



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. E121 OF 2021

MATHEW LEKIDIME LEMPURKEL.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR/RESPONDENT

(Being a ruling from the judgement, conviction and sentence of the Hon. H. Onkwani, PM,

dated 5/11/2021 in Nairobi Chief Magistrates' Court in Criminal Case No. 187 of 2016,

Republic v Mathew Lekidime Lempurkel)

RULING

The applicant moved this court pursuant to the provisions of article 159 (2) of the 2010 Constitution of Kenya, section 357 of the Criminal Procedure Code (Cap 75) Laws of Kenya and all other enabling provisions of the Law, under certificate of urgency, seeking the following orders.

- 1) Spent
- 2) An order directing that the applicant be released on bail pending the hearing and determination of his appeal.
- 3) An order directing that the record of the lower court be typed expeditiously.
- 4) An order granting leave in advance to the applicant to introduce certified proceedings at a later stage by way of a supplementary record.
- 5) An order be issued to suspend the judgement and sentence of the lower court pending the hearing and determination of this appeal.
- 6) That the court makes such other order as deems just.

The case for the appellant/applicant

The application is supported by 13 grounds that are set out on the face of the notice of motion and a 23 supporting affidavit of the applicant.

The major grounds are as follows. The applicant was convicted and sentenced to one year imprisonment in respect of the offence of assault without the option of a fine. He has filed an appeal challenging both the conviction and sentence.

The applicant has applied to be supplied with a copy of the proceedings which are bulky and will take time to type.

The appeal has high chances of success as it raises substantial points of law including the following. The trial court disregarded material evidence and the cogent submissions of the applicant.

The trial court disregarded the legal principles relating to the standard and burden of proof.

The trial court was partial and was biased and the applicant's fair trial rights under article 50 (1) of the 2010 Constitution were infringed. Furthermore, the trial court disregarded the Judiciary sentencing guidelines which prescribe the imposition of a non-custodial sentence in cases of a misdemeanour such as the present case. The court also imposed a harsh sentence that was also draconian; given that the appellant was a first offender and that the victim sustained minor injuries.

The applicant had been released on a cash bail of shs 100,000/- in the lower and that he attended court religiously and therefore the appellant is not a flight risk.

The applicant's appeal involves exceptional or unusual circumstances as the applicant and the complainant are both contesting for Member of Parliament for Laikipia North Constituency in the forthcoming General Elections scheduled to be held on 9/8/2022; which are barely 9 months away. And further that the imposition of one year sentence of imprisonment would give the applicant's opponents including the complainant an undue and unfair advantage. Additionally, the imposition of this sentence may appear to the public as a political move against the applicant and may water down public confidence in the administration of justice. The mandatory sentence imposed by the court overlooks the need to decongest the prisons in the light of the raging Covid-19 pandemic and it also puts at great risk the health of the applicant and other inmates.

The applicant would have served a substantial part of his sentence before the can be heard and determined appeal. It would therefore be a travesty of injustice to deprive the applicant of his liberty during the pendency of the appeal.

In his supporting affidavit the applicant has replicated the same grounds that he raised in support of his notice of motion, and I find it unnecessary to reproduce them herein; except for the following matters. In his mitigation, the applicant before sentencing pleaded and prayed for a non-custodial sentence citing, inter alia, the fact that the offence in respect of which he was convicted was a misdemeanour and that he was a first offender. Additionally, there were no aggravating circumstances.

The submissions of counsel for the applicant.

Counsel for the applicant (Senior Counsel Mr. Orengo and Mr. Kanchory) have submitted that the principles upon which an applicant may be released on bail pending the hearing determination of his appeal are well settled, a matter in respect of which counsel cited Jivraj Shah v Republic (1986) e-KLR, the Court of Appeal observed that the principal consideration in matters of bail pending hearing and determination of the appeal is if there exist exceptional or unusual circumstances that may warrant the grant of such bail. That court further observed that an applicant may be granted bail if the sentence or substantial part of it will have been served by the time the appeal is heard.

The foregoing principles were followed by this court (Onyiego, J) in John Koyi Waluke & Another v Republic (2020) e-KLR. Counsel further submitted based on the evidence that there are overwhelming chances of success of the appeal. He has further submitted that the trial court disregarded material evidence such as for instance the evidence of the applicant that he was assaulted; which was corroborated by that of Dw 3.

Counsel further submitted that the trial court was biased, partial and hostile and that the article 50 (1) of the Constitution fair trial rights of the applicant were violated. Counsel also submitted that the proceedings show that the trial magistrate was not impartial and was also not objective. It is also counsel's submission that the learned magistrate expressed very deep feminist/sexist views in the proceedings and this impaired her judgement. Because of this counsel advised the applicant to apply for recusal of the learned but the applicant declined to do so, since the applicant was optimistic and had belief in the court process and because he wanted the matter to be speedily concluded.

Furthermore, counsel submitted that the sentence imposed was draconian and the trial court did not follow the sentencing guidelines in matters of sentence in view of the following. The applicant was a first offender and the injuries inflicted were minor. Based on Joseph Muthaura Kaura v Republic (2019), counsel submitted that the option of a fine was available unless the circumstances were so grave and the offender posed a danger to society that a custodial was warranted. Counsel also cited Emily Sanguli Mabishi v Republic (2016) e-KLR, in which the court in part recommended that the said guidelines should be read by the trial court in that case.

The case for the respondent/prosecutor

The Respondent through her counsel (Ms Maureen Akunja) filed both grounds of opposition and skeleton arguments in opposition to the application.

As regards the grounds of opposition, counsel stated, inter alia, that the application lacked merit and was misconceived and unsubstantiated. Additionally, the application was an abuse of the court process and that the applicant has not demonstrated the existence of special or unusual circumstances. She therefore urged the court to dismiss the application.

In her skeletal arguments counsel has submitted that the grant of appeal is purely discretionary following the conviction of the applicant. Having lost his presumption of innocence the burden of proof that the applicant's appeal has chances of success is now upon the applicant.

She has further submitted that there are no exceptional circumstances in the appeal. And the fact that the applicant is a political aspirant for the seat of Member for Laikipia North Constituency does not warrant the treatment of the applicant differently.

Furthermore, she has also submitted that there is no likelihood of success of the appeal.

Finally, counsel has submitted that this court is handling 2020 matters and therefore there would not be inordinate delay in hearing and determining this appeal. She further submitted that the typing of the record of the proceedings can be expedited and the appeal will therefore be heard and determined within a reasonable time.

Counsel also submitted that the sentence imposed is merited and that there.

She has therefore urged the court to dismiss the appeal.

Issues for determination

I have considered the affidavit of the applicant and submissions of counsel for the applicant. I have also considered the grounds of opposition and the skeleton submissions of counsel for the Respondent.

I find the following to be the issues for determination.

1. Whether the appeal has overwhelming chances of success.
2. Whether there are exceptional or unusual circumstances in the appeal.

Issue 1

I find as credible that the applicant has applied to be supplied with a copy of the proceedings which are bulky and will take time to type. I also find that the record of appeal will not be prepared until the applicant has received a certified copy of the proceedings. On the other hand, I find as speculative the submission of counsel for the Respondent that the typing of the record of the proceedings can be expedited and the appeal will therefore be heard and determined within a reasonable time. The reason for this is that there are proceedings in other cases to be typed. This case will not be given preference since the policy of the court in this regard is that the older cases have to be disposed of first on the basis of first in first out. I further find that if the typing of the record of the proceedings in this case was to be given preference it may amount to breach of equality among the litigating public, which constitutionally is not permissible.

In the circumstances I find that in view of the one year sentence of imprisonment the applicant will have served a substantial part of his sentence before his appeal is heard and determined. This is likely to render as nugatory his appeal. In this regard, I find as persuasive the decision of the Court Appeal in *Jivraj Shah v Republic*, supra, in which that court observed that an applicant may be granted bail if the sentence or substantial part of it will have been served by the time the appeal is heard. There is therefore no justification in denying the applicant his liberty.

Issue 2

Furthermore, the fact that the applicant and his victim (Sarah Korere) are political aspirants for the seat of Member of Parliament for Laikipia North constituency does not constitute an exceptional or unusual circumstance. Furthermore, I agree with the submission of counsel for the Respondent that the fact that the applicant is a political aspirant for the seat of Member of Parliament for Laikipia North Constituency in the forthcoming General Elections scheduled to be held on 9th August 2022 does not warrant his being treated differently.

The submission of counsel that the learned magistrate was partial and expressed deep feminist/sexism views in the proceedings are matters that are irrelevant to this application. Furthermore, counsel is not allowed to disclose his advice to the court without the consent of his client; because this is in breach of the advocate-client confidentiality under the rules of evidence.

In the premises, I find that the applicant's appeal has overwhelming chances of success with the result that his application succeeds and is hereby ordered released on bail pending the hearing and determination of his appeal.

The applicant is hereby ordered released bail on the same terms as in the trial court that is cash bail of shs 100,000/- in terms of prayer No.2.

Prayer No. 3 which seeks an order for the expeditious typing of the proceedings is hereby allowed, subject to the rule that first in first out in terms of service to the litigants in that regard.

Prayer No. 4 which seeks in advance leave of the court to file a supplementary record of appeal is premature and is hereby struck out.

Prayers No. 5 which seeks the suspension of the sentence of one year imprisonment is otiose and is hereby struck out.

Additionally, the appellant is to appear before the Deputy Registrar of this court once at the end of every month on a working day until his appeal is heard and determined.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Quintus court assistant

Ms. Nyawira holding brief for Mr. Orengo (S.C.) and Mr. Kanchory for the appellant/applicant

Mr. Kiragu for the Respondent.