



REPUBLIC OF KENYA



**Njiru v Republic (Criminal Appeal E087 of 2024)
[2024] KEHC 16066 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E087 OF 2024
LM NJUGUNA, J
DECEMBER 19, 2024**

BETWEEN

JAMES NJAGI NJIRU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellant/applicant was charged with the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. He was convicted and sentenced to 15 years imprisonment. Being dissatisfied with the decision of the trial court in Siakago MCSO No. E030 of 2021, the appellant/applicant herein has filed a petition of appeal alongside a notice of motion dated 27th October 2024 seeking orders that:
 - a. Spent;
 - b. The applicant herein be granted bail pending hearing and determination of the appeal herein; and
 - c. Costs be provided for.
2. The applicant based his application on the argument that the appeal has high chances of success and he stands to suffer irreparably if the order sought is not granted. He stated that he suffered a road traffic accident which caused him injuries which are still being treated and that he will not fully recover if he continues being incarcerated. That he was released on bail of Kshs.50,000/= and he attended court faithfully except when he was hospitalized after his accident.
3. In its grounds of opposition, the respondent opposed the application, stating that no exceptional circumstances have been proved by the applicant to warrant granting of bail pending appeal. Further, that no weaknesses have been cited in the prosecution's case that may cause the appeal to succeed.



4. The application was canvassed by way of written submissions.
5. The applicant submitted that his appeal has triable issues and it has high chances of success. He relied on the case of *Jivraj Shah v. Republic* (1986) eKLR and argued that the courts have previously guided on the parameters to be considered while granting bail pending appeal. He argued that since the accident, he continually requires specialized medical attention and his wounds have not fully healed. That he is aware that the court is going on transfer and that it may take time before the incoming Judge settles down to hear his appeal. That these are exceptional and unusual circumstances that warrant granting of bail pending appeal. Further reliance was placed on the case of *Maripett Loonkomok v Republic* [2016] KECA 520 (KLR) and he argued that there is weakness in the prosecution's case which gives the appeal overwhelming chances of success.
6. In its submissions, the respondent relied on the case of *Jivraj Shah v. Republic* (1986) eKLR and argued that the court should grant bail pending appeal where the applicant has disclosed exceptional circumstances. That while *