



REPUBLIC OF KENYA



KENYA LAW
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**Wiyema v Republic (Criminal Application E002 of 2021)
[2022] KECA 383 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 383 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E002 OF 2021
RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA
MARCH 4, 2022**

BETWEEN

ELIAS MALIACHI WIYEMA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Elias Malicachi Wiyema, was charged before the High Court of Kenya, Naivasha, 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 Mwongo, J. He was sentenced to serve 20 years' imprisonment from the date of conviction but he was to benefit in that:

“... The latter ten (10) years shall stand suspended should the convict comply with the following:

- a. Attend a Programme of Rehabilitation to include counselling over a period of three (3) years designed by the Probation Officer.
- b. Not get involved in any offences or matter of a criminal nature for the next five (5) years.
- c. The Court shall in the fifth (5th) year of his sentence term review the offender's conduct and sentence based on Reports of the Probation Officer and the Prison's Service.”

In the Motion before us 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 of such reasonable terms as the court may determine pending an appeal from the said Judgment and we make such other order 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 it is said that the applicant was sentenced on 28th July, 2021; he has been in custody since then; he filed a Notice of Appeal; that the appeal is not frivolous and has overwhelming chances of success because: the trial Judge relied on erroneous evidence; that the Judge erred in failing to consider evidence of criminal and violent character of the deceased which supported the applicant's defence of self defence; that the defence of self defence was supported by cogent evidence. It is also said that there are exceptional circumstances on account of the applicant being the sole breadwinner of his young family; that if not released the applicant will have served a substantial part of the sentence when the appeal is concluded which would be unfair if the appeal succeeds; that the applicant is of good character; that he abided strictly with bond conditions at the High Court and he is not a flight risk.

2. When the application came up for hearing before us on 31st January, 2022 on a virtual platform the applicant was represented by learned counsel Mr. Ongaya; learned counsel Miss Jacinta Kibiru appeared for the Office of Director of Public Prosecutions while learned counsel Mr. Mbanja appeared for the victim respondent. The respective counsel for the applicant and the victim respondent submissions and legal authorities which they had filed in court and did not wish to highlight the same choosing to leave the matter to us.
3. The applicant in the said submission cites the case of *Arvind Patel v Uganda, Supreme Court of Mengo Criminal Application No. 1 of 2003* where principles guiding grant of bail pending appeal were discussed. It is submitted for the applicant that the appeal has high chances of success; that the Judge made presumptions unsupported by the evidence which led to the Judge ignoring the defence of self defence. It is further submitted that this Court has power to interfere with findings of fact by a trial Judge if they are not supported by the evidence; that the applicant is a man of good character not convicted before of any offence and he did not abuse bond terms given by the High Court. For all that we should admit the applicant to bail pending appeal.
4. Miss Kibiru relied on submissions filed on behalf of the victim respondent where it is submitted that bail pending appeal, unlike bail pending trial, is not a constitutional right; that after a person is convicted there is no presumption of innocence as in the case of bail pending trial. Counsel cites some persuasive cases such as *Francis Ngobu Murathe v Republic [2013] eKLR* for that proposition. Counsel also cites this Court's decision in *Daniel Dominic Karanja v Republic [1986] eKLR* where the court stressed the importance of overwhelming chances of success of the appeal being shown. The court also emphasized the importance of establishing whether there were exceptional or unusual circumstances to admit a convicted person to bail. It is submitted that the appeal has no chance of success as the trial Judge made correct findings on the evidence and material produced before him. We are asked to dismiss the application.
5. We have carefully considered the application and the submissions made.
6. The applicant was convicted of the serious offence of murder and sentenced to a term of imprisonment.
7. This Court has had occasion to consider applications for bail pending appeal on various occasions. In the case of Daniel Dominic Karanja (supra) this is what the Court expressed on that issue:

“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 illhealth 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.”

In *Jivraj Shah v Republic [1986] eKLR* decided about the same time as Daniel Dominic Karanja (*supra*) this is what the Court said on bail pending appeal:

“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] E A 476* which was referred to by this court with approval in Criminal Application 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 the weight and relevance of the points to be argued.”

We recognize the relevant principles set out in the 2 cases as well as the Ugandan case of Arvind Patel (*supra*). As we have seen the applicant was convicted of murder, a serious offence. He was a police officer issued with a firearm which he used to shoot the deceased with fatal consequences. The only issue he raises in the appeal is that the Judge considered presumptions not supported by the evidence without delving into an in-depth analysis of what the applicant means by saying that the Judge considered presumptions not supported by evidence lest we embarrass the outcome of the intended appeal. We do not on the facts laid before, think that the appeal has overwhelming chances of success entitling the applicant to be admitted to bail pending appeal. The applicant has not satisfied us that he falls within the considerations set out in the cases we have cited. The Motion fails and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

R.N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.



Signed

DEPUTY REGISTRAR

