



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & GATEMBU, J.J.A.)

CRIMINAL APPLICATION NO. E006 OF 2020

BETWEEN

JOSHUA KIPROP KISORIO.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an Application for bail pending appeal in an intended appeal from the judgment of the

High Court of Kenya at Nairobi (Luka Kimaru, J.) delivered on 22nd July 2020

in

Criminal Appeal No. 246 of 2019)

RULING OF THE COURT

1. Joshua Kiprop Kisorio (the applicant) was convicted by the Anti-Corruption Court and sentenced to serve several years imprisonment on various charges. His appeal to the High Court (Luka Kimaru, J) was unsuccessful and the said court upheld both conviction and sentence in a judgment rendered on 22nd July, 2020. The applicant is therefore, currently serving custodial sentence.
2. Being aggrieved, he has moved to this Court vide a Notice of Appeal filed on 2nd September, 2020 in which he challenges both conviction and sentence. In the meantime, the applicant has filed the Notice of Motion dated 9th September, 2020 pronounced to be premised on **Articles 49, 51(1), 159(2)(b) & (d)** of the Constitution of Kenya and **Rule 5(2)a** of this Court's Rules and all other enabling provisions of the law, seeking in the main an order that he be admitted to bail pending hearing and determination of the appeal. In the alternative, and without prejudice to the main prayer he prays that his appeal, being **Criminal Appeal No. 246 of 2019** be heard on priority basis.
3. The motion is predicated on the grounds on its face and supported by the affidavit sworn by the applicant on 9th September, 2020. The applicant deposes that he has a medical history of chronic peptic ulceration and severe chest infection; that if he is exposed to the danger of contracting Covid 19 Virus which he says would be lethal as he has underlying health issues. He also avers that he is not a flight risk as he is a person of fixed abode, and that if he is not released on bail pending hearing and determination of appeal, in the event his appeal succeeds, he will have served a substantial part of his sentence. He therefore urges us to allow this application.
4. There is no replying affidavit or submissions filed by the respondent. In his oral submissions in Court at the plenary hearing of the application, Mr. Mwangi learned counsel for the applicant urged that the intended appeal has overwhelming chances of success. He maintained that the two courts below erred by misapprehending the documentary evidence before them pertaining to the forged signatures in the documents in question hence erroneously finding that the applicant was the perpetrator. It was learned counsel's contention that the document examiner's report had exonerated the applicant.
5. On his part, Mr. Njeru learned counsel for the State explained to the Court that he was unable to prepare written submissions because he could not get the lower court's proceedings. He nonetheless maintained that the conviction was sound and the appellant was serving a lawful sentence. As for the applicant's medical condition, counsel was of the view that the same can be well managed in prison.
6. We have considered the application along with the submissions by counsel. Even though granting bail pending appeal is at the discretion of the Court, the court has over the years established some principles that guide the Judges in their exercise of the said discretion. For

instance, in the case of Jivraj Shah v. Republic (1986) KLR 605 this Court pronounced itself as follows:-

“1. The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.” (Emphasis supplied)

8. This position was reiterated in Francis Kamote Mutua v Republic [1988] eKLR where the Court stated thus:-

“It must be remembered that a person has been convicted by a properly constituted Court, and is undergoing punishment, because of that conviction, which stands until set aside on appeal. It is not wise to intervene either from the point of view of the welfare of the Appellant or the State, unless there is a real reason why the Court should hold that he should not be deprived of his liberty. The best test of that consideration is whether the Appellant can show an overwhelming chance of establishing his right to be set at liberty. If he does not do so, the law should take its ordinary course.” (Emphasis added)

(See also Issack Tulicha Guyo v Republic [2011] eKLR).

7. Before delving into the substance of this application, it is imperative to note that the applicant has not annexed the impugned decision. The Court is in the circumstances not able to decipher the reasons why the appellant’s appeal was dismissed. As the application stands now, it is impossible for the Court to assess the evidence adduced before the two courts below and the law applied to support the conviction, for us to determine whether the appeal has chances of success. Worse still is the absence of the memorandum of appeal which would have shed some light on the aspects of the law challenged by the appellant on this appeal.

8. It is not sufficient for the applicant to fault the learned Judge in the submissions only because in absence of the judgment, the Court is not able to verify the correctness of the issues raised in the submissions. We do not have sufficient material before us to enable us apply the principles set out in the Jivraj case (*supra*). We cannot exercise our discretion *in vacuo*. In as much as we sympathise with the applicant’s health status, he has not laid before us sufficient material to enable us exercise our discretion in his favour.

9. We decline the prayer for the appellant’s release on bail. We however direct that **Criminal Appeal No. 246 of 2019** be given a hearing date on priority basis.

Dated and delivered at Nairobi this 4th day of June, 2021.

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR