REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E025 OF 2020

THAMBURA LEONARD MUCUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Principle

Statute

[1] The Criminal Procedure Code provides for bail pending appeal at section 357 in the following terms:

> *"**357. Admission to bail or suspension of sentence pending appeal***
>
> *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.*
>
> *2. If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.*
>
> *3. The Chief Justice may make rules of court to regulate the procedure in cases under this section.*
>
> *[Act No. 22 of 1959, s. 37, Act No. 27 of 1961, Sch.]"*

Case-law

[2] The leading decision on bail pending appeal is the 1986 Court of Appeal case of ***Jivraj Shah v. R*** (1986) KLR 605 which considered earlier decisions of the court, elaborating the factor of overwhelming chances of success and held as follows:

> *"There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. **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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.***
>
> *The decision in **Somo v Republic** [1972] EA 476 which was referred to by this court with approval in Criminal Application 5 No NAI 14 of 1986, **Daniel Dominic Karanja v Republic** where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and 10 the weight and*

relevance of the points to be argued. It is almost self defeating to attempt to define phrases or to establish formulae. There is a helpful passage in ***Archbold, Criminal Pleading Evidence and Practice****, 41st Edition page 783, paragraph 7-86. 15*

We find it unnecessary to go in detail into the circumstances of the grounds of the application. We will not pre-empt the hearing of the appeal. ***We would grant that the issue of law to be argued as to whether there was a "taking" within section 268 of the Penal Code (cap 63) is substantial.*** *The circumstances in which the presiding judge became a complainant against 20 the applicant were brought to our notice.* ***It would appear to us that there is a serious question*** ***whether justice can be said to have been done and have been seen to have been done.***

For that reason, we think this is a proper case in which to exercise our discretion in the applicant's favour and admit him to bail."

[3] This court has also previously considered the principles for the grant of bail pending appeal in the case of ***PETER WANJOHI NJIRAINI v. R***, MACHAKOS HC CRI. APPEAL NO. 56 OF 2015, as follows:

*""****Principles for the grant of bail pending appeal***

3. Article 49 (1) (h) provides as one of the rights of arrested persons –

> *"(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."*

4. Although the applicant's right to presumption of innocence has been extinguished by his conviction by the trial court, the right to bail pending trial must meaningfully be taken to be co-extensive to the criminal trial process, which includes appeal. However, in determining whether there are compelling reasons for refusal of bail, the fact that the applicant is now a convict must be taken to be a compelling reason in that a convicted person is likely to abscond because his guilt has already been established and certainty of punishment which has already been imposed.

5. ***In Boke Chacha v. Republic,*** *Kisii H.C. Cri. Appeal No. 244 of 2012, I considered the principles for the grant of bail pending appeal*

> *"According to authorities on bail pending appeal, bearing in mind that* ***the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal****, the criteria for consideration is:*
>
> *a. Whether there exists exception or unusual circumstances which justify grant of bail in interests of justice. See* ***Jivraj Shah v. R****(1986) KLR 605.*
>
> *b.* ***Such exceptional circumstances exist where the appeal has overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard.*** *See* ***Jivraj Shah,*** *supra;* ***Mutua v. R*** *(1988) KLR 497; and* ***Somo v. R*** *(1972) E.A 476.*
>
> *c. The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See* ***Dominic Karanja v. R*** *(1986) KLR 612.*
>
> *d. A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal. See* ***Dominic Karanja,*** *supra."*

[4] I respectfully note the decision of Mabeya, J. in *Francis Mithika v Republic* [2018] eKLR, cited by the applicant's counsel, where he applied the test for overwhelming chances of success in granting the bail pending appeal in that case.

Application of the Principle in this case

[5] By the Notice of Motion dated 7th January 2021, the applicant in this case seeks bail pending appeal on the grounds that the appeal has overwhelming chance of success, the applicant risks losing his permanent and pensionable employment as a teacher and that by the time the appeal is heard he will served a substantial portion of his sentence making his appeal nugatory, as set out in the application as follows:

> *"a) THAT the Applicant has been tried, convicted and* ***sentenced to serve thirty (30) years in prison*** *by the Honourable PM WECHULI sitting at the Magistrate's Court at Tigania in Criminal Case No. 1495 of 2018.*
>
> *b) THAT the Applicant being dissatisfied with the judgment and sentence has lodged the appeal herein and* ***which has great chances of success.***
>
> *c) THAT the Appellant who is a Teachers Service Commission (TSC) teacher employed on permanent and pensionable basis, is in prison and unless he is admitted to bail and released by 8.1.2021* ***he risks being sacked*** *thus rendering him and his children destitute.*

*d) Given **the time it may take to hear the appeal** and the nature of the sentence, if successful the appeal will be rendered nugatory."*

[emphasis added]

[6] In his Memorandum of Appeal dated 23rd November 2020, the appellant set out his grounds of appeal as follows:

"*PETITION OF APPEAL*

The Appellant, being greatly aggrieved by the Judgment and sentence of Hon. P.M WECHULI Senior Resident Magistrate dated/delivered iz" November, 2020 in Tigania Criminal Case No. 1495 of 2018 (REPUBLIC-VS- THAMBURA MCHUI LEONARD) appeals to this Honourable court and sets herein below the following grounds of appeal

1. The Learned Senior Resident Magistrate erred in law and fact in failing to find that the evidence of the prosecution did not meet the threshold of proving the charge of grievance harm to the required standard thus erroneously convicting the Appellant on an unproved charge.

2. The Learned Senior Magistrate erred in law and fact in failing to find that the Appellant had gone to the complainant's home on invitation of the complainant to visit PW4, who was allegedly unwell, in effect the Appellant falling onto the complainant's trap of bringing the Appellant at the scene and erroneously being influenced by the reason of the Appellant being at the scene of crime to be a basis of conviction.

3. The Learned Senior Magistrate erred in law and fact in failing to find that the Appellant had gone to the complainant's home on invitation of the complainant which ended to be a trap by the complainant who had prestationed criminals who also grievously injured the Appellant.

4. The Learned Senior Resident Magistrate erred in law and fact in not allowing the Appellant to adduce all the evidence he had at his disposal in his defence thus erroneously convicting the Appellant.

5. The Learned Senior Magistrate erred in law and fact in failing to find that there was vendetta between the Appellant and the Complainant as former lovers whose relationship had gone sour reason the Complainant could have framed the Appellant and erroneously relying on the evidence of only the complainant's close relatives to convict the Appellant.

6. The Learned Senior Resident Magistrate erred in law and fact in disregarding in totality the Appellant's evidence in defence.

7. The Learned Principal Magistrate erred in law and fact in disregarding the Appellant's mitigation in sentencing the Appellant.

8. The sentence of 30 years imprisonment without the option of a fine meted on the Appellant is excessive and against the weight of the evidence.

IT IS PROPOSED to ask this Honourable Court for an order setting aside the Judgment and sentence of the lower court and therewith substitute an order acquitting the Appellant of the charge."

[7] In his Supporting Affidavit to the application for bail sworn on 7th January 2021, Counsel for the appellant set out the facts as follows:

"*1. THAT I am an Advocate of the high court of Kenya retained by the Appellant! Applicant to conduct this appeal. 2. THAT I being instructed and in conduct of this matter on behalf of the Appellant I am well versed with the matters and have authority to make this application and Affidavit on behalf of the Appellant.*

3. THAT the Appellant was charged with the offence of causing Grievous Harm (contrary to section 234 of the Penal Code) as per the copy of proceedings and judgment filed with this appeal.

4. THAT the Appellant was convicted on the count and sentenced to serve thirty (30) years without the option of a fine.

5. THAT I am instructed by the Appellant as follows- ~ The Appellant is a boyfriend to the complainant before their relationship became sour and the complainant was left with their minor daughter.

6. THAT the appellant is dissatisfied with the conviction and sentence and has lodged an appeal in this honourable court as appears in the petition of appeal. (Annexed and marked "TAl" is a copy of the petition of appeal). ***On the day the offence is said to have occurred the Appellant was indeed trapped by the complainant by inviting the Appellant to her parents home purportedly to visit their sick minor daughter when the Appellant was grievously harmed by the complainant and her hired goons hidden at the scene of crime by the complainant.***

5. Following the attack the appellant was hospitalised for months and was surprised when he was discharged to be confronted with the lower court criminal case by which he is now incarcerated.

6. THAT the appellant is dissatisfied with the conviction and sentence and has lodged an appeal in this honourable court as appears in the petition of appeal. (Annexed and marked "TAl" is a copy of the petition of appeal).

7. THAT the appeal herein has a high probability of success.

8. THAT the Appellant who is a Teachers Service Commission (TSC) teacher employed on permanent and pensionable basis, is in prison and unless he is admitted to bail and released by 8.1.2021 he risks being sacked thus rendering him, his children and dependants destitute (Annexed and marked "TA2" is a copy of the letter from the head teacher of the school where the Appellant is a teacher.

9. THAT further the Appellant is apprehensive that if not granted bail his appeal may be rendered nugatory should he succeed given that he may have been interdicted and or served most of his sentence by the time the appeal is heard and determined.

10. THAT I am also instructed that the appellant is the sole bread winner and he has small children and other dependants to look after.

11. THAT in the lower court appellant has always attended court when required and will do so if released on bail pending appeal.

12. THAT I swear this affidavit to support the application to have the Appellant/Applicant released on bail pending appeal.

13. THAT what is deponed herein above is true to the best of my knowledge, information and belief except where matters are deponed on information whose sources are disclosed."

[8] The DPP has opposed the grant of the bail pending of appeal upon Grounds of Opposition dated 20th January 2021 set out as follows:

"*GROUND OF OPPOSITION*

TAKE NOTICE that the respondent shall oppose the instant application on the following grounds:

1. THAT the application is incompetent, lacks merit and an abuse of court process and ought not to be entertained by this Honourable court.

***2. THAT the Appeal is weak and does not at all have any high chance of success because the prosecution proved its case beyond reasonable doubt**.*

3. THAT the Applicant! Appellant had been convicted rightly, as there are no inconsistencies in the witness statements and evidence on record.

4. THAT the Applicant has not met any ground at all to be granted bail and further that there are no compelling reasons to have him granted bail pending Appeal.

5. THAT the fact that the Applicant/Appellant is a teacher and employed by the Teacher Service Commission is not a justifiable reason or special circumstance to warrant release of the Applicant/Appellant to be released on bail pending Appeal.

6. THAT the application is misleading, full of half-truths and it does not disclose any special/peculiar circumstances to grant the order prayed for and ought to be dismissed."

Issue for Determination

[9] The issue before the court is whether there are ***exceptional circumstances*** in the nature of an ***overwhelming chance of success*** of appeal; a possibility of the appellant ***serving substantial portion of the sentence*** before the determination of his appeal, ***or otherwise***, as to justify the grant in discretion of the court of bail pending appeal in this case.

Meaningful right of appeal

[10] Every accused person has a right to appeal an adverse judgment to a higher court under Article 50 (2) (q) as follows:

"*2. Every accused person has the **right to a fair trial**, which includes the right—*

*(q) if convicted, **to appeal to,** or apply for review by, **a higher court as prescribed by law."***

[11] This right to consideration by a higher bench, if meaningful, must come with it a protection from substantial and detrimental execution of a sentence imposed by the impugned judgment appeal from which is a constitutional right. This would ensure that the appeal, if successful, is not rendered *nugatory*, in the oft-used civil law terminology. However, the necessary safeguards for the eventual implementation of the sentence finally found deserving on the offender upon determination of his appeal, under statute and case-law, are recognized in the right of appeal and must be observed.

Exceptional circumstances test,

[12] In my respectful view, therefore, the correct test for bail pending appeal is the ***exceptional circumstances test*** in ***Jivraj Shah*** which is more encompassing of the grounds for the grant of bail pending appeal, of which the ground of overwhelming chances of success is one of the sufficient grounds that the court may consider granting bail pending appeal despite the applicant now not enjoying the pre-judgment presumption of innocence which supports the provision of bail pending trial under Article 49 (1) (h) of the Constitution.

[13] The appellate court shall, therefore, look for any existing exceptional circumstances including the ***overwhelming chances of success*** or the existence of a ***prima facie*** arguable point or "***a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard".***

*Want of **mens rea** for the offence*

[14] In urging an overwhelming chance of success test, Mr. Thuranira Atheru, counsel for the applicant submitted that the alleged commission of the offence of grievous harm in the trial court was not proved as there was not demonstrated *mens rea* for the offence and relying on the ***Francis Mithika*** case, supra, argued that-

> *"I submit that the appeal has overwhelming chances of success because in the trial court there was no **mens rea** proved. The appellant was invited by his former wife to visit their sick child and he was attacked by relatives. He had no mens rea.*
>
> *The Appellant was not allowed to produce his documents to show that he was grievously harmed. It was also not admitted in mitigation.*
>
> *The eyewitnesses were relatives of the complainant and no independent witnesses and the appellant was not represented.*
>
> *If the apepla is successful the appellant stands to serve substantial part of his sentence and lose his job as a teacher….*
>
> *I rely on **Francis Mithika v. R** (2018) eKLR, Meru Criminal Appeal No. 77 of 2018 that when it appears there is **prima facie** point of law, it is incumbent to grant bail. "*

[15] For the DPP, Ms. Nandwa, Prosecution Counsel, relied on her Grounds of Opposition filed in Court and urged that the issues raised by Counsel for the appellant could be raised in the hearing of the appeal itself.

Mens rea

[16] The issue of *mens rea* is the subject of principle of responsibility for criminal offence under section 9 of the Penal Code that a person is not responsible for acts that occur without the intention of the actor or the guilty mind as follows:

> ***"9. Intention and motive***
>
> *1. Subject to the express provisions of this Code relating to negligent acts and omissions, **a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.***
>
> *2. Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.*
>
> *3. Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."*

[17] Although *mens rea* is a different consideration to self defence, the submission by Counsel for the appellant appear to suggest self defence, which is the subject of section 17 of the Penal Code as follows:

> ***"17. Defence of person or property***
>
> *Subject to any express provisions in this Code or any other law in operation in Kenya, **criminal responsibility for the use of force in the defence of person** or property shall be determined according to the principles of English Common Law."*

See also ***R. v. Duffy*** (1967) 1 Q.B. 63; 50 Cr. App. R. 68 CCA on the common law position that a person is entitled to use such force as was reasonably necessary to protect himself or another or property; and ***Archbold, Criminal Pleading, Evidence & Practice*** (2017) para 19-42, p. 2075.

On the merits

[18] This court needs to observe with revulsion that some of the matters of fact deponed in the supporting Affidavit by Counsel for the Applicant are not supported by evidence on record before the trial court. Counsel should refrain themselves from making factual statements in affidavits in support of applications by parties, which set out facts other than given in the evidence given before the court by their clients. Counsel are not witnesses of fact.

[19] The allegation of fact made by the advocate for the appellant/applicant that –

> "***On the day the offence is said to have occurred the Appellant was indeed trapped by the complainant by inviting the Appellant to her parents home purportedly to visit their sick minor daughter when the Appellant was grievously harmed by the complainant and her hired goons hidden at the scene of crime by the complainant*"**

could only be made by the appellant, not by his counsel who represents him on appeal after conviction by the trial court. The Court will, of course, act on the evidence on record of appeal, but such affidavits may be misleading to court.

