



REPUBLIC OF KENYA



KENYA LAW
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**Kagunya v Republic (Criminal Appeal 10 of 2023)
[2024] KEHC 5394 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 10 OF 2023
FN MUCHEMI, J
MAY 16, 2024**

BETWEEN

JAMES MBIRWE KAGUNYA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief facts

1. The applications coming up for determination are dated 6th November 2023 and 26th January 2024. The application dated 6th November 2023 seeks for orders that the Honourable court compel the respondent to produce the results of the deoxyribonucleic acid (DNA) tests conducted on the samples collected from the victim and the appellant. The application dated 26th January 2024 seeks for orders of review and setting aside of the orders issued on 10th March 2023.
2. In opposition to the application dated 26th January 2024, the respondent filed a Replying Affidavit dated 20th March 2024.

Appellant/Applicant's Case on the application dated 6th November 2023.

3. The applicant contends that a sample of blood was collected for DNA testing and the respondent failed to adduce the DNA results at trial causing the trial court to render judgment without reference to the said results. The applicant thus believes that the DNA results will be essential in proving his innocence during the appeal hearing.



Appellant/Applicant's Case on the application dated 26th January 2024.

4. The applicant states that he filed an application for bail/bond and a ruling delivered on 10th March 2023 denying him the chance to be out on bail. The applicant contends that during the duration he was held in custody, he observed good behavior and has not been involved in any indiscipline case.
5. The applicant states that he is a father and husband and prior to his incarceration, he was the sole bread winner of his young family. Since he was held in custody, the applicant further states that his family has been thrown in financial turmoil and has been languishing in poverty forcing them to beg for financial assistance.
6. The applicant argues that his appeal raises substantial points of law and thus has overwhelming chances of success. The applicant further contends that there are exceptional circumstances and it would be just that he be admitted to bail pending the outcome of the appeal. Furthermore, the applicant states that he may end up serving a substantial part of the sentence thereby rendering the appeal an academic exercise.
7. The applicant states that he was granted bail during trial and he obeyed all the conditions imposed by the trial court until the matter was heard and determined on 23rd September 2020.

The Respondent's Case

8. The respondent states that the applicant has failed to satisfy the extreme high standard for bail/bond pending appeal as he has not demonstrated any point of law to show that the appeal has overwhelming chances of success and neither has the applicant shown that he shall serve a substantial part of the sentence in the event the appeal is likely to succeed. The respondent further contends that the applicant has not shown any exceptional circumstances to warrant exercise of the court's discretion to grant bail pending appeal.
9. The respondent argues that this court has no jurisdiction to review/set aside orders made on 10th March 2023 by the High Court in Kiambu which denied the applicant bail pending appeal. The respondent contends that this court is of concurrent jurisdiction and entertaining the instant application would amount to this court sitting on appeal in regard to an order made by a court of similar jurisdiction. Being dissatisfied with the decision, the applicant ought to have filed an appeal against the judge's ruling in the Court of Appeal.

The Applicant's Submissions

10. The applicant relies on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and the case of Republic vs Public Procurement Administrative Review Board & 2 Others [2018] eKLR and submits that the court has jurisdiction to review and set aside its own decision. The applicant submits that the court ought to review its decision issued on 10th March 2023 on the grounds of discovery of new and important matter as the court while rendering its decision on bail pending appeal did not have the record of appeal and thus was not privy to the evidence in the record of appeal hence made the decision devoid of the information and evidence in the record of appeal with respect of the appeal and its probability of success.
11. The applicant relies on Section 357 of the Criminal Procedure Code and the cases of Jivraj Shah vs Republic [1986] KLR 605 and Chimambhai vs Republic [1971] EA and submits that he was convicted purely based on suspicion and circumstantial evidence. The applicant further argues that the prosecution failed to prove that he is the one who committed the offence by failing to produce the



DNA results in court and failing to call the doctor as a witness to produce the medical evidence relied on for conviction. Therefore, the applicant submits that his appeal has a high probability of success once it is heard and determined.

