



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 158 OF 2013

BENJAMIN LIHURU MATINI::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC:::::::::::::::::::::RESPONDENT

RULING

The appellant, **BENJAMIN LIHURU MATINI**, was convicted for the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

As the complainant was a child who was about 5 years old, the trial court sentenced the appellant to life imprisonment.

The appellant has lodged an appeal to the High Court, challenging both the conviction and the sentence. And whilst awaiting the hearing and determination of the appeal, the appellant has now asked this court to grant him Bail.

Mr. Namiti, the learned advocate for the appellant submitted that his client's appeal had high chances of success. His reason for that contention was that the conviction was founded upon evidence which was not corroborated.

The appellant faulted the trial court for concluding that there had been penetration when there was no such evidence.

Secondly, because the appellant was not medically examined to link him to the offence, he believes that that was another reason why his appeal was likely to succeed.

The appellant described himself as an old man, who was 65 years old. He has a family who depended on him. Therefore, he needed to be available to provide for their needs.

During the trial, the appellants says that he was out, on Bail.

Finally, he cited the case of **SIMON MWANGI KIRIKA -VS- REPUBLIC, CRIMINAL APPEAL NO. 3 OF 2006**, as authority to back his application for bail pending appeal.

His fear was that because it was unknown when the appeal would be heard, he would have served a substantial portion of the sentence before his appeal was heard. It was for those reasons that I was invited to grant to the applicant, Bail pending appeal.

Ms. Ruto, learned state counsel, opposed the application. In her considered opinion, the appeal did not have overwhelming chances of success.

The Respondent pointed out that there was evidence that there had been penetration. In effect, the Respondent was saying that the appellant's contention, that there was no corroboration, was not properly founded.

Meanwhile, as regards the sentence, the Respondent argued that the applicant will not have served a substantial portion of the life imprisonment by the time his appeal was heard.

In Kenya, when a person is sentenced to serve life imprisonment, he remains behind the prison walls until he dies. In other words, the said sentence does not have a specified time-frame.

In contrast, some countries have defined Life Imprisonment to mean a specified duration, of say 30 or 40 years.

In those jurisdictions, it is then possible for a person who is serving a Life sentence to peg his reasoning on the specified duration. He could point out that because appeals ordinarily take about six or seven years to be concluded, that would constitute a substantial portion of the sentence.

But when the sentence is for an unspecified length of time, I hold the view that it is nothing more than conjecture when it is contended the period of time spent in jail constituted a substantial portion of the sentence.

A portion of something is deemed to be either substantial or small, if compared to the whole thing. Thus if the actual duration of a sentence is not specified, it is not possible to know whether or not a portion of such sentence was or was not substantial.

In determining an application for Bail pending appeal, the most important consideration is about the likelihood of the appeal succeeding.

In **JIVRAJ SHAH -VS- REPUBLIC [1986] KLR 605**, which was quoted with approval in the case of **SIMON MWANGI KIRIKA -VS- REPUBLIC, CRIMINAL APPEAL NO. 3 OF 2006**, the Learned Judges of Appeal said;

“1. The principal consideration in an application for bail 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 urged and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions exist for the grant of bail.

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.”

In that case, the Court of Appeal reiterated that there was no legal basis for the dismissal of an appeal in criminal case because there was want of prosecution. Therefore that constituted a substantial point law which could result in the appeal being allowed.

Meanwhile, because the Court had no way of determining how long it would take before the appeal was heard, but appreciating that the appellant may well have served a substantial part of the sentence, the court granted bail.

But before granting bail, the court had noted that the appellant was;

“an old man of 65 years, who suffers from acute hypertension and suffered a stroke in 1996. He is currently on medication for that condition and requires close supervision. We think all these amount to unusual or exceptional circumstances, and there is a firm basis therefore, for the exercise of our discretion in favour of the applicant.”

It is to be noted that the appellant in that case had been convicted on 2 counts of manslaughter and 4 counts of contravention of various Local Authority By-Laws relating to building construction.

The 2 counts of manslaughter arose from an incident in which the building which the appellant was constructing, collapsed, causing 2 workers to suffer fatal injuries.

For each of the counts of manslaughter, the appellant in that case was jailed for 3 years. However, those sentences were to run concurrently.

And for the infractions to the By-laws, the appellant was fined Kshs. 2,000/-, for each of the 4 counts. In default of each such fine, he was sentenced to serve 3 months in jail.

When the Court of Appeal granted him Bail pending appeal, it ordered him to execute a personal Bond of Kshs. 500,000/- with 2 sureties of like sum. However, he was also given the option of a Cash Bail of Kshs. 500,000/-.

In the case before me, the appellant is also 65 years old. He is said to suffer from a medical condition known as ***“Bronchospasms/ atrophy”*** which keeps on recurring, and which causes him to suffer lots of pain. He therefore says that he required constant medical check-up, failing which he fears that he may succumb to the ailment.

The medical report attached to the applicant's affidavit was from the office of the Medical Superintendent at the Vihiga District Hospital, Maragoli. The report is dated 15th August, 2012.

I note that although the report relates to a person named BENJAMIN LIHULU, that person was said to be 40 years old. Therefore, I do not think that the said report relates to the appellant, who is now 65 years old. As at 2012, the appellant would have been 63 years old; not 40.

In the event, I find no evidence to back the appellant's alleged exceptional or unusual circumstances.

Meanwhile, as regards the prospects of success of the appeal that is pending, I am unable to share the appellant's optimism. The medical doctor attributed the infection called Trychonomas Vaginallis to sexual activity, as such infection was spread through sexual intercourse.

The complainant's hymen was red, although it did not have tears. Accordingly, the doctor said that there had been a possibility of partial penetration.

If corroboration was required, to support the testimony of the complainant, it would appear that the doctor provided it.

That is the reason I found myself unable to share the appellant's optimism, which was founded on the alleged lack of corroboration.

In the result, the appellant has failed to demonstrate that he ought to be granted bail pending appeal. I therefore reject the application.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 30TH DAY OF APRIL, 2014

FRED A. OCHIENG

JUDGE