



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ACEC APPEAL CASE NO. E012 OF 2021

CONCELIA AOKO ONDIEK.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant **CONCELIA AOKO ONDIEK**, by way of the application dated 1.8.2021 urged this court be pleased to review and or set aside the ruling made herein on 14.4.2021 in court file No. ACEC Misc. No. E005/2021, delivered by the Hon. Lady Justice Mumbi Ngugi and to issue an order to release the applicant on bail pending appeal. The application is on the ground that there are new information presented before this Honourable court.

During the hearing of this application, it was submitted by the applicant that the initial application by the applicant was dismissed vide the ruling of the court 14.4.2021. That this application is now based on the new and exceptional circumstances, based on a medical report from Langata Women Prison (CA-2). That the same confirms the health status of the applicant. That due to covid, no referrals are done to Kenyatta National Hospital, yet the applicant's condition required specialized treatment.

Counsel for the applicant first relied on a Ugandan statute, the Uganda (Trials and Indictment Act), on the issue of exceptional circumstances that could merit the grant of bail pending the hearing of an appeal counsel also relied on the authority of ***Francis Macharia Nzeki Versus Republic (2021)eKLR***, that every person has the right to the highest attainable standard of health, and that the case of applicant is a matter of life and death.

Lastly, it was submitted that the situation of the applicant should not be left to deteriorate like was the case of ***John Gakuo and Others Versus Republic (2018)eKLR***, where the appellant was denied such bail only to succumb while in prison.

The Respondent/state on the other hand, opposed this application. First, that this court lacks jurisdiction over this matter as the Hon. Justice Mumbi Ngugi already dealt with the application for bail pending appeal and dismissed the same. Secondly, that the letter attached is from the prison and is not reason enough to warrant the applicant being released as same is not even from a doctor and fails to show any history of the conditions pleaded. Neither does the letter confirm the position that applicant cannot be taken to Kenyatta National Hospital.

Counsel distinguished the authority relied on of ***Francis Macharia Nzeki Versus Republic (2021)eKLR***, that in that case, the court had been convinced that there was an arguable appeal, which matter has been settled herein. Also the Gakuo case which was dismissed after failure to show any detailed report.

I have considered 2 rival submissions. The one undisputed fact in this matter is that the applicant's original application for bail pending appeal, dated 16.2.2021 on grounds that her pending appeal has high chances of success was dismissed by way of the ruling of the court of 14.4.2021. similar, the applicant's application dated 23.3.2021, also seeking release on bail pending appeal, but now on grounds of ill health was also dismissed by the same ruling of the court of 14.4.2021.

In the present application, the applicant has sought for release on bail pending appeal, again on the grounds of ill health and supported the same on the basis of a new information or evidence. The said new evidence, attached to the affidavit of the applicant is a communication by Officer in Charge, Langata Women Prison dated 28.7.2021. The said letter states that the applicant is suffering from hypertension, diabetes and arthritis and has not been responsive to the treatment offered at the clinic at the institution.

The issue for determination by this court is whether the evidence now produced by the applicant is suffering enough to make this court revise the orders of 14.4.2021 and order for release of the applicant on bail pending appeal on this ground.

This application being one of bail pending appeal, it is important to consider under what circumstances the same can issue. In the ruling of the Honourable court of 14.4.2021, the Honourable Judge relied on the case of ***Joshua Kiarie Njuguna Versus Republic (2021)eKLR***, that the applicable principles are as follows:-

a) *Whether the appeal has overwhelming chances of success (Ademba Versus Republic (1983)KLR 442, Somo Versus Republic (1973)EA 476, Mutua Versus Republic (1988)KLR 497.*

b) *There are exceptional or unusual circumstances to warrant the court's exercise of its discretion (Ragbir Singh Lamba Versus Republic (1958)EA 37, Jiuraj Shah Versus Republic (1986)eKLR, Somo Versus Republic, Mutua Versus Republic.*

c) *There is a high probability of the sentence being served before the appeal is heard (Chimahshai Versus Republic (1971)EA 343"*

In deciding on the 2 applications for bail, the Honourable Judge considered extensively on the above parameters. And a reading of the said ruling of the Honourable Judge clearly shows that the Honourable Judge already considered the issue of ill-health in determining the issue of bail pending appeal. A few examples would suffice to show this:-

At paragraph 37 of the ruling, the learned Judge noted;

"She avers in the affidavit filed in support of her application that she has serious medical conditions, while her advocate avers in support of the second application that she has contracted covid 19 in prison and is in isolation... No evidence has been placed before the court relating to the applicant's medical condition other than averments by her advocate and the medical report from a private practitioner dated 29.1.2021. No confirmation of the applicant's medical condition from the prison authorities or public medical facility has been placed before the court, I am not satisfied that there are exceptional circumstances on account of the applicant's health that, justify the grant of bail pending appeal"

At paragraph 38, the court held;

"In any event, it has consistently been held in our court, that ill health is not a ground for grant of bail pending appeal, and that there are medical facilities in prison that can handle the medical needs of prisoners sue Dominic Daniel Karanja Versus Republic (Supra)."

The applicant is essentially asking this court to revisit an issue which has been canvassed and ruled on substantively by a court of concurrent jurisdiction. This, this court does not have jurisdiction to do. Neither the constitution, nor any statute confers upon this court any such powers of revision over orders or findings of a court of similar jurisdiction.

The applicant, has based this application on the letter of the officer in charge of the prison stating the various ailments that the applicant allegedly suffers from. Without venturing into the probative value of this information in the form of a letter, I am not convinced by the submissions of counsel for the applicant, that this is new information that should convince the court to revive the orders of 14.4.2021. I say this in view of the substantive finding of the court, based on past judicial precedent, that ill-health is not a ground for grant of bail pending appeal. Neither is it an exceptional and unusual circumstance to warrant the grant of bail.

In the case of Election petitions Nos. 3, 4, and 5, of 2017 (Supreme Court) Raila Odinga and others Versus IEBC and others (2013)eKLR, the Supreme Court of Kenya had this to say on the issue of jurisdiction of the courts;

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The principle is that once such a decision has been given, it is (Subject to any right of appeal to a superior body or functionary), final and conclusive. Such a decision cannot be revoked or varied by the decision makers."

The direct import of the above direction of the Supreme Court in our case is that the decision and finding of the Hon. Lady Justice Mumbi Ngugi were final and this court, being of concurrent jurisdiction, cannot reconsider the same issues.

While I find no merit in the application of the applicant dated 1.8.2021, this court appreciates the need for enforcement of the constitutional right to life under Article 26 of the constitution. The applicant is, without a doubt, entitled to the right to life and good health care. I am therefore not persuaded by the submissions that for some undisclosed reasons, the applicant cannot be referred for treatment and management of her condition to Kenyatta National Hospital or indeed any other referral hospital.

The sum total is that the applicants application dated 1.8.2021, lacking in any merit, is wholly dismissed. It is however ordered that the officer in charge, Langata Women Prison clinic, do facilitate the referral and or treatment of the applicant, if need be to Kenyatta National Hospital, or any other referral Hospital. It is so ordered.

D. O. OGEMBO

JUDGE

14.10.2021

Court:

Ruling read out in court (on-line) in presence of Ms. Kimani holding brief for Ms. Ndombi for the Respondent and the applicant (Langata Women Prison)

D. O. OGEMBO

JUDGE

14.10.2021