Oyatsi v Republic (Criminal Appeal 111 of 2023)
[2024] KEHC 1986 (KLR) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 1986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 111 OF 2023

JRA WANANDA, J

MARCH 1, 2024

BETWEEN

SYPHROSE OYATSI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Application before the Court is the Notice of Motion dated 11/12/2023 filed through the firm of Messrs Gideon Nakhone & Associates and seeks the following orders;

    a. That the court be pleased to admit the Appellant/Applicant Ms. Syphrose Oyatsi to bail/bond pending hearing and determination of the appeal.

    b. That the costs of this application be provided for.

2. The Application is expressed to be brought pursuant to Article 50 of the *Constitution* and Section 357 of the *Criminal Procedure Code*. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by Gideon Nakhone, Advocate on record for the Applicant.

3. In the Affidavit, the Advocate faulted the trial Court's handling, entry and conviction of the Appellant on a plea of guilty which was equivocal, failing to inquire from the Appellant the language she understood and failing to explain to her in such language the offence she was accused of and facts and ingredients thereof and failing to appreciate that the plea of guilty was induced by threats, that the Appellant is a sickly person on constant medication and there was need for a medical evaluation to be carried out before sentencing, and sentencing the Appellant without the aid of a Probation Report and passing a sentence that was harsh and unreasonable. He submitted that the trial Court did not conduct the proceedings in compliance with the guidance given in the case of *Adan v Republic* [1973] EA 445 and that the Appeal which seeks to have the plea of guilty set aside has very high chances of success.

4. He deponed further that the Appellant has a medical condition which requires that she has constant supply of anti-retroviral drugs and that a default in taking the medicine would not only endanger her life but also pose a danger to those around her, that the Appellant is willing and ready to abide by any conditions for bond that may be set by the Court, that she has a fixed abode within the jurisdiction of the Court and hence will readily avail herself and that she is not a flight risk.

Hearing of the Application

5. It was then directed, and agreed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Appellant's Counsel filed his Submissions on 25/01/2023 while the State Counsel Ms Okok for the Respondent, did not file any Submissions.

Applicant's Submissions

6. Counsel for the Applicant submitted that the Appellant is aged, alliterate and above all, battling a terminal health condition. He reiterated the allegations that the conviction on a plea of guilty was improperly handled and entered. On bail pending Appeal, he cited Section 257 of the *Criminal Procedure Code* and submitted that the principles for granting bond pending an appeal were reiterated in the case of *Jivraj Shah v Republic* [1986] eKLR. He also cited the case of *Chimambhai v Republic* 1971 EA 343 and also the "*Bail and Bond Policy Guidelines*" – page 27 at paragraph 4.30 – which provides that "the burden is on the convicted person to demonstrate that there is an overwhelming chance of success".

7. On the Appeal having overwhelming chances of success, Counsel submitted that the own plea of guilty entered by the Court was not equivocal, that there were glaring anomalies in the proceedings and which have the effect of rendering the entire plea of guilty and subsequent conviction unequivocal, and that this implies that the Appeal has high chances of success. Counsel then recited the matters already set out in the Supporting Affidavit regarding the manner that the plea of guilty was entered. On the need for inquiry on the language understood by the Appellant and use of such language in the proceedings, Counsel cited the case of *Elijah Njihia Wakianda v Republic* [2016] eKLR, and also the case of *Judy Nkirote v Republic* [2013] eKLR.

8. Counsel submitted further that the facts as recorded in the proceedings neither supported nor disclosed what the Appellant was accused of, did not disclose how the Appellant purportedly hit the victim, did not disclose the findings of the doctor who prepared the P3 Report, that the Appellant was never given a copy of the P3 Report, and that the illicit brew that was alluded to was not even produced. He cited the case of *Sarah Amulabu Omwaka v Republic* [2019] eKLR and submitted that from the proceedings it is fair to conclude that there was a communication breakdown between the Court and the Prosecution on one side the Appellant on the other, that the situation was not helped by the facts that were read out in Court which were simply ambiguous, that this was confirmed from what the Appellant said in mitigation that "the mother left me with three children I do not know where the others are since I was arrested, will not repeat" Counsel observed that it is as if the Appellant was mitigating in a case of child neglect rather than assault that she had been charged with.

9. Counsel submitted further that the trial magistrate erred by failing to explain to the Appellant the essential elements that constitute the charges proffered against her, and that the Court never attempted to be solicitous of the Appellant's welfare despite noting that the accused was unrepresented. He cited the case of *Abdalla Mohammed v Republic* [2018] eKLR and argued that the Magistrate never warned the Appellant that if she pleaded guilty, she would be convicted and sentenced to a jail term. He again cited the case of *Elijah Wakianda v R* (supra), the case of *Jackson Wambua v Republic* [2022] eKLR and also the case of *Otumoi Putuai v Republic* [2018] eKLR

10. Counsel submitted further that Magistrate failed to appreciate that the plea of guilty was not voluntary, that had the Court made further inquiries, it would have realized that the Appellant was coerced to plead guilty, that the trial Magistrate erred in failing to appreciate that the Appellant is a sickly person on constant medication and that the Court would have realized all this had it sought for a pre-sentencing report or even a medical evaluation to be carried on the accused person before sentencing. He cited "The Sentencing Guidelines" of the Kenyan Judiciary which guides the Court "to pass a just sentence, it is pertinent to review and consider relevant information". He submitted that the Magistrate erred by passing a sentence that was harsh and unreasonable where the sentence recommended by the Act is not a minimum sentence. He cited the case of *Simon Gitau Kinene v Republic* [2016] eKLR. In conclusion, he urged that the entire plea taking process was a sham and it is then beyond peradventure that the Appeal has high chances of success.

Analysis and Determination

11. The issue that has been placed before the Court is "whether the Appellant should be granted bail pending appeal".

12. The background of this matter is that the Appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code* in Eldoret CMCRC No. E2458 of 2023. The victim/complainant was a 12 years old minor who, from the proceedings, appears to have been in the Appellant's custody. The trial Court convicted the Appellant on her own plea of guilty on 1/11/2023 and sentenced her to 4 years' imprisonment. Aggrieved with the conviction and sentence, the Appellant instituted the present appeal.

13. Article 49(1)(h) of the *Constitution* provides that:

> " An accused person has the right ...
>
> .....
>
> (h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released."

14. On its part, Section 357 of the *Criminal Procedure Code* under which the Application is brought provides that:

> " After the entering of an appeal by the person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of the appeal."

15. This being an application for bail pending appeal, it differs from one of bail pending the hearing of a case. In the case of *Masrani v R* [1060] EA 321, it was held that:

> " Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction."

16. The principles applicable when considering an Application for bail pending appeal have been discussed extensively by the Courts in various authorities. In *Jivraj Shah v Republic* [1986] KLR 605, for instance, the Court laid out the principles as follows:

> " 1. The principal contribution in an application for bond 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.
>
> 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."

17. Further, the Court of Appeal in the case of *Dominic Karanja v Republic* [1986] KLR 612 stated as follows:

> " (a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;
>
> (b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;
>
> (c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;
>
> (d) ....."

18. The main ground for the Application is that the appeal has high chances of success. The Appeal is premised on the unequivocality of the plea of guilty that the Appellant entered in the trial Court. On my part, I agree that it is trite law that a plea of guilty that is not unequivocal cannot found a conviction.

19. On bail pending Appeal, the Court of Appeal in the case of *Chimambhai v Republic (No 2)* [1971] E.A.343 remarked as follows:

> " The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one-time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases. ....."

20. I am alive to the fact that I should not at this stage, delve deeply into the merits of the Appeal as doing so may prejudice or pre-judge the Appeal. However, it is also true that to establish whether the Appeal demonstrates overwhelming chances of success, I will have to some extent analyze and dissect the grounds preferred for the Appeal. I will therefore try to examine the grounds without breaching this boundary and by exercising utmost caution.

21. Counsel for the Appellant has faulted the manner in which the plea of guilty was entered and placed much reliance on the allegation that the trial Court never inquired the language that the Appellant understood and that therefore there is no uncertainty that the Appellant understood the proceedings. However, a casual perusal of the proceedings reveals that contrary to these allegations, the trial Court did make such inquiry and the Appellant responded that she understood the Kiswahili language whereupon the proceedings were conducted in that language.

22. Counsel also alleges that no P3 Report was produced. However, the Record reveals otherwise. Granted, it is not very clear whether the trial Magistrate did formally mark the P3 Report as an exhibit but the proceedings indicate that the Prosecutor had the same in his/her possession in Court and asked to produce the same. The indication is that the same was indeed produced. I say so because there is in the Court file a duplicate original copy of the P3 Report.

23. Counsel has also alleged that the fact that in mitigation, the Appellant stated that "the mother left me with children. I do not know where the others are" meant that the Appellant never understood the proceedings and that the said statement sounds like the Appellant was pleading to a charge of neglecting children. I find this to be far-fetched and a twisting of the facts. It is evident that what the Appellant was communicating or meant is that there are some children who were left under the Appellant's custody and care by their mother and that the children will therefore suffer should the Appellant be sent to jail.

24. Regarding the allegation that the 4 years prison sentence without the option of a fine was harsh and unreasonable, I agree that the same may appear to be so. Although under Section 251 of the *Criminal Procedure Act*, the sentence prescribed for assault causing actual bodily harm does not include a statutory option of a fine, I do not believe that there is any bar to a trial Court considering that option in appropriate circumstances. However, in this case, no attempt has been made to demonstrate that the trial Magistrate abused his discretion or acted beyond his powers or that the sentence was in any way unlawful. During the hearing of the Appeal, this issue shall be canvassed and the Court shall at that stage be in a proper position to make an informed determination. At this stage, I only observe that Section 251 aforesaid under which the Appellant was charged allowed the Magistrate to impose imprisonment for up to 5 years. Even if the sentence appears harsh therefore, that cannot by itself amount to a proper ground for granting bail pending Appeal. As aforesaid, all these matters shall be canvassed at the hearing of the Appeal. For now, and for the reasons stated, I do not deem this ground to disclose an overwhelming chance of success for the Appeal.

25. It is also my considered view that the Appellant has not demonstrated the exceptional circumstances that would necessitate the granting of bail pending appeal. Counsel has cited the Appellant's alleged ill-health as a ground for grant of the Application. However, as aforesaid, ill health per se, is not, by itself, considered an "exceptional circumstance" since access to medical treatment and medical facilities are available in all Kenyan prisons.

26. In view of the foregoing, I find the allegation of overwhelming chances of success on appeal not sufficiently demonstrated. I also do not find any exceptional circumstances that would warrant grant of bail pending appeal. I therefore decline the Application.

Final Orders

27. The upshot of the findings above is that the Application for grant of bail pending Appeal fails and I order as follows:

    i. The Application dated 11/12/2023 is dismissed.

    ii. Since the trial Court file has already been forwarded to this Court, the Record of Appeal shall now be prepared and served and the Appeal set down for admission and directions on the hearing thereof.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 1ST DAY OF MARCH 2024

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WANANDA J.R. ANURO

JUDGE