending hearing and determination of the appeal, where he seeks admission of the applicant on the same bail terms set out by the trial court, and, issuance of such further orders that this court would deem fit.

5. The application is premised on the grounds that: The learned magistrate convicted and sentenced the applicant on subjective reasoning, insufficient evidence hence the appeal has high chances of success; There is a probability of substantial delay in prosecution and determination of the appeal; The applicant diligently complied with the bond terms during the trial thus making him a perfect candidate for bail before this court;

6. The application is further buttressed by a supporting affidavit sworn by Mr Omondi Sam Ogutu, learned counsel for the appellant/applicant, who depones that the trial magistrate failed to analyse the evidence before him and arrived at the wrong conclusion.

7. That the applicant is likely to serve a substantive portion of the prison term before the appeal is determined and thus substantial prejudice would result; and, that the applicant is not a flight risk as discerned from his compliance at the lower court attendance without fail, having been admitted to bail of ksh 200,000/=

8. The respondent filed grounds of opposition to the appeal where it was urged interalia that no special or unusual circumstances have been demonstrated to warrant the appeal, but, there is no response to the application.

9. The application was disposed through written submissions. It is argued by the applicant that conditions for granting bail exist as the sentence or substantial part of it would be served by the time the appeal is heard. That the court should consider the weight and relevancy of points to be argued. That there exist factual and legal inconsistencies in the judgment that makes the appeal stand a high chance of succeeding.

10. The applicant is apprehensive that given the circumstances surrounding hearing of appeals in the judicial system, he may serve a substantial amount of his sentence before being heard on appeal hence end up being prejudiced should he win the appeal.

11. That there exist peculiar circumstances to persuade the court to grant bail like crowding in prison provides a portent environment for spread of Covid-19 and other diseases coupled with the applicant's aging and sickly parents.

12. The application is unopposed. However, the respondent filed submissions where it was urged that granting bail pending appeal is discretional as the applicant has lost presumption of innocence and was already convicted and is serving a lawful sentence handed out by a competent court. That the onus is on to the applicant to demonstrate that they warrant grant of bail pending appeal. That the applicant has not demonstrated any exceptional circumstances warranting grant of bail pending appeal.

13. That the evidence is cogent, the prosecution having proved the case beyond reasonable doubt. That the court is handling 2022 matters and there will be no delay in hearing the appeal; he is serving close to 23 years imprisonment while this appeal can proceed on priority basis . The appeal has been admitted and there is no back log in criminal division.

14. I have duly considered the application, affidavit in support, annexures thereto, and submissions by both parties. The legal principles that govern bail pending appeal are settled and have been stated in various cases from the appellate court. In the case of *Jivraj Shah vs Republic* (1996) KLR 605 these principles were enumerated as :-

    (1) The principal consideration in an application for bond 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) 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.

    (3) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.

15. The applicant herein is a convict who is serving a lawful sentence, therefore, does not benefit from the presumption of innocence and inherent right to bail pending trial.

16. In the case of *Mutua vs R* [1988] KLR 497, the Court of Appeal stated that:

> "It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal."

17. Where it is established that there exist circumstances that call for release of the offender on bail to prevent miscarriage of justice that would render a competent appeal nugatory, the court would consider acting in accordance to the law. It is therefore upon the applicant to demonstrate existence of the circumstances. This is well captured in the *Bail & Bond Policy guidelines* where it is provided that:

> "…. the burden is on the convicted person to demonstrate that there is an overwhelming chance of success."

18. The main argument put forward is the application having been unopposed. The fact that the respondent did not file a replying affidavit or specific response to the application does not displace the burden of proof placed on the applicant. Looking at the entire application, the applicant has not urged any specific ground to persuade the court that his appeal has overwhelming chances of success. His submissions are misconceived and are based a general view that the burden is on the court to examine each ground and find if there is a chance of success. That overview goes beyond mere grounds that can be urged to assist the appellant at the main hearing, the grounds must be outstanding in that if compared with the evidence would lead to an acquittal.

19. Whether the sentence was excessive is an issue to be determined on appeal, the applicant must not only show that the sentence was illegal, but, that it was also excessive. On evidence adduced, whether, it was insufficient, this cannot be determined at an interlocutory stage. It will be tantamount to pre-empting the appeal.

20. The fact that the accused believes that his appeal has merit and has chances of success is not a ground to allow the application. In the case of *Charles Ratemo Matumo vs Republic* [2021] eKLR Odunga G V J (As he then was) held that:

> "The mere fact that the applicant believes that his appeal has chances of success does not necessarily amount to exceptional circumstances since appellants are only expected to lodge appeal where they believed that their appeals have chances of success. It requires more than such belief to satisfy the court that there are exceptional circumstances."

21. Exceptional circumstances alluded to herein are that there are diseases in prison that the applicant may contract including Covid-19. Prison has medical facilities where inmates are attended to. There is special primary health care which is equivalent to the one provided in Communities, with health professionals who adhere to National Standards, therefore, this cannot be an exceptional circumstance. It is also worth noting that the appeal was filed during a period when measures were taken to prevent spread of diseases, measures that have been successful. Further, that threat is not specific to the applicant but may affects all Kenyans and fellow convicts who are serving under similar circumstances. The Covid 19 pandemic is not an exceptional circumstances and in this case the appellant is not suffering from Covid.

22. The fact that he has old and ailing parents is not an exceptional circumstance to persuade this court, his personal circumstances and the obligations placed on him are also not sufficient grounds to allow his release on bond.

23. In the case of *Ademba vs Republic* (1983) KLR, 442 the Court of Appeal held that:Bail pending appeal may only be granted if there are exceptional or unusual circumstances.The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the Appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.

24. Further the fact that the accused was in good behaviour and did not abscond trial during the trial is not a reason to grant bail.

25. In the case of *Dominic Karanja vs Republic* [1980] KLR 612.the court of appeal held that:

> "...The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners."

26. The appellant further urges that he may serve a substantial amount of his sentence before judgement given the circumstances surrounding hearing of appeals in the judicial system. The circumstances have not been stated. The current judicial framework is geared to expeditious disposition of cases and matters have been fast tracked to achieve this objective. The appellant's case is not an exception. This is an appeal that has been admitted for hearing. The applicant was duly advised to proceed with the appeal but he preferred urging the application first. And, having been sentenced to serve 23 years and has only served four months of the period, this appeal cannot run for 23 years.

27. The upshot is that the application is bereft of merit, and, is accordingly dismissed.

28. It is so ordered.

WRITTEN, DATED AND SIGNED BY HON. LADY JUSTICE L N MUTENDE, THIS 17TH DAY OF NOVEMBER, 2022.

L N MUTENDE

JUDGE

RULING DELIVERED BY HON JUSTICE J M BWONWONG'A ON THIS 29TH DAY OF NOVEMBER, 2022.

J M BWONWONG'A

JUDGE