



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCCR. CASE NO.39 OF 2019

JEREMIAH KINYANJUI MUTURA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. This is a ruling on application dated 14th May 2019 filed by the Applicant herein seeking bond pending appeal. The application is brought under **Section 356** and **357** of the **Civil Procedure Code Cap 75**. The application also prayed for an order to call for the lower court file and order for it to be kept in safe custody of the Registrar High Court and for proceeding to be typed under direction of the Deputy Registrar.
2. In the lower court, the Applicant was charged with three counts of offences; **Count One** being the offence of **making a document without authority**, **Count Two: making false swearing** and **Count Three: fabricating evidence**. Hearing was concluded on 16th March 2015. Judgment date was scheduled for 11th May 2015. On 11th May 2015 the accused/ applicant was absent and warrant of arrest issued. Judgment was delivered on 14th May 2019. The accused/applicant was sentenced for 2 years imprisonment. The Applicant now seeks bond pending appeal.

SUBMISSIONS BY PARTIES

3. The Applicant submitted that the complaint in Criminal Case No.1487 of 2009 together with his advocate gained access to the judgment before it was delivered; that this is confirmed by the filing of a copy of the judgment in succession matter on 3rd May 2019 six days before delivery of the judgment. He termed the position as irregular and cited the case of **Jivraj Shah Vs Republic** where the court granted bail due to unusual circumstances. Counsel further submitted that even after delivery of judgment the magistrate declined to give the applicant a chance to mitigate.
4. Counsel for the applicant further submitted that the Applicant requires medical attention as shown by medical report annexed to the application.
5. **Mr. Chigiti** for the state opposed the application on ground that the applicant is guilty of laches; that at the time of arguing the application, it was 20 days after delivery of judgment yet he had not filed appeal yet he was informed of his right to appeal. He submitted that the application has been brought prematurely as no appeal has been lodged nor intended appeal attached.
6. Counsel for the state further submitted that principles for grant of bail pending appeal have not been met. Principles being that appeal stand great chances of success but in this case, there is no appeal to look at. Further that the trial magistrate warned himself that the accused is a flight risk as he had absconded and was brought under warrant of arrest.
7. Mr. Chigiti submitted that the issue is whether the Applicant has demonstrated that the appeal has high chances of success and on irregularities; he submitted that no irregularity can vitiate a regularly obtained sentence and the remedy is review. He submitted that record show that the advocate opted not to mitigate. He urged the court to dismiss the application.

ANALYSIS AND DETERMINATION

8. I have considered arguments by both parties herein. I have also perused the lower court record. Record show that, after issuance of warrant of arrest on 11th May 2015, the matter came up next on 16th May 2019. Advocate for the accused applied for lifting of warrant of arrest on

the ground that the accused had the impression that the matter was withdrawn and he never resisted arrest neither is he a flight risk. The prosecutor confirmed that a letter was written by the firm of **Waiganjo & Co. Advocates** requesting the case be withdrawn. The trial magistrate declined to lift warrant-pending judgment on ground that the accused was present when judgment date was given and failed to follow up this matter for 4 years.

9. There is no dispute that the appeal has not been filed neither has the intended appeal been annexed to the application to enable me look at it and make a determination as to whether it has chances of success or not. Counsel for applicant's explanation for delay is that, the proceedings are at prove reading stage. On whether the appeal is merited, he submitted that the applicant will continue to serve the remainder period of sentence if the appeal is unsuccessful.

10. On the issue of delay in filing appeal, , advocate for the applicant by letter dated 14th may 2019 applied for typed proceedings and also made oral application for proceedings on 6th may 2019. The advocate also applied to be allowed to peruse the court file. I note that proceedings in the court file are in draft form. Proceedings may not have therefore been prove read and certified and the fact that the applicant has not been supplied with certified copy of proceeding despite having applied is sufficient explanation for delay in filing appeal.

11. On mitigation, record show that advocate for the applicant declined to mitigate and sought suspension of sentence to appeal against conviction. He also sought bond pending appeal. Trial court disallowed the application and proceeded to sentence the accused. I will not deal with the issue as to whether he was denied opportunity to mitigate at this stage. That may be dealt with in the intended appeal if it is one of the grounds to be filed.

12. In respect to irregularities, record show that judgment was to be delivered in 2015 by trial magistrate who has since been transferred. Warrant of arrest was issued in 2015. It is not indicated whether the file was returned to the registry with a written judgment. The copy of judgment attached to the application is hand written. The registry should be able to explain how it was released to the respondent. In my view, that should be subject of investigation.

13. On the issue of applicant being a flight risk, I have taken note of the letter dated 24th August, 2011 in which the complainant intimated that he intended to withdraw the matter. I will give the applicant a benefit of doubt in that as it may have created mistaken belief that the matter was withdrawn.

14. I have also taken into consideration applicant's medical condition and find that it would be in the interest of justice to grant bond on condition that the intended appeal is filed within 14 days from the date of this ruling.

FINAL ORDERS

1. Applicant may be released on bond of kshs 100,0000 with one surety of a similar amount.
2. The intended appeal to be filed within 14 days from the date of this ruling
3. Failure to comply with order 2 above, the applicant to be rearrested and sentence to continue.

Ruling dated, signed and delivered at Nakuru this 13th day of June 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jared/ Schola Court Assistant

Onyango & Opiyo Counsel for Accused

Wambui Counsel for State