



**Mboya v Director of Public Prosecutions (Criminal Appeal E100 of 2021)
[2023] KEHC 2681 (KLR) (Crim) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E100 OF 2021
JM BWONWONG'A, J
MARCH 15, 2023**

BETWEEN

TOM OYWA MBOYA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(Being a ruling on the review of the ruling of Hon. Justice J.M. Bwonwong'a dated 10th January 2022 in respect of conviction and sentence dated 6th October 2021 in the Chief Magistrate's Court at Nairobi (Milimani) in Criminal Case No. 2000 of 2016, Republic v Tom Oywa Mboya)

RULING

1. The applicant under certificate of urgency has applied for the following orders.
 1. Spent
 2. An order to review its ruling dated 10th February 2022 and admit the appellant/applicant on reasonable bond/bail terms pending the hearing and determination of his instant application.
 3. An order to review its ruling dated 10th February 2022 and admit the appellant/applicant on reasonable bail/bond terms pending the hearing and determination of his appeal.
 4. To make any other order that the court may deem fit to grant.
2. The application is supported by ten grounds that are set out on the face of the notice of motion dated 3rd February 2022, with the following being the major grounds. The applicant made an application for release on bail pending the hearing and determination of his appeal. This court in its ruling of 10th February 2022 dismissed the said application on the ground that the prison authorities have proper referral facilities to Kenyatta National hospital for patients in respect of whom they lack facilities.



3. The prison authorities started to be pro-active following the death of John Gakuo, the former Nairobi town clerk, on 30th October 2018 while serving in prison a three-year term over Kshs 283 million cemetery scandal in the Anti-Corruption and Economic Crimes Appeal Nos 9,10,11 and 12 of 2018 (Consolidated) *John Gakuo & 3 Others v Republic* (2018) e-KLR. The court is invited to take judicial notice of this unfortunate event under section 60 of the *Evidence Act* (Cap 80) Laws of Kenya.
4. On 28th February 2022 the prison authorities drew the attention of the appellant's family of the appellant's ill health that needed urgent attention. According to the report of Dr. Omboki Joshua who is in charge of the inmates Medical Service at Nairobi Remand & Allocation Maximum Prison, the appellant went to the inmate's health centre on 30th October 2021. He complained of rapid heartbeats, sleeplessness, chest pains and productive cough. Upon examination the doctor found as follows. The applicant was in a fair state of health with the exception of erratic blood pressure readings, heart burn, swollen eyelids, constipation, lower back pains and urine hesitancy. Treatment was commenced.
5. On 28th January 2022 following further manifestation of dizziness, throbbing headache, sleeplessness and chest pains in drawing tenderness led to his transfer from block A3 to sick bay D4 for direct observed treatment. On 18th February 2022 the applicant fainted in the washrooms occasioned by severe chest left sided pains and was taken by inmates to the prison medical facility and was eventually referred to and taken to Mbagathi hospital.
6. The applicant was attended to in Mbagathi hospital. Triage was done at the out-patient department which resulted to severe analytical work ups with chest x-ray posterior-anterior. The X-ray showed that the overlying thoracic soft tissue structure inflammation. Treatment was started with a view to undertaking electro encephalogram and the applicant was referred to Kenyatta National Hospital (KNH).
7. The electro encephalogram was not available at KNH due to machine breakdown.
8. Dr Omboki Joshua noted that the unavailability of the electro encephalogram at KNH due to the breakdown worsened the disease condition of the applicant. As a result, it disabled the facility's goal which is to maintain and ensure quality life as the applicant continues serving his prison term.
9. The said doctor has recommended that the applicant undergoes the electro encephalogram procedure which is unavailable at KNH. This procedure will reveal the problem and will deter the progression of the psycho physiologic systemic reaction in relation to the compromised organs of the applicant.
10. Counsel has indicated that Dr Omboki Joshua is willing to testify and be cross examined in respect of his report.
11. Counsel for the applicant has therefore concluded that the foregoing shows a change of circumstance namely the unavailability of sufficient medical equipment and services at the prison facility. Similarly, there unavailability sufficient medical equipment and services at the highest referral facility to treat the applicant warrants the review of the order refusing the admission of the applicant to bail pending the hearing and determination of his appeal and allowing the same on medical grounds to prevent an imminent danger of loss of life. Additionally, counsel has also stated that the main objective of the criminal justice system is to punish and to correct, but not at the expense of one's life.
12. Counsel has conclusively stated that unless the prayers sought are granted there is danger that the applicant might lose his life due to his critical health condition which cannot be fixed or treated by the prison authorities' facility and at KNH; which negates the principal objects of the criminal justice system.



