Muasya v Republic (Criminal Appeal E017 of 2022) [2024] KEHC 588 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E017 OF 2022

FR OLEL, J

JANUARY 31, 2024

BETWEEN

ELVIN MUTUA MUASYA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Mr R.W. Gitua dated on 9th May 2023 at Mavoko Criminal S.O Case No. 15 /2020)

RULING

a. Introduction

1. The appellant herein, Elvin Mutua Muasya, was charged before the Mavoko Chief Magistrate's Court in Criminal (SO) Case No. 15 of 2020 and convicted of the offence of defilement contrary to section 8(1) as read together with section 8(4) of the *Sexual Offences Act*. No. 3 of 2006. Upon conviction he was sentenced to serve 10 years imprisonment.

2. Aggrieved by the said decision he has lodged this appeal. Pending the hearing and determination of the appeal, he seeks that he be admitted to bail. According to him, his appeal has overwhelming chances of success. He expounded this by stating that the trial Magistrate erred by relying on the evidence of a single witness without warning himself of the danger of relying on such evidence. It was further contended that the medical evidence adduced did not support the finding of the trial magistrate and therefore the magistrate erred to conclude that the hymen of the minor had been broken and/or penetration proved as required in law. It was thus in the interest of Justice and fair to allow the prayers sought and grant bail to the Appellant pending hearing and determination of the Appeal filed.

3. It was therefore submitted that the said grounds disclose the existence of an appeal that has overwhelming chances of success and is likely to succeed even before the same is argued in court based on the judgment of the court. The appellant finally submitted that he was a married man with a wife

and child, who relied on him as the sole bread winner and therefore ought to be given a chance to take care of his young family.

4. In opposing the application, the Respondent averred that the ingredients of the offence with which the appellant was charged were proved before the trial court. It was further noted that the sentence facing the appellant is a long one and he was likely to Jump bail. To the Respondent, the appeal has no chances of success and the applicant has not demonstrated any peculiar and exceptional circumstances warranting the grant of the orders sought.

b. Determination

5. I have considered the application and the affidavit in support thereof, the submissions filed and the oral submissions of the Respondent made in opposing this application.

6. Article 49(1)(h) of the *Constitution* provides that:-

> An accused person has the right...
>
> (h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

7. However, a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the *Criminal Procedure Code* provides as follows:

> After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.

8. It was therefore held in *Masrani vs. R* [1060] EA 321 that:

> "Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction."

9. In *Charles Owanga Aluoch vs. Director of Public Prosecutions* [2015]eKLR where it was held that:

> "The right to bail is provided under Article 49(1) of the *Constitution* but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:
>
> 1. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
>
> 2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, then, a condition of granting bail will exist.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued."

10. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the Court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

    a. Whether the appeal has overwhelming chances of success.

    b. There are exceptional or unusual circumstances to warrant the Court's exercise of its discretion.

    c. There is a high probability of the sentence being served before the appeal is heard.

11. In this case, according to the applicant his appeal has overwhelming chances of success on the grounds that there was no sufficient evidence to warrant his conviction and the court did not warn itself on relying on the danger of convicting him based on the evidence of a single witness.

12. While these contentions may well be sustained by the Court at the hearing of the appeal itself, I am not satisfied that they constitute overwhelming chances of success. Insufficiency of evidence, and irregularity in proceedings are allegations that Courts do deal with routinely and nothing makes the said allegations exceptional or show that the appeal has overwhelming chances of success.

13. To constitute overwhelming chances of success, the applicant must show the Court, without the necessity of detailed analysis of the evidence, a glaring error committed by the trial Court such as a patently illegal sentence. Where such a decision can only be arrived at by a minute and protracted examination of the lower court record, it cannot be said that such an appeal has overwhelming chances of success since to do so would amount to invitation to the Court to usurp the position of the appellate court and to determine the appeal at the interlocutory stage.

14. Further, there is a difference between an appeal that has prospects of success and one that that has overwhelming chances of success. While the latter may warrant the party to be admitted to bail/bond during the pendency of the appeal, the former does not. In this case, it is my finding that the matter falls under the former and hence does not meet the threshold for admission to bail pending appeal. See *Somo vs. R* [1972] E A 476. A (supra).

15. The applicant further disclosed that he was married and has a child and ought to be given a chance to take care of his young family as he was the sole bread winner. The Court of Appeal in *Daniel Dominic Karanja vs. Republic* [1986] eKLR however, dealt with similar allegation as follows:

> "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 illhealth per se would

> constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country."

16. In this case the appellant was sentenced to 10 years. It is very unlikely that the appeal would be disposed after 10 years. In fact, if the appellant's legal counsel moves with speed, the appeal may well be disposed of in the next few months. As regards the appellants alleged family and marital responsibilities, those factors even if true, in my view, do not, on their own, constitute exceptional circumstances. It is my view that it would be better for the appellant to expeditiously pursue his appeal so that he can now ascertain where he stands.

17. In light of the foregoing I find no merit in this application and dismiss the same. Let the appellant expedite the process of the hearing of his appeal.

18. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 31ST DAY OF JANUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 31ST DAY OF JANUARY, 2024

In the presence of;

Appellant present from Kitengela prison

Mr. Mongare for Respondent

Mr. Kilonzi holding brief for Mr. Kyalo for Appellant

Sam - Court Assistant