[20] This Court has looked at the evidence before the trial court and without prejudice to the hearing of the appeal, there would appear not to be a ground for interfering with the decision of the court on the argument urged by the court that there was no *mens rea* for the offence. *Mens rea* is the guilty intention to commit the offence and it is not taken away by the fact that the appellant was trapped by the complainant who invited him to her parents only to be attacked while there by the complainant and her parent and hired goons.

[21] The offence of Grievous harm is set out in section 234 of the Penal Code as follows:

> "*234. Any person who **unlawfully** does **grievous harm** to another is guilty of a felony and is liable to imprisonment for life.*
>
> *[Act No. 53 of 1952, Sch., Act No. 54 of 1960, s. 27, Act No. 5 of 2003, s. 44.]"*

[22] *Mens rea* for the offence of grievous harm is the ***knowledge*** of the unlawfulness of the act leading to grievous harm and the ***intent*** to commit it. There is no question that it is ***unlawful*** to strike, cut or otherwise wound another person. The offence is complete when the appellant *intentionally* assaults the complainant and causes her grievous harm. The intention may only be taken away in the circumstances described under section 9 of the Penal Code. Unless it can be shown that the appellant was by reason of insanity (section 12 of the Penal Code) or intoxication induced by the complainant (section 13 of the Penal Code) not aware of what he was doing, or that it was unlawful. It matters not that the appellant was tricked into going to the home, and was while there attacked as alleged. That would only be relevant if the defence of self-defence were proffered.

[23] If the appellant intended to raise a defence of self-defence which is available in accordance with section 17 of the Penal Code set out above, the same was not taken up in the submissions before this court or in evidence before the trial court. The issue of self-defence - not lack of *mens rea*, as counsel has configured it – if proved may go to the consideration of proof of the offence, and even if conviction were affirmed, to the consideration, as a mitigation factor, of the appropriate sentence for the appellant. However, having not been raised, the court cannot base its decision on the issue of self-defence.

[24] It matters not that the applicant is a teacher who stands the risk of losing his employment with the Teachers Service Commission. This must be taken as the natural consequence of his conviction and sentence for imprisonment for thirty (30) years of the offence of grievous harm. What concerns the court is that such fate should not befall an innocent person, and hence the requirement of an ***overwhelming*** case of probability of success of the appeal or the likelihood that the sentence or a substantial part thereof may be served by the appellant who eventually succeeds before the hearing and determination of his appeal.

[25] In this case an overwhelming case has not been demonstrated. There is also no possibility that the applicant will have served a substantial portion of his 30-year sentence before the appeal is heard and determined. In any event, there is now a policy of court, no doubt as we have adopted at the Meru Law Court, to grant priority hearing for deserving cases upon a consideration at a triage session conducted by the Presiding Judge every month.

Conclusion

[26] This case does not disclose an overwhelming chance of success of the appeal nor any exceptional circumstances to warrant the grant of bail pending appeal. The prima facie issue offered by counsel for the appellant on the ground of want of *mens rea* is, with respect, not well founded. However, without prejudging the appeal which is yet to be heard so as not to embarrass the court that hears the appeal, the court finds that the appeal raises an issue of the circumstances surrounding the commission of the offence which may at the hearing be found meritorious, if not against the conviction, at least in mitigation as to severity of the sentence of imprisonment for thirty (30) years. In such circumstances, the remedy appears to me, with respect, to be the expedited disposal of the matter by the full hearing of the appeal.

[27] For this reason, this court considers that this is a proper case for an order that the matter be heard on priority basis.

Orders

[28] Accordingly, for the reasons set out above, the court makes the following orders:

1. The appellant's application for bail pending appeal herein is declined.

2. For the expeditious disposal of the matter, the appellant's appeal shall be set for hearing on priority dates convenient to court and counsel.

Order accordingly.

DATED AND DELIVERED THIS 11H DAY OF FEBRUARY 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Thuranira Atheru, Advocate for the Appellant.

Ms. Nandwa, Prosecution Counsel for the Respondent.