



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Coram: F.A. Ochieng J

CRIMINAL APPEAL NO. 159 OF 2013

DAVID KAHI AMBUKU.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

RULING

1. The applicant, **DAVID KAHI AMBUKU**, has requested this court to grant him Bail pending the hearing and determination of his appeal.
2. When urging his application, the applicant submitted that his appeal has overwhelming chances of success.
3. His first reason for that contention was that his *Alibi* defence was never given consideration by the trial court, although the defence was un-challenged.
4. The second point which the applicant cited was the procedural flaw which denied him an opportunity to cross-examine some of the prosecution witnesses. The flaw cited by the applicant was the re-call of some witnesses when the applicant was absent from court.
5. Thirdly, the trial court was said to have been wrong by commenting on the demeanour of witnesses who testified in the absence of the magistrate who made the comments in issue. As the magistrate who made those comments in the judgment did not observe the witnesses when they testified, the applicant submitted that the magistrate could not have observed their demeanour.
6. The applicant said that he was a first offender. That fact, together with his mitigation was said to have been completely ignored when sentence was being handed down.
7. The applicant also submitted that the charge sheet was defective, because Count 1 did not meet the parameters contemplated under Section 312 of the Penal Code.
8. Meanwhile Count 2 was said not to conform to the rules of framing charges.
9. In the result, the applicant asserted that Section 137 of the Criminal Procedure Code and Section 9 of the Penal Code had been flouted.
10. Describing himself as the sole bread-winner for his family, the applicant said that his family was now destitute.
11. He also pointed out that he is a Kenyan, with a permanent abode in this country.
12. His health was suffering, as his prognosis was poor.
13. And he might end up serving a large portion of his sentence before his appeal was heard and determined.
14. For all those reasons, the applicant urged this court to grant him Bail. And he reminded the court that during the trial, he was out on Bail, and that he never failed to attend court whenever he was required to do so.
15. Mr. Mulati, learned Senior State Counsel, submitted that the applicant's appeal did not have overwhelming chances of success.

16. The respondent's position was that the trial court gave due consideration to the applicant's *alibi*. It was said that the defence was only dismissed because the evidence produced by the prosecution had placed the applicant at the scene of crime.
17. As regards the provisions of Section 200 of the Criminal Procedure Code, the respondent submitted that the succeeding magistrate complied with the law.
18. Just because the learned magistrate who wrote the judgment did not observe all the witnesses was seen, by the Respondent, as not being a bar to having him comment on the conduct of the witnesses who appeared before him.
19. Was the charge sheet defective?
20. The Respondent asserted that there was no defect in the charge sheet. But if the failure to mention "*Intent*" in the charge sheet was deemed to be a defect, the respondent submitted that the same would be curable, as it did not prejudice the applicant.
21. On the issue of the applicant's ill-health, the respondent argued that the prison authorities had an obligation to provide care and attention for all inmates.
22. When he was called upon to reply to the respondent's submissions, the applicant said that he would prove to the appellate court that he was not at the scene of crime.
23. Pausing there for now, I find that the applicant has confidence that he will be persuading the appellate court, that his *alibi* proved that he was not at the scene of crime. Therefore, at this stage I cannot know whether or not the appellate court will eventually be persuaded by the applicant.
24. It would be premature for me to try and pre-judge something that is yet to be canvassed. I will therefore leave the issue to the appellate court to determine after hearing both parties.
25. As regards the *Alibi* defence, I note the following from the judgment of the learned trial magistrate;

"Before I determine whether the prosecution has proved the aforesaid, I must first deal with the defence of alibi raised by the accused in his evidence and that of his witnesses. It is trite law that once an accused person has raised the defence of alibi, then the same must be disproved by the prosecution. This is so because in crucial case, the burden of proving guilt is on the prosecution and never shifts. It is however important to note that evidential burden would shift from side to side, in the course of the trial".

26. The trial court was clearly well conversant with the law governing the defence of *alibi*.
27. From the record, the learned trial magistrate who wrote the judgment analyzed the evidence and then concluded the defence of an *alibi* was an after-thought. For that reason, the said defence was rejected.
28. In the circumstances, the applicant was not right to have accused the trial court of failing to give consideration to the *alibi*.
29. It would also appear to be mis-leading for the applicant to have suggested, as he did before me, that his *alibi* was un-challenged when all the evidence of the prosecution suggested facts which were inconsistent with the *alibi*.
30. The applicant did not specify the witnesses who were allegedly recalled when he was absent, thus denying him an opportunity to cross-examine them.
31. Perhaps the said witnesses will be specified when the appeal is being canvassed, so as to enable the appellate court make an informed assessment of the applicant's case.
32. It was not good enough for the applicant to make a blanket statement, and then expect this court to delve into the record of appeal to ascertain the accuracy or otherwise of his contention.
33. As regards the comments which the trial court made regarding the demeanour of witnesses, I note that this is what the learned magistrate said;

"I have assessed the evidence tendered by the prosecution on this issue and the accused's defence. I also had the benefit of observing the demeanour of the accused herein and his witnesses".

34. From the record, it is clear that the Hon. F.N. Kyambia P.M was the presiding Judicial officer when the defence case was put forward.

35. In those circumstances, the learned magistrate was perfectly entitled to comment on the demeanour of those witnesses, as they testified before him.
36. On the issue of sentence, the court indicated that the mitigation put forward by the accused was given consideration, alongside the fact that the accused was a first offender.
37. It cannot therefore be open to this court, at this stage, to accept the applicant's contention that the trial court failed to consider the mitigation.
38. If the applicant has any specific reasons to show why the appellate court should arrive at a different conclusion, on this aspect, he will perhaps demonstrate that position to the appellate Judge.
39. On a prima facie basis, the sentence that was handed down was lawful.
40. Was the charge sheet defective?
41. I decline to answer that question at this stage because it ought to be left to the appellate court. Why do I say so? It is because it would require me to make a specific finding or holding on an issue which would then bind the hands of the Judge who will determine the appeal. That would be wrong of me to do, at this stage, as I would have effectively usurped the function of the appellate Judge. But suffice it to say that the issue is not so clear-cut in favour of the applicant that it could have led me to conclude that the appeal has overwhelming chances of success.
42. In the result, I find that the applicant has not satisfied the court that he ought to be granted Bail pending appeal. His application is therefore dismissed.
43. However, I do urge the appellate court to try and give the applicant an early opportunity to canvass his appeal.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of July, 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Applicant in Person.

N/a for Respondent.