REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

MISC. CRIMINAL CASE NO. 1 OF 2021

CHARLES MOMANYI NYANGAU.....APPLICANT

=VRS=

THE REPUBLIC.....RESPONDENT

RULING

By the application dated 22nd December 2020 the applicant seeks two orders:- first, leave to appeal out of time and second bond pending the hearing and determination of the intended appeal. The intended appeal challenges the conviction and sentence purportedly imposed against him on 1st December 2020. The application which was first filed in the High Court at Kisii is premised on grounds that: -

"1. The Learned trial Magistrate erred in law and in fact by sustaining, trying, convicting and sentencing the Appellant on charges/accusations that are civil in nature and that required redress via civil proceedings.

2. The Learned trial Magistrate erred in law and in fact by convicting and sentencing the Appellant on charges that were not proved to the required standard in law.

3. The Learned trial Magistrate erred in law by lowering the standard of proof in criminal cases thus convicting and sentencing the Appellant on flimsy grounds and on the basis of doubtful witness testimonies.

4. The Learned trial Magistrate erred in law by lowering the standard of proof in criminal cases thus convicting and sentencing the Appellant on counts and particulars that did not meet the elements set forth in law.

5. The Learned trial Magistrate erred in law and fact in convicting the Appellant against the weight of evidence and gave no weight by disregarding the evidence of the Appellant.

6. The Learned Magistrate erred in law and fact by convicting and sentencing the appellant when the evidence adduced could not sustain a conviction.

7. The Learned Magistrate erred in law and in fact in failing to find that the Prosecution did not prove their case beyond any reasonable doubt.

8. The Learned Magistrate erred in law by denying the accused his right to a benefit of doubt.

9. The Learned Magistrate erred in law and in fact in failing to find that there were reasonable doubts in the evidence tendered by the Prosecution which doubts ought to have been resolved in favour of the Appellant.

10. The Learned Magistrate erred in law and in fact in giving superficial or no consideration to the evidence tendered by the Appellant, while giving undue and disproportionate weight and significance to the evidence tendered by the Prosecution contrary to law.

11. the Learned trial Magistrate erred in law and fact in sentencing the Appellant harshly and ignoring the mitigation tendered by the Appellant.

12. The Learned trial Magistrate erred in law by preferring a custodial sentence while the options of noncustodial sentences presented themselves to him for his consideration."

The application is vehemently opposed and was canvassed by way of written submissions.

In addition to the submissions, Counsel for the applicant has filed the proceedings of the lower court. I have carefully considered the rival submissions and also had ample opportunity to peruse the proceedings of the trial court.

Section 349 of the **Criminal Procedure Code** states that: -

> **"An appeal shall be entered within fourteen days of the date of the order or sentence appealed against."**

The proviso to the section however gives the court an unfettered discretion to enlarge the time for filing an appeal. The proviso states: -

> **"Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor."**

From the proceedings of the trial court the applicant was not convicted on 12th November 2020 but on 20th August 2019. The record indicates that the sentence was deferred to 12th September 2019 but come that day the applicant entered into a consent agreement to refund the money the subject of the charges to the complainant. He agreed to do so by 17th September 2019. The record however shows that he did not keep his word and it was not until 2nd October 2019 when he paid half the sum (Kshs. 600,000/=). He promised to pay the balance on 30th December 2019. The record shows that upon paying half the sum the trial court stayed his sentence and released him from custody. He never did pay the balance of Kshs. 600,000/= which is what led him into entering into a second consent on 3rd February 2020. His default thereafter culminated in the impugned order dated 1st December 2020. It is instructive that between 2nd October 2019 and 1st December 2020 there were eight mentions and at one point a warrant of arrest was issued against the applicant. The applicant is therefore not candid when he says that the decision of the trial Magistrate was rendered on 12th November 2020. The fourteen days reserved for filing an appeal against conviction started running from 20th August 2019 when judgement was delivered by **Hon. Alice C. Towett – SRM**. Therefore, the intended appeal against conviction by **Hon. M. Nyigei – PM** is misplaced as there was no such conviction. It is my finding that the application for leave to appeal against the judgement out of time was made fifteen months after conviction. Needless to say the delay of fifteen months is inordinate. I have combed the application, the grounds thereof, the supporting affidavit and the submissions of Learned Counsel for the applicant and I have not seen any explanation for the delay. In the premises I find that no good cause has been demonstrated to warrant this court to admit the appeal against conviction.

Regarding the application for bond pending appeal, **Section 357 (1) of the Criminal Procedure Code** provides: -

> **"(1) <u>After the entering of an appeal</u> 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……." (Emphasis mine).**

In this case the applicant did not enter an appeal against his conviction and as this court has already stated it shall not grant leave to appeal the conviction out of time as no good cause has been demonstrated ***(see Section 349 of the Criminal Procedure Code).*** My reading of **Section 357 (1) of the Criminal Procedure Act** is that this court cannot grant bond where there is no appeal. Accordingly, the court will not grant bond pending appeal on account of the conviction.

As regards the sentence by **Hon. M. Nyigei** the same was imposed on 1st December 2020 and therefore fourteen days lapsed on 15th December 2020. The memorandum of appeal was filed on 23rd December 2020 so the delay is not inordinate. The applicant has explained that the delay was occasioned by failure by the registry to supply him with a copy of the proceedings and judgement. He has annexed a letter by his advocate dated 20th December 2020 requesting for the said copies of proceedings and judgement. The proviso to **Section 349 of the Criminal Procedure Code** states that a delay necessitated by inability to obtain the order, judgement and proceedings ought to be granted by the court. I find therefore that the applicant has shown good cause to warrant this court to admit the appeal against the **order/sentence of Hon. M. Nyigei (PM).** The appeal is to be filed within fourteen days of this ruling.

What about bond pending appeal? The same argument for bond pending the appeal against the conviction will apply to the application for bond pending hearing of the appeal against the sentence and it is that since there is yet no appeal then bond cannot be granted. Moreover, the applicant has not met the known conditions for grant of bond pending appeal set out in the case of **Jivraj Shah v Republic [1986] KLR 605** that: -

> **"1. The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests 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 urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.**
>
> **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……."**

The applicant's illness is not an exceptional or unusual circumstance as there is a hospital in the facility where he is being held and the illness can be managed thereat. It is also doubtful that the appeal once filed shall have high chances of success given that the applicant freely and voluntarily entered into the agreement which culminated in the order that he wishes to appeal. Further, in this court appeals are now heard in real time and there is no risk that he would have served a substantial part of his sentence had his appeal been filed on time. Indeed, this application has only served to squander the time and nothing else.

In the upshot I find that the application for bond pending appeal is misconceived and premature and the same is dismissed. The applicant may however file an appeal against the order/sentence pronounced by Hon. Nyigei on 1st December 2020. He shall do so within fourteen days of this ruling. It is so ordered.

RULING SIGNED, DATED AND DELIVERED ELECTRONICALLY ON THIS 2ND DAY OF MARCH 2021.

E. N. MAINA

JUDGE