Mbote v Republic (Criminal Appeal (Application) E002 of 2022)
[2023] KECA 325 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 325 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL (APPLICATION) E002 OF 2022

AK MURGOR, S OLE KANTAI & JM MATIVO, JJA

MARCH 17, 2023

BETWEEN

DANIEL NZIOKA MBOTE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for bail pending appeal against the decision of the High Court of Kenya at Makueni (Ong'udi, J.) dated l7th June, 2021 and from the original conviction and sentence given in the High Court of Kenya at Makueni (Dulu, J.) dated 23rd September, 2021 in HCr. Case No. 163 of 2017)

RULING

1. The applicant, Daniel Nzioka Mbote was charged before the High Court of Kenya, Makueni, with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. He was convicted of that offence after a trial in a Judgment delivered on 22nd February, 2021 by Dulu, J. He was sentenced to serve 30 years' imprisonment from the date of conviction on 23rd September, 2021. Currently, he is at Makueni Main Prison. He filed a notice of appeal on 5th October, 2021.

2. In the motion before us dated 16th December, 2021 brought under Rule 5(2) (a) of the *Court of Appeal Rules*, 2010, it is prayed in the main that we release the applicant on bail pending the hearing and determination of the appeal in this Court that is, Nairobi Criminal Appeal No. E100 of 2021 and we make such other orders as we may deem just and expedient. The motion which is supported by the applicant's supporting affidavit is based on grounds set out on the face of the motion.

3. The motion is opposed by the prosecution *vide* ground of opposition dated 25th March, 2022 and a replying affidavit sworn on 1st August, 2022 by Ms. Matiru, learned State Counsel. The application was heard by this Court on 5th September, 2022.

4. Counsel for the applicant in support of the application submitted that there are exceptional circumstances to warrant grant of bail pending appeal. He contended that even though the applicant was yet to be furnished with a record of appeal to enable him file a memorandum of appeal, the appeal was not frivolous and had 2 overwhelming chances of success since the State failed to prove its case to the required standard which is beyond reasonable doubt. Furthermore, counsel maintained that the victim died as a result of a fatal accident. Consequently, malice a forethought was not proved.

5. It is also argued that the applicant is not a flight risk since he attended all his court sessions without fail and he is currently ready to abide with any terms set by the court. Counsel further maintains that the applicant is in extreme ill health and is confined to a wheel chair; that he is unable to attend to calls of nature with the toilet facilities in the prison as demonstrated by various medical reports. Further, he has a distal left femur fracture in his leg requiring him to attend to a clinic on several occasions for dressing.

6. It is the applicant's case that he is the sole bread winner of his young family and if not released on bail he will have served a substantial part of the sentence when his appeal is concluded. In support of the applicant's case counsel cited *Jivraj Shah v Republic* (1986) KLR 605 which laid out two basic considerations, namely; 'overwhelming chances of success' and 'exceptional and unusual circumstances.

7. Ms. Matiru learned State Counsel, on the other hand opposed the application on the grounds that: the intended appeal by the applicant has no chance of success whatsoever since the evidence tendered by the prosecution was overwhelming, well corroborated and sufficient to warrant the conviction arrived at by the High Court; the applicant has not demonstrated any peculiar and/or exceptional circumstances to warrant grant of the orders sought; the long sentence the appellant/applicant is facing makes his chances of absconding extremely high; the offence committed by the appellant/applicant is a serious offence rendering the applicant a great flight risk and even before the trial at the High Court commenced the applicant already demonstrated that he is a flight risk as he initially fled to Mombasa after the commission of this heinous offence; the learned trial Judge was well aware of the applicant's medical conditions and upon considering the reports tendered in court, ruled that the applicant should be treated in custody just like the other inmates; and the sentence meted out on the applicant was very lenient considering the attack on the victim was so vicious.

8. In support of the respondent's case, the learned State Counsel cited *Dominic Karanja v Republic* (1986) KLR 612 where this Court held that ill health per se does not constitute an exceptional or unusual circumstance in every case. Counsel also cited the dictum in *Republic v Naftali Chege and 3 Others* [2021} eKLR where the court held that persons may legitimately and constitutionally be deprived of their liberty in given circumstances.

9. We have considered the material placed before us. The issue arising for our determination is whether the applicant has overwhelming chances of success and demonstrated exceptional circumstances which would justify his release on bail pending the hearing of his appeal. The court's discretion to release a convicted person on bail pending the determination of the appeal is provided under Rule 5(2) (a) of the rules as hereunder;

> " 5(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may –
>
> a. in any criminal proceedings, where notice of appeal has been given in accordance with Rule 59, order that the appellant be

released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal."

10. It is noteworthy that in exercising such discretion, the court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him/her by Article 49 of *the Constitution*. Consequently, pending appeal, the burden would be upon the convicted person to show that the conviction was wrong and the sentence is illegal. Therefore, as it has been stated time and time again bail pending appeal will only be granted in rare and exceptional circumstances- See *Michael Otieno Ademba v Republic* (1982- 88) 1 KAR 263.

11. Similarly, in *Chimambhai v Republic* 1971 EA 343 (a persuasive authority from High Court) Harris, J. observed as follows:

> " 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...."

12. This Court has also had occasion to consider applications for bail pending appeal on various occasions. The principles for granting bond pending an appeal were reiterated in Daniel Dominic Karanja (*supra*) decided about the same time as Jivraj Shah v Republic (*supra*) thus:

> "The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: See *Somo v Republic* [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of ill health arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case.
>
> There exist medical facilities for prisoners in the country."

13. The rationale for considering the chances of success of the appeal was given in Somo v R (*supra*) at page 480 as follows:

> " There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word "overwhelming" deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his

appeal will prove successful, he must show that there is overwhelming probability that it will succeed."

14. In determining the application, this Court takes into consideration the nature of the offence, legality or otherwise of the conviction under sentence, the existence of material or evidence to conclude that it is in the interest of justice to grant bail.

15. On whether the appeal has overwhelming chances of success, we find that the argument by the applicant that his defence of malice aforethought was not being proved since the victim's demise was as a result of a fatal accident, is in our view an arguable ground of appeal. However, the same ground does not infer that the applicant's appeal has overwhelming chances of success. We need not go deep into the merits of the applicant's grounds of appeal lest we embarrass the bench that will be constituted to hear the appeal.

16. On the existence of exceptional circumstances, it is argued that the applicant's appeal is likely to be determined after the sentence is served. With due respect we do not agree. The appellant was sentenced to 30 years barely a year ago. It is very likely that the appeal will be determined long before the 30 years have lapsed. The submission that the applicant is the sole breadwinner of his family in our finding do not constitute exceptional circumstances.

17. As regards the appellant's extreme ill health, it is our view that this Court has already rendered itself in Daniel Dominic Karanja (*supra*). Further, we find that the applicant has not demonstrated that he is unable to access health facilities while incarcerated at Makueni Main Prison. Consequently, we find and hold that the applicant has failed to demonstrate exceptional circumstances which would entitle him to be released on bail/bond.

18. In light of the foregoing, we find that there are no exceptional and/or unusual circumstances to warrant the granting of orders for bail pending appeal. The application has no merit and the same is dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

A. K. MURGOR

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR