



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR. MISC. APPL. NO. 72 OF 2018

FRANCISCAH MWIKALI APPELLANT/APPLICANT

-VERSUS-

REPUBLIC RESPONDENT

(Being an appeal from the whole Judgment and conviction of Honourable Senior Principal Magistrate Mwaniki J. (Mr.) dated 18/09/2018 in Makueni Criminal Case No. 459 of 2016)

BETWEEN

REPUBLIC PROSECUTOR

VERSUS

FRANCISCAH MWIKALI SYOMBUA 1ST ACCUSED

HELLEN MULEWA NDUNGA 2ND ACCUSED

RULING

INTRODUCTION

1. The Applicant with another was charged with an **OFFENCE OF PREPARATION TO COMMIT A FELONY CONTRARY TO SECTION 308 (1) PENAL CODE.**

2. Particulars being on the 23rd day of **July, 2016**, at St. Jude Girls Secondary School in Kathonzweni Sub-County within Makueni County, **FRANCISCA MWIKALI SYOMBUA AND HELLEN MULEWA NDUNGA**, jointly with others not before court were found in possession of Petrol to wit a half litter and a matchbox.

3. The Applicant pleaded not guilty and the matter went into trial.

4. The Applicant was convicted of the offence charged and was jailed to serve 3 (three) years imprisonment.

5. Being aggrieved by the above decision, the Applicant has an appeal setting out five grounds of appeal namely:-

1) The Learned Magistrate erred in law and in fact when he found that the Appellant was preparing to commit a felony when in fact she did not.

2) The Learned Magistrate erred in law and in fact when he failed to consider that all the elements of the offence for which she was charged was not proved.

3) The Learned Magistrate erred in law and in fact when he handed down an excessive sentence against the Appellant.

4) The Learned Magistrate erred in law and in fact when she used the wrong standards of proof.

5) The Learned Magistrate erred in law and in fact when he failed to appreciate that the evidence adduced was not sufficient to establish the subject hereof.

6. On 24/09/2018, the Applicant lodged instant application for bail pending appeal.
7. The same was premised on grounds that, the appeal has overwhelming chances of success, conviction was based on insufficient evidence and Applicant is likely to be prejudiced as she may serve whole or part of the sentence before matter is heard and determined *inter alia*.
8. The court notes that the charge does not mention the felony intended to be committed nor do facts support same see **MUNENE –VS- REP 2015 EKL**.
9. From inception, I have noted serious anomalies in the manner the matter was handled which could vitiate the entire proceedings.
10. On 27/09/2016, the court noted quote;

“I have noticed the accused persons are minors and students at St. Jude Girls Secondary School, consequently, I hereby grant the accused persons to look for advocates for representation in view of serious nature of the charges against them.”
11. On 13/12/2016, without revisiting the said order, the court just commenced hearing of the matter.
12. No indication as to the fate of the representation. Further, the court does not indicate whether the Applicant was furnished with statements of the witnesses.
13. Further, PW1 was a minor who gave unsworn evidence. After his testimony, the Applicant was not given an opportunity to cross examine same witness.
14. Failure to swear a witness does not immunize the witness from being cross examined in criminal case.
15. There is a galaxy of authorities which stipulate that a witness is subject to cross examination despite giving unsworn evidence.
16. See **SULA –VS- UG 2001 E.A. SCOU JUDGEMENT, CR APPEAL 326 OF 2010 KSU 2014 EKL**, relying on section 208 C.P.C. Also **WAMBUA –VS- REP. CR. APPEAL 373 OF 06 MSA**.
17. The principle evidence was from prosecution witness one Mutinda Mutiso, 15 years, who gave evidence to the following effect
18. He is 15 (fifteen) years old. On 23/07/2016, he was looking after animals next to a road. He heard children calling him. He was near Kathonzweni.
19. The 2nd accused Hellen called him and told him to go and buy paraffin for her. Hellen was inside a pit latrine at St. Jude Secondary School.
20. He went and was given Kshs.105/= (One hundred and five Kenya Shillings by Hellen. She asked him to buy petrol with a match box. He went to the market. He bought petrol.
21. The principal asked him if “*these*” children have sent him anywhere and he answered in the positive, he led him to where he hid the petrol.
22. He knew the name of the 2nd accused, she is Hellen. They used to study together with her at Makutano.
23. He did not know the 1st accused person by name. He used to see her earlier when they were playing games at their playground
24. PW2 principal of the school stated that she saw some boy passing by the road next to the school. The boy was wearing a red T-shirt.
25. He called the boy and when he asked him if any student sent him yesterday, he said yes and that he was sent to buy bread. Later he said he was sent to buy petrol.
26. He told him the girls that sent him to buy petrol told him to lie at the petrol station that he needed the petrol for a motor bike. He told him he hid the petrol at a school fence.
27. The Investigation Officer PW6 said ***“I came to know accused 2 had sent one of prosecution witnesses to buy petrol and match box.”*** See page 12 of proceedings.
28. The evidence on record as pertains to Appellant culpability is also wanting going by the aforesaid observations.
29. Immediately after PW6 testified the court just said *prima facie* case made. The court never analyzed evidence to establish whether *prima facie* case was made, no submissions opportunity was given at that stage and at closure of defense.
30. The trial was on substance and procedure highly wanting and manifests breach of fair trial principle under Article 50 constitution of

Kenya on the face of it.

31. The core consideration for grant of bail pending appeal is “*whether appeal has over whelming chances of success*. See **ADEMBA –VS- REP. 1983 KLR 442**.
32. Other factors are whether the Applicant will abscond *inter alia*. Overwhelming chances have been established by observations stated earlier.
33. The Applicant was on free bond of Kshs.50,000/= during trial and she never violated the bail terms. She is a candidate in form 4 (four) aged 20 and is likely to be prejudiced by doing exam while in prison.
34. The trial ought to have been conducted taking to account the best interest of a minor child but court assumed that it was normal trial.
35. Article 53(2) and Section 4, 75, 76 and 77 of children’s Act, the principle consideration which must be born in mind in all decisions and actions relating to children, is the best interest of the child.
36. It seems to have commenced in open court even when the court noted the child was 17 (seventeen years) and PW1 was also a minor.
37. All in all the court finds that a case for bail pending appeal has been made and the court makes the following orders:-

The Applicant will execute a Personal Bond of Kshs.50,000/= and will attend court for hearing of appeal on 29/01/2019.

SIGNED, DATED AND DELIVERED THIS 18TH DAY OF OCTOBER 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE