



REPUBLIC OF KENYA



KENYA LAW
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**Kangongo v Republic (Criminal Appeal 57 of 2021)
[2022] KECA 499 (KLR) (1 April 2022) (Ruling)**

Neutral citation: [2022] KECA 499 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 57 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 1, 2022**

BETWEEN

MOSES KIBET KANGONGO APPLICANT

AND

REPUBLIC RESPONDENT

(An application for bail pending an appeal against the judgement of the High Court of Kenya at Garsen (R. Korir J.) delivered on 18th June 2019 in Criminal Case (Murder) No 7 of 2015)

RULING

1. The application before this Court is a Notice of Motion dated 12th October 2021, brought by Moses Kibet Kangongo, the Applicant herein. The Applicant prays that he be admitted to reasonable bail/ bond terms pending the hearing and determination of the appeal herein. The application is supported by an affidavit sworn on 12th October 2021 by the Applicant, and the grounds upon which it is based are that there exist exceptional or unusual circumstances to enable the granting of bail in the interests of justice for reasons that the applicant has a short sentence and it is unlikely that his appeal will be heard expeditiously in view of the shortage of judges, that the prison is congested and the applicant is fearful that his life and health may be affected by covid-19 infections; and that he is not a flight risk.
2. The Applicant annexed a copy of the impugned judgment delivered by the High Court on 20th May 2020 and of his sentencing ruling. The ground for the application were reiterated during the hearing of the application on 31st January 2022 by Ms Aoko, the learned counsel for the Applicant, who relied on written submissions dated 18th January 2022. The counsel cited the cases of *Jivraj Shah v R* (1966) KLR 605 and *Chimanbbai v R* (1971) EA 343 for the principles to warrant grant of bail pending appeal, and pointed out that the Applicant was convicted on 10th May, 2020 and sentenced on 14th April 2021, and had already served 2 years out of his 7-year imprisonment term.



3. Ms. Ongeti, learned counsel for the Respondent, opposed the application, and relied on Grounds of Opposition dated 28th January 2022. The Respondent stated therein that the application does not meet the legal requisite threshold of the orders since the Applicant has not demonstrated any peculiar and exceptional circumstance to warrant grant of the orders sought, and courts are now fully functional after they were reopened after the COVID-19 pandemic with matters even proceeding virtually, and in any event that the Applicant had not provided any supporting evidence of his risk to infection by COVID 19. In addition, that Applicant is facing a long sentence of 7 years for the serious offence of manslaughter, and the intended appeal has no chance of success whatsoever as the evidence tendered by the prosecution is overwhelming, well corroborated and sufficient to warrant the conviction arrived at.
4. A brief background of the events giving rise to the application is that the Applicant, who was a police officer at the time of commission of the offence, was initially charged with the murder of a deceased colleague after a gunfight. After trial, he was subsequently convicted for the offence of manslaughter in a judgment delivered by the High Court on 20th May 2020, and sentenced to serve seven (7) years' imprisonment by the said Court on 14th April 2021.
5. This Court has discretion under Rule 5(2)(a) of the *Court of Appeal Rules* to order that an Appellant be released on bail pending the determination of an appeal once a notice of appeal has been given within fourteen days of the decision being appealed against. In this regard, the Applicant annexed a copy of a notice of appeal dated 19th April 2021 and lodged on 26th April 2021. In addition, the principal consideration is if there exists exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail and, the most important ground being whether the appeal had overwhelming chances of being successful.
6. Hence, 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. But it must also be remembered that an applicant seeking bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside. See in this regard the decisions of this Court in *Mutua vs R.* [1985] KLR 497 and *Jivraj Shah v Republic*[1986] eKLR.
7. The issue for determination therefore, is whether the Applicant herein has demonstrated any exceptional or unusual circumstances to warrant his being released on bail pending appeal. The Applicant relies on the implications of COVID-19 pandemic and the short length of his sentence to urge that it is in the interests of justice that he is released on bail. It is notable in this regard that he has not raised any arguments as to his appeal being successful, and having already been convicted, this Court cannot grant bail on considerations unrelated to the substance of an appeal raised by the Applicant on the effects of the COVID-19 pandemic and shortage of judges.
8. In addition, it is notable that one of the considerations that the High Court took into account in imposing the seven-year imprisonment sentence was the cumulative two years the Applicant had spent in custody before and after his trial. He will therefore be required to serve a seven-year imprisonment sentence, which in our view is not a short sentence. For that reason, we are of the view that this is not a proper case in which to exercise our discretion in the Applicant's favour.
9. This application dated 12th October 2021 is accordingly found not to have merit, and is hereby dismissed with no order as to costs.
9. Orders accordingly.



DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF APRIL 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

