



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT VOI**  
**CRIMINAL APPEAL NO. 7 OF 2020**  
**PM.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**  
**RULING**

1. The Appellant herein filed a **Petition** on the **10<sup>th</sup> February, 2020** and later filed a **Notice of Motion** Application dated **12<sup>th</sup> August, 2020** that is the subject of this **Ruling**. The Appellant in the Application dated **12<sup>th</sup> August, 2020** prays for the following orders:

**a. Spent;**

**b. THAT this Honourable Court be pleased to Order that the Appellant be escorted to Mathare Mental Hospital for a full mental checkup and medication and a report be made to this Honourable Court to that effect.**

**c. THAT this Honourable Court be pleased to admit the mental assessment report as additional evidence at the hearing of the Appeal.**

**d. THAT pending the hearing and determination of the appeal herein this Honourable Court be pleased to grant the appellant bail pending Appeal**

**e. THAT the costs of this Application be in the cause.**

2. In summary, the Application is premised on the grounds that the mental condition of Applicant/Appellant continues to deteriorate and he lacks proper care at Manyani Maximum prison. The Applicant/Appellant avers that he is entitled under the Constitution of Kenya to the highest attainable standard of health care and thus prays that his mental assessment be done at Mathare Mental Hospital and the mental report be admitted as evidence by this Appeal Court.

3. The Application is supported by an **Affidavit** sworn by **BM**, who claims to be the mother of the Applicant/Appellant, and states that the Applicant's/Appellant's mental condition has deteriorated. She also avers that the Applicant/Appellant has been living with a mental condition ever since he was young and has been undergoing treatment. She further states that, it is in the best interest that the Applicant/Appellant be taken to Mathare Mental Hospital for a full mental checkup and a medication report made to that effect for presentation to the Appeal Court.

4. The Respondent did not file a response in the form of a reply to the Appellant's Application.

**DIRECTIONS OF THE COURT**

5. Parties took directions on disposing of the application by way of written submissions. The Applicant/Appellant filed his submissions on **22<sup>nd</sup> October, 2020**. The Respondent in response filed submissions on **9<sup>th</sup> October, 2020**.

**THE APPLICANT'S SUBMISSIONS**

6. It is the Applicant's/Appellant's case and submission that this Application be allowed and he be escorted to Mathare Hospital for a full mental checkup and the mental assessment report be admitted as additional evidence at the hearing of the Appeal. The Applicant/Appellant further submits that he be granted bail pending Appeal.

7. On the question of whether the Applicant/Appellant should be escorted to Mathare Hospital for assessment, it is his submissions that he is entitled to the highest attainable health service as provided for under **Article 43 as read with Article 51** of the **Constitution of Kenya**. The Applicant/ Appellant also submits that he does not have any evidence that he is mentally disturbed, but the only person able to corroborate his mental incapacity claim is his mother who confirms that the Applicant/Appellant has lived with mental health issues from childhood.

8. The Applicant/Appellant avers that once a mental assessment is done, the mental report be admitted as evidence at the hearing of the Appeal herein. He goes on to submit that under **Section 358(1)** of the **Criminal Procedure Code**, this court has power to admit any new evidence provided it gives sufficient reasons for doing so. The Applicant/Appellant has relied on the cases of **LO -vs- Republic (2019)eKLR, Criminal Appeal No.51 of 2017** and **Samuel Kungu Kamau -vs- Republic (2015) eKLR**.

9. On the question of bail pending Appeal, the Applicant/Appellant has submitted that **Section 357 of the Criminal Procedure Code** gives this Court the power to grant the Appellant bail pending Appeal. The Applicant/Appellant has stated that his Appeal has high chances of success and that bail be granted for the sole purpose of ensuring that the Applicant's/Appellant's mental condition is well managed. He has cited the cases of **Jivraj Shah -vs- Republic [1986] KLR 605** and **Chimambhai -vs- Republic 1971 EA 343**.

10. Finally, the Applicant/Appellant has submitted that the Application dated **12<sup>th</sup> August, 2020** has merit the same should be allowed.

#### **THE RESPONDENT'S SUBMISSIONS**

11. The Respondent on the other hand, has submitted that **Section 38** of the **Prisons Act** provides for what ought to be done when a person is suspected to have mental illness. The Respondent avers that the Applicant's/Appellant's mother has emotionally invested in the case and is not an expert on matters concerning mental health. The Respondent is of the opinion that the concerns over the Appellant's mental health ought to come from the Prison's Medical Officer, and for such reasons, the prayer for the Appellant to be escorted to Mathare be should denied.

12. On whether the mental assessment report can be admitted as evidence of this Court, the Respondent submits that this request is premature as the Applicant/Appellant has not been assessed to establish whether or not he suffers from mental illness.

13. The Respondent has rebutted the Applicant's/Appellant's prayer to be granted bail pending Appeal stating that the Applicant/Appellant has not satisfied the ingredients as enunciated in the case of **Sivraj Shah -vs- Republic (1986) KLR 605**. The Respondent also argues that the charges at the lower court were undefended and that there is no substantial merit of the appeal apparent from the record.

14. Further, the Respondent avers that the Applicant's/Appellant's claim of being of unsound mind is not enough for this Court to grant bail pending Appeal. They relied on the case of **Dominic Karanja -vs- Republic (1986) KLR**.

15. In conclusion, the Respondent has prayed that the Application dated **12<sup>th</sup> August, 2020** be denied.

#### **ANALYSIS AND DETERMINATION**

16. I have considered the pleadings and submissions by the Applicant/ Appellant and the Respondent (Prosecution) alongside the cited statute and case law in line with the proceedings of the trial court. The three issues that arise for determination are as follows:

**i. Whether the Appellant should be escorted for a full mental checkup at Mathare Mental Hospital and a medical report made to this Court;**

**ii. Whether the mental assessment report can be admitted as additional evidence.**

**iii. Whether this court can grant bail pending appeal**

#### **i. Whether the Appellant should be escorted for a full mental checkup at Mathare Mental Hospital and a medical report made to this Court.**

17. The Applicant/Appellant is seeking this court to order that he be escorted for a mental assessment at Mathare Mental Hospital for a full checkup based on the mother's assertions.

18. The Applicant's/Appellant's mother avers that her son has not been of proper mind and claims that the same has gotten worse every time she visits him at Manyani Maximum Prison. The Applicant's/Appellant's mother, further avers that the Appellant has had a belaboring mental condition ever since he was a child and has been on medication.

19. This Court notes from the trial court's proceedings that a mental assessment was done on the Applicant/ Appellant on the **26<sup>th</sup> August, 2019** and the same adduced in court on the **11<sup>th</sup> September, 2019**. I have perused the lower court proceedings together with the mental report and established that the mental report shows he was examined by a Psychiatrist and found to be of sound mind. The findings were never contested by the Applicant/Appellant.

20. In the instant application, the Applicant's/Appellant's mother avers that her son has had mental issues from childhood, and has been on treatment, but the same was not raised before the trial court and neither has she provided any medical evidence from a Psychiatrist to support the averment.

21. **Section 11** of the **Penal Code** and **Section 162 (1) and (2)** of the **Criminal Procedure Code** are the applicable provisions of the law in this regard. **Section 11** of the **Penal Code** provides as follows:

**“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved”.**

22. On the other hand, **Section 162** of the **Criminal Procedure Code** reads as follows:

**“162. (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.**

**(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.”**

23. From the reading of the above-cited provisions of law, I find that the trial court was therefore in compliance with the provisions of **Section 11 of the Penal Code** and **Section 162 of the Criminal Procedure Code** in ordering for a mental assessment to be conducted on the accused person in determining the case against him.

24. Further, this Court agrees with the Respondent’s submission that **Section 38 (1) of the Prisons Act** is enough to ensure that the Applicant/Appellant is well protected and taken care of in prison in respect of any health condition, mental health included. **Section 38(1)** of the **Prisons Act** provides:

**“...whenever a medical officer is of the opinion that any prisoner is of unsound mind, he may, by order under his hand in the form prescribed, direct that such prisoner be removed to any mental hospital in Kenya and there be detained and such order shall be authority for the reception of the prisoner and for his detention in such mental hospital until removed or discharged as hereinafter provided...”**

25. In the instant application, the Applicant’s/Appellant’s mother has not shown to this court that they contacted the prison’s medical personnel and presented the Applicant’s mental condition and requested for an evaluation. They have, without any proof whatsoever come to this court for grant of an order of mental assessment.

26. Indeed, it is this Court’s belief that if the Applicant/Appellant is suffering from mental health, the prison personnel are well trained to identify the same and refer him for proper treatment and management to a facility that deals with such cases.

27. With this finding, this Court declines to grant the Applicant/Appellant an order to be escorted for mental check up and medication at Mathare Hospital, Nairobi.

**ii. Whether the mental assessment report can be admitted as additional evidence.**

28. The power to allow an appellant to adduce additional evidence on appeal is discretionary and this is stipulated under the provisions of **Section 358(1)** of the **Criminal Procedure Code**. The said provision stipulates that:

**“In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.”**

29. The Applicant/Appellant is asking this court to admit a medical assessment report as additional evidence at the hearing of the Appeal. The *locus classicus* case of **R –vs- Parks (1969) All ER at page 364** sets out the principles in exercising such discretion to admit new evidence as follows:

**a. That the evidence that is sought to be called must be evidence which was not available at the trial.**

**b. That it is evidence that is relevant to the issues.**

**c. That it is evidence that is credible in the sense that it is capable of belief.**

**d. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.”**

30. In the case of **Samuel Kungu Kamau –vs- Republic [2015]eKLR** stated: -

**“It has been said time and again that the unfettered power of the Court to receive additional evidence should always be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal. In the words of Chesoni Ag JA (as he then was) in Wanje v Saikwa [1984] KLR 275:**

**‘This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence.**

31. In the instant case, there is no evidence before this court, to enable it assess the importance of the evidence the Appellants intend to adduce. Also the Applicant/Appellant has not told this court the significance of the intended medical report in the Appeal herein.

32. Having not been able to examine the evidence to be adduced by the Applicant/Appellant, this Court is unable to grant orders for admitting the intended medical report as additional evidence before this court as the same has not been justified, hence prematurely made.

**iii. Whether this court can grant bail pending Appeal.**

33. The provision of law that applies to bond/bail pending appeal is vide **Section 357** of the **Criminal Procedure Code** and it provides as follows:

**“(1) After the entering of an appeal by a 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 his appeal:**

**Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.**

34. In the instant case, the Applicant/Appellant was granted bail/bond of Kshs.80,000/= with one surety of a like sum or cash bail of Kshs.50,000/= by the trial court. The Applicant/Appellant was granted bail/bond by the trial court in line with the accused’s rights as provided for under **Article 49** of the **Constitution** on the presumption of innocence until proven guilty. This is unlike the case herein where this Court is being called upon to consider bail/bond where the Appellant is already convicted.

35. Bail/Bond pending trial is an essential right of an accused person provided they fulfill the requisite conditions, without losing the presumption of innocence.

36. In the case of **Chimambhai -vs- Republic 1971 EA 343**, J. Harris made another observation in such an application when he said;-

**“The case of an appellant under sentence of imprisonment seeking bond 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.....”**

37. The granting of bail pending appeal is discretionary, depending on the circumstances of each case. Justice Odera of the Supreme Court of Uganda in the case of **Arvind Patel -vs- Uganda SC. Cr Appeal No.1 of 2003** set out the circumstances under which bail pending appeal could be granted as: -

- 1. The character of the offender;**
- 2. Whether applicant is or not a first offender;**
- 3. Whether the offence of which the applicant is convicted involved personal violence;**
- 4. The appeal must not be frivolous and has reasonable chances of success;**
- 5. The possibility of substantial delay in the determination of the appeal and;**
- 6. Whether the applicant complied with bail conditions granted before the applicant’s conviction during the pendency of the trial.**

38. In complying with **Arvind Patel case**, the Applicant/Appellant herein was convicted for grievous harm, in which he was accused of attacking his neighbour.

39. The issues for determination then are;

- a. whether the Appeal has overwhelming chances of success; and**

**b. whether there are exceptional circumstances warranting the release of the Applicant/Appellant on bail pending Appeal.**

40. The burden lies with the Applicant/Appellant to establish exceptional circumstances that would warrant his release on bail pending Appeal. The applicant/Appellant herein, wants to be released on bail pending Appeal on the basis of his alleged mental health issues. The same are yet to be established or proved by the Appellant in any way.

41. In the case of **Dominic Karanja -vs- Republic (1986) KLR 612**, as cited by the Respondent, and which I agree with, the Court held as follows:

**“(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”**

42. The Applicant's/Appellant's mental health is not an exceptional circumstance as there are medical personnel in prison. And to add on this, the law under **Section 38(1)** of the **Prisons Act** provides for ways to deal with persons of unsound mind.

43. The Applicant/Appellant has therefore not demonstrated that his Appeal has high chances of success, and neither has he shown any exceptional circumstances to warrant him being granted bail pending Appeal.

**CONCLUSION**

44. For the above reasons, I find the Application dated **12<sup>th</sup> August, 2020** devoid of any merit and the same is dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10<sup>TH</sup> DAY OF FEBRUARY 2021.**

**D. O. CHEPKWONY**

**JUDGE**