



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. E007 OF 2020

KENNEDY MAIRURA NATHAN.....APPELLANT/APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence of Hon. B. M. Kintai (Mr.) – PM Keroka

dated and delivered on the 30th October 2020 in the original Keroka Principal Magistrate’s Court

Criminal Case No. 1132 of 2018}

RULING

This ruling pertains to the appellant’s renewed application for bond pending appeal. I refer to it as “**renewed**” because on 21st January 2021 I delivered a ruling by which I dismissed the appellant’s substantive application for bond pending appeal and gave my reasons. The present application was filed on 10th February 2021 and is premised on the following grounds: -

- “1. THAT the appellant/applicant is in prison and likely to suffer if he continues to remain custody given his medical condition and the current outbreak of the COVID-19 PANDEMIC.**
- 2. THAT the appellant/applicant filed an application for bail pending appeal dated 13th November 2020 which was canvassed and a ruling delivered on 21st January 2021 dismissing his prayers for bail pending appeal.**
- 3. THAT among other grounds, the appellant/applicant had advanced his sickly and ill health conditions for consideration for grant of bail pending hearing and determination of the appeal.**
- 4. THAT by the time the matter was slated for hearing i.e. on the 17th day of December 2020; due to logistical issues, the appellant’s advocates had not been furnished with the medical documents.**
- 5. THAT during the hearing; the appellants/applicants were able to attend the hearing virtually albeit in a sickly condition on which date the court issued the 21st January 2021 as the ruling date.**
- 6. THAT the appellant/applicant was exposed to COVID-19 which he was isolated. It can to date not be confirmed if he fully recovered or not as the subsequent tests conducted revealed that he was yet to recover.**
- 7. THAT prior to incarceration, the appellant/applicant herein who has served as a civil servant was first diagnosed with Asthma in the year 2019 at Kitui County Referral which he has managed to live with by dint of the regular medical check-ups.**
- 8. THAT for a duration when the appellant/applicant herein was attached at South Eastern Kenya University (SEKU) as a police officer with the security personnel, he has been attending clinic in Ikombe dispensary at Yatta Sub-county in Machakos.**
- 9. THAT his last date of appointment was on the 12th October 2020 just before he was convicted and incarcerated thus the disruption of his religious attendance of the clinic leaving him susceptible to constant Asthma attacks that are endangering**

his life.

10. THAT while he is attending to treatment at the Kisii Prison, he is not able to attend to the same in the required frequency as well as specialization thus a the occasioning of a clear jeopardy to his life and right to medical care.

11. THAT while in prison, he tested COVID-19 positive which novel ailment put his life at an enormous risk considering his prevailing condition. In as much as he recovered, there is a huge likelihood of reinfection which could put his life on the line due to the daily admission of inmates into the facility.

12. THAT unless this application is heard urgently, and on priority basis; the appellant/applicant may suffer prejudice as the prisons department are not able to avail to him the medication and diets prescribed to him for his subsistence.”

The same is supported by the affidavit of Danstan Omari, Advocate, sworn on 29th January 2021 and further affidavit sworn on 14th April 2021. To his supporting affidavit sworn on 29th January 2021 Counsel has annexed several medical documents and reports which form the backbone of the “**renewed**” application.

The application is vehemently opposed both by the State and by the victim. Both have filed replying affidavits setting out their reasons for opposing the application the gist of which is that this court has previously dismissed the appellant’s application for bond; that this court is *functus officio*; that the appellant has not demonstrated how his appeal has high chances of success and that there is yet no appeal admitted by this court.

To respond to the issues raised by Prosecution Counsel and the victim, Mr. Danstan Omari swore a further affidavit in which he seeks to discredit the replying affidavit of Prosecution Counsel on the ground that the same is neither signed nor commissioned. He also reiterates that his client had previously advanced his sickly and ill health for consideration but due to logistical issues he did not furnish the medical documents but the same are now available. Mr. Omari also discounts the deposition that this court is *functus officio* and contends that the applicant has demonstrated that the appeal does indeed have high chances of success. He further deposes that the applicant lodged his appeal on 12th November 2020 and accuses Prosecution Counsel of misleading this court. He has urged this court to allow the application and grant bond to the appellant.

Before I go into the merits of the application I wish to confirm that there is indeed an appeal and that the same was admitted by this court on 22nd January 2021.

I have carefully considered the depositions in the affidavits by both sides and whereas I do not ascribe to the position that I am *functus officio* in this matter, I am not persuaded that this “**renewed**” application has merit. The reason for this is simple and it is that whereas I had in the earlier ruling intimated that I could have considered the appellant’s ill health as a condition to grant him bond we now have evidence that proves beyond a shadow of doubt that the prison where the appellant is being held has taken steps to afford him medical treatment. Mr. Danstan Omari, Learned Advocate for the appellant has deposed that not only was his client taken to Kenyatta National Hospital where he was treated but he has also been issued with a special diet. It is therefore evident that although he is incarcerated he is still getting medical care for his ailment. Accordingly, his ill health can no longer be a ground for granting him bond. Nothing has been placed before this court from the prison to the effect that it is unable to cater to the appellant’s condition. The measures the Prison Service is taking to protect those who are incarcerated in its prisons from Covid-19 is now in the public domain and the pandemic perse cannot be a ground to grant bond to the appellant.

In the upshot this application is devoid of merit and the same is dismissed. This ruling will apply to **HCCRA No. E008 of 2020** as the application was similar and the facts and circumstances the same.

By this ruling Counsel for the appellants are reminded to file the records of appeal in the appeals so that this appeal can be heard and determined expeditiously. For information, the record of the trial court has already been transmitted to this court and the proceedings and judgement have therefore been typed and are available for Counsel’s collection.

Ruling signed, dated and delivered in Nyamira (Electronically via Microsoft Teams) this 27th day of May 2021.

E. N. MAINA

JUDGE