



**Ochieng v Republic (Criminal Appeal 139 of 2023)
[2024] KEHC 11526 (KLR) (Crim) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 139 OF 2023
LN MUTENDE, J
SEPTEMBER 30, 2024**

BETWEEN

JOSEPH OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Joseph Ochieng, the Applicant, has approached this court seeking bail pending appeal. He was charged in Makadara Chief Magistrate’s court with three (3) counts of committing indecent acts with three (3) minors aged between 13 and 11 years, respectively. Having been taken through full trial he was found guilty on all the three (3) counts, convicted and sentenced to serve five (5) years imprisonment on each count.
2. The application is premised on grounds that the applicant is of ill health and his continued stay in prison jeopardizes his frail health; he is not flight risk; he has a young family of six (6) children who solely depend on him; the burden of proof was not discharged by the prosecution; and, that it is in the interest of justice for the application to be allowed.
3. The State/Respondent filed grounds of opposition urging that; the application lacks merit, is misconceived and unsubstantiated; is incompetent and does not meet the threshold of granting bail pending appeal. That the application is an abuse of the court process as the prosecution discharged its burden beyond reasonable doubt; and, the applicant has not demonstrated any special exceptional or unusual circumstances to warrant the grant of bail pending appeal.
4. I have considered the rival arguments. Section 357 of the *Criminal Procedure Code* relied on by the applicant provides thus:



- (1) 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: Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.
 - (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.
 - (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.
5. Principles for granting bail pending appeal were stated in *Jivraj Shah v Republic* (1986) KLR 606 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.”
6. In *Dominic Karanja v Republic* (1986) KLR 612, the court stated thus:
- “(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)

7. The right to bail pending appeal is not automatic and not subject to the right to be presumed innocent as provided by Article 49(1)(h) of the Constitution; therefore; the question whether the person is a flight risk or not does not arise. In Mutua v R (1988) the court of appeal stated that

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”
8. The applicant herein was convicted and is serving a lawful sentence. His appeal will be considered as a balance of rights between the convict whose appeal should not be rendered nugatory and the public interest to punish him as the offender that he is. This means that the burden of proof lies on the applicant to establish the factors that may be favourable to him calling for his release on bail at this stage.
9. In Mutua v R. (*Supra*) the court held that:

“It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so. It is my opinion that the applicant has not established existence of any exceptional circumstances to warrant grant of bail pending appeal..”
10. It is argued by the applicant that there were contradictions in the matter, the evidence of the minors was uncorroborated; ingredients of the offence were not proved; and, the magistrate approached the case with a predetermined mindset hence proceeding on the wrong basis of the law.
11. The argument put forth suggests that the appeal has high chances of succeeding. Where there is a likelihood of an appeal succeeding the appellate court would have no reason of denying the applicant orders sought. The instant matter concerns three minors of tender age where evidence adduced can be relied on to return a verdict of guilty as long as the trial court believes the child(ren) and records reasons for the belief. The applicant has delved into merits of the appeal which this court must restrain itself from determining at this stage lest it is deemed to conclusively determine the appeal.
12. On the question of existence of exceptional circumstances; it is submitted that the applicant is innocent, he is a bread winner of children, he is of ill health and requires specialized treatment.
13. As clearly stated in the Dominic Karanja case (*Supra*) hardship facing a family, if any, exists, as it was not demonstrated in the instant case; and, even ill health, as medical facilities that are equipped exist in prisons, do not amount to exceptional circumstances.
14. The upshot of the above is that, the applicant has failed to discharge the duty of demonstrating existence of reasons requiring him to be released on bail pending appeal. Accordingly, the appeal which is unmeritorious fails and is dismissed.
15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 30TH DAY OF SEPTEMBER, 2024.

L. N. MUTENDE



JUDGE

