



**Keter v Republic (Miscellaneous Criminal Application E001 of 2024)
[2024] KEHC 10224 (KLR) (19 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2024
RN NYAKUNDI, J
AUGUST 19, 2024**

BETWEEN

GODFREY KIPKOECH KETER APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein is the convictee of Eldoret main prison. The Applicant was charged, convicted and sentenced to serve 14 years' imprisonment on the offence of attempted murder under section 220 of the *Penal Code*. He appealed against the conviction and sentence, and later applied for bail/bond pending appeal.
2. The Applicant filed undated application which was brought under Section 357 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya and Articles 87, 49(h), 50(1)(2) and 259 of the *Constitution* of Kenya 2010 which is before me.
3. The Applicant seeks for orders that the Honourable Court be pleased to admit the Applicant to bail pending hearing and determination of the instant appeal.
4. The application was premised on the grounds that the Applicant herein is the convictee of Eldoret main prison. The Applicant was charged, convicted and sentenced to serve 14 years' imprisonment on the offence of attempted murder under section 220 of the *Penal Code*. He appealed against the conviction and sentence, and later applied for bail/bond pending appeal.
5. That the Applicant was convicted by the Subordinate Court and has filed the instant appeal. That the Applicant has got good grounds of appeal with overwhelming chances of success.
6. The Applicant through his Supplementary Bail/Bond Grounds stated the following:



- a. Family land dispute: He said that he contracted lawyer Mr. Mitei to represent his family on a land dispute case at the high court and that when he was convicted, the lawyer, Mr. Mitei has since ignored his calls putting his family and him in an awkward position and they don't know the status of the case whether to continue as agreed.
- b. Sell Agreement Defaulted: he stated that the lawyer Mr Mitei facilitated the signing of property/plot Sale Agreement of Kshs 1.6 million which the buyer paid Kshs 200,000 and the balance were to be settled in three installments, last being December 2023. He further said that the buyer wants to develop the property taking advantage of the imprisonment and that his lawyer, Mr. Mitei has not responded to his calls and yet he has all the facts of the agreement.
- c. Petition of the Appeal and the Charge: he stated that the issues raised in the petition of Appeal are weighty and that the charge carries a sentence of up to life imprisonment, it needs proper research and analysis hence he prays to be bonded so that he gets enough time and facilities to prepare a good submission as well as reaching out to his wife (the Complainant) through the ADR if this court permits.

Applicant's case Summary

7. The Applicant submits that Section 357 of the *Criminal Procedure Code* under which the application is brought states that: -

‘After the entering of an appeal by the 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 the appeal.’
8. The Applicant relies on the case of *Dominic Karanja v Republic* (1983) KLR 613 where the court stated inter alia: That if the appeal had such overwhelming chances of success there is no justification for depriving the Appellant of his liberty and that the minor relevant consideration would be whether there were exceptional or unusual circumstances.
9. The Applicant submits that the principles for granting bail/bond pending an appeal were reiterated in the case of *Jivraj Shah v Republic* [1986] KLR 605 as follows: -
 1. The principal contribution in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.
 2. 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.
 3. 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.
10. The Applicant also made reliance to Article 156 of the *Constitution* of Kenya 2010 and Article 157. The Applicant stated that he made an oral application for Alternative Dispute Resolution before the



Complainant and believes that if he was granted the same ADR option, they would have settled the matter peacefully out of court hence he was deprived the opportunity even after making a written application for diversion to the DPP.

11. The Applicant also stated that the trial Magistrate enhanced and changed his bail status from Kshs 30,000 to 200,000 personal bond. The Applicant also stated that the charge sheet was defective and the evidence adduced and which was used to convict was grievous harm as indicated in the P3 form filled by the doctor at the date of arrest.

Analysis and Determination

I have perused and considered the submissions filed by the Applicant as well as the submissions filed by the Director of Public Prosecutions.

12. 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.

13. In the case of *Masrani v R* [1060] EA 321, it was held 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.”

14. This court agrees with the position in the case of *Charles Owanga Aluoch v 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 *JivRaji Shah v R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

- “(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.
- (2) If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some 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, conditions for granting bail exists.
- (3) 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.”



15. The Court of Appeal in the case of *Dominic Karanja v Republic* (1986) KLR 612 stated that: -

- “(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;
- (b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;
- (c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;
- (d)

16. This court has considered the decisions above on whose basis point that it is the discretion of the court to grant bail pending appeal, which discretion should be exercised judiciously. In such an application, the applicant has the burden of establishing that the appeal has high chances of success or has a high likelihood of serving a substantial part of the sentence before hearing the appeal.

17. In the application herein, only judgment of the trial court was availed but not the proceedings. This court was not in a position to peruse the record to establish whether an arguable appeal with high chances of success have been disclosed by the grounds of appeal.

18. The Applicant was sentenced on 23rd August 2021 to 14 years’ imprisonment Therefore, there is no likelihood of him having served a substantial part of the sentence before the appeal is heard. The current policy of quick disposal of cases does not create the possibility of delay in hearing of the appeal.

19. Additionally, this court observes that the Applicant has not demonstrated the existence of exceptional or unusual circumstance to warrant grant of bail pending appeal. The fact that the Applicant did not breach bail conditions in the trial court, is of good character, he is the bread winner of his family, and cooperated with the court in having the matter determined in good time are not exceptional circumstances to warrant admission to bail pending appeal.

20. In conclusion, this court finds no merit in the application and is therefore dismissed. Hearing of the appeal be fixed on a priority basis. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 19TH DAY OF AUGUST, 2024

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R. NYAKUNDI

JUDGE