12. The applicant further relies on the case of *Chimambhai vs Republic* [1971] EA 343 and submits that he has demonstrated exceptional circumstances as he is of good character and he is the bread winner of his young family.

The Respondent's Submissions

13. The respondent relies on Section 357(1) of the Criminal Procedure Code and the case of *Jivraj Shah vs Republic* [1986] eKLR and submits that the applicant has not met the required threshold for an application for bail pending appeal. Further, the respondent relies on the case of *Somo vs Republic* [1972] EA 476 and submits that the appeal does not have overwhelming chances of success as the evidence shows that the applicant was properly convicted. The respondent submits that the applicant has the burden to prove that the appeal has high chances of success as there is a presumption that he was lawfully convicted unless the contrary is proven. The respondent further submits that the applicant has failed to demonstrate that he shall serve a substantial part of the sentence if the appeal is likely to succeed.
14. The respondent relies on the case of *R vs Kanji* [1946] 22 KLR and submits that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.
15. Relying on the case of *Chimambhai vs Republic* [1971] EA 343, the respondent contends that currently, the law and practice favour quick dispensation of matters without an unreasonable delay. The respondent further argues that the applicant failed to discharge the burden of proof that he is likely to serve a substantial part of the sentence before the appeal is heard which in turn could be successful hence leading to prejudice.
16. The respondent submits that the current court does not have jurisdiction to review and set aside the orders made on 10th March 2023 before the Kiambu High Court as the court has similar jurisdiction and the court has become *functus officio*. The respondent contends that the applicant has a chance at the Court of Appeal to argue his dissatisfaction of the orders made by the High Court in Kiambu.

The Law

Whether this court has jurisdiction to adjudicate on the application dated 26th January 2024.

17. The law on the question of jurisdiction was enunciated in the case of *Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited* [1989] KLR 1 where the court held:-

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

18. On the source of jurisdiction, it was held in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others* (2012) eKLR that:-

A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.



19. The jurisdiction of the High Court is provided for in Article 165 (3) of *the Constitution* which gives unlimited original jurisdiction in criminal matters. The applicant herein filed two applications in the Kiambu High Court dated 29th September and 20th October 2021 seeking bail pending appeal. On 10th March 2023, the court found that the applications were devoid of merit and dismissed the same. The court thus became functus officio and the applicant being dissatisfied with the ruling ought to have filed an appeal in the Court of Appeal. This court cannot entertain an application for review of the orders made on 10th March 2023 because doing so would amount to this court sitting on appeal on the orders of another judge with concurrent jurisdiction.
20. The appellant further seeks to have the court compel the respondent to produce the results of the DNA tests. Section 36 of the *Sexual Offences Act* provides for evidence of a medical or forensic nature such as DNA tests which the court can order for such examination upon exercising its discretion. It is trite law that in cases of defilement, what must be proved by the prosecution is the age of the complainant, the identity of the perpetrator and penetration which is proved by medical evidence. Medical examination of the perpetrator is not a mandatory requirement to prove defilement save in appropriate cases which may render it necessary depending on the circumstances of the case. Such a case similarly, DNA Tests are not necessary to prove defilement. The law on sexual offences requires proof by evidence tendered by the prosecution and is not dependent on the examination of the perpetrator. Evidence of the victim is key in sexual offences and the only crucial medical examination is that of the victim to corroborate the fact of defilement. In the case of *Fappyton Mutuku Ngui vs R (2014) eKLR* while considering a similar issue of medical examination of the perpetrator, the court stated:-

In our view such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW2's testimony which is trustworthy as to the person who defiled her.
21. In the case before us, the trial court relied on the testimony of the complainant and the medical evidence was present to corroborate her testimony. Therefore medical examination of the appellant was not necessary. Without pre-empting the appeal, the prosecution set out to prove the elements of the charge of defilement and therefore DNA testing is not necessary to establish the charge against the appellant.
22. It is my considered view that the applications dated 06/11/2023 and 26/04/2024 lack merit and are hereby dismissed.
23. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED THIS 16TH DAY OF MAY 2024 AT THIKA.

F. MUCHEMI

JUDGE