The appellant/applicant's supporting affidavit

13. The applicant has deposed to a 12-supporting affidavit, in which he has replicated the ground set out on the face of the notice of motion, which I have declined to reproduce herein.

The submissions of counsel for the appellant/applicant

14. Counsel for the applicant (Professor Tom Ojienda & Associates) has filed his written submissions in support of the application.
15. In addition to the foregoing counsel also orally highlighted his submissions. Counsel submitted that the court has jurisdiction to review its order citing the decision of this court *Republic v Diana Suleiman Said & Another* (2014) e-KLR. In that case the court held that the court was entitled to review its order if there has been a change of circumstances.
16. In addition to the foregoing counsel cited a number of other authorities including *Jivraj Shah v Republic* (1986) e-KLR. In that case the court held that if the appeal has chances of success and if there exist exceptional or unusual circumstances upon which the court can fairly conclude that it is the interests of justice to grant bail, the court may grant bail. The other cases cited restate the same principles; which I need not consider herein.

The submissions of counsel for the respondent

17. Counsel for the respondent (Ms Maureen Akunja) did not file a replying affidavit in response to the application. Instead, counsel filed written submissions.
18. Counsel submitted that this court has jurisdiction to review its ruling/order on the ground of changed circumstances. In the instant application, the court has jurisdiction to entertain the current application.
19. Additionally, counsel has submitted that the applicant has availed new information from the doctor in charge of medical services at the Nairobi Remand and Allocation Maximum Prison dated 28th February 2022. According to the said doctor the applicant needs medical attention which is not available at KNH.
20. According to counsel the issue for determination is whether this new information is sufficient to warrant the review of the court's earlier ruling and order the release of the applicant on bail pending the determination of his appeal.
21. Counsel has finally urged the court to issue directions in the matter and in regard to the hearing of the main appeal.

Issues for determination

22. I have considered the supporting affidavit of the applicant and the report of Dr. Omboki Joshua together with the submissions of Prof Ojienda (SC) and the authorities that he cited. I have also considered the submissions of counsel for the respondent (Ms. Maureen Akunja).
23. After considering all of the foregoing matters in the light of the applicable law. I find the following to be the issues for determination.
 - 1 Whether the court has jurisdiction to entertain and determine the current application.
 - 2 whether the applicant has made out a case for the grant of the orders sought.



Issue 1

24. The main issue raised by the application is whether this court has jurisdiction to entertain and determine the application.
25. The jurisdiction of this court flows from the 2010 [Constitution of Kenya](#), the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya.
26. I will start with the enquiry by referring to the 2010 Constitution of Kenya; since most of the provisions relating to the criminal procedure have been constitutionalized. the [Constitution](#) in article 50 (2) (q) has guaranteed to every accused person the right to a fair trial which includes the right-

if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”
27. It is clear from the foregoing that the right of appeal including its hearing and determination by the High Court has been constitutionalized. It should be understood that what is contemplated by the phrase “or apply for review by a higher court” in article 50 (2) (q) of the [Constitution](#) of Kenya is the hearing and determination of the appeal itself. It does not refer to review of interlocutory orders of the High Court such as the current order that is sought to be reviewed.
28. Furthermore, reference to the [Criminal Procedure Code](#) is equally necessary as this is the implementing statutory legislation in respect of matters of bail including the grant of bail pending the hearing and determination of the appeal and the grant of bail pending hearing and determination of the trial of an accused in the trial court.
29. It is clear from sections 356 and 357 of the [Criminal Procedure Code](#), which are in relation to the issue of granting of bail pending the hearing and determination of the appeal do not make provision for the review of an order that has denied bail to the applicant pending the hearing and determination of the appeal to an aggrieved party.
30. It is clear therefore that there is a lacuna in the law in that regard. It therefore follows that this court has to resort to its inherent powers to meet the ends of justice. One cardinal rule regarding the usage of inherent powers is that they should not be used to defeat the express provisions of statutory law. Their application in the instant application will not be in conflict with the provisions of the Criminal Procedure Code.
31. I have already found that the relevant provisions in the 2010 [Constitution of Kenya](#) and the [Criminal Procedure Code](#) are silent in respect of whether this court can review its own previous ruling. In other words, there is a lacuna.
32. Furthermore, I find that the application of the inherent powers of this court to the instant application will not be in conflict with the 2010 [Constitution of Kenya](#). They will also not be in conflict with the relevant provisions of the [Criminal Procedure Code](#). See *Taparu v Roitei* (1968) EA 618
33. It therefore follows that I am entitled to invoke the inherent jurisdiction of this court in order to meet the ends of justice in this application.
34. I find that the authorities cited by counsel for the applicant are in relation to the review of orders in respect of bail pending the trial of an accused. They are therefore not relevant.
35. I further find that the provisions of article 165 (3) of the [Constitution](#) of Kenya which vest in the High Court unlimited original jurisdiction in civil and criminal matters is also not relevant since the instant



application is in relation to the appellate proceedings in this court. And for that reason, the original jurisdiction of the High Court cannot be invoked.

36. I therefore find that I will resort to the inherent powers of the court to resolve the dispute in this current application by way of review.
37. I also find that the refusal of bail to the applicant pending the hearing and determination of his appeal by this court is not appealable to the Court of Appeal. In this regard, the Court of Appeal in *Odemba v Republic* (1983) KLR 442 held that it cannot grant an order of bail pending appeal in respect of an appeal that is still pending hearing and determination of the appeal in the High Court.
38. It therefore follows that the invocation of the inherent jurisdiction of this court is unavoidable in view of the fact the applicant has no right of appeal to the Court of Appeal in respect of the refusal by this court to grant him bail.
39. In the premises I find that I have jurisdiction to entertain and determine this current application.
40. I therefore answer the first issue in the affirmative.

Issue 2

41. It is clear from the ruling in dispute that among the grounds for refusing to grant bail to the applicant pending the hearing and determination of his appeal was that there were medical facilities at Kenyatta national hospital (KNH) to cater for the illness of the applicant.
42. The unopposed medical evidence in the report of Dr Omboki Joshua clearly shows that the facilities at KNH are not adequate to cater for the medical condition of the applicant due to their break down. I find the report of the Dr. Omboki Joshua that there is imminent danger to the life of the applicant due to the ineffective medical facilities at KNH.
43. I find that the 2010 Constitution of Kenya was enacted for the welfare and wellbeing of all its citizens including the convicted applicant.
44. In the premises I find that the applicant has made out a case for the grant of an order of review of the previous ruling of this court.
45. I hereby set aside the ruling of this court dated 10th January 2022. In its place I hereby release the applicant on bail pending the hearing and determination of his appeal on the same terms as in the trial court, namely on a bond of Kshs 300,000/- with one surety of a similar amount.
46. Additionally, the appellant/applicant will appear before the Deputy Registrar of this court once at the end of a working day in every two months pending the hearing and determination of his appeal.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE ON THIS 15TH DAY OF MARCH 2022.

J M. BWONWONG'A

JUDGE

In the presence of-

Kinyua: Court Assistant

Prof Tom Ojienda (SC) for the applicant

Ms Kibathi for the respondent



Applicant in person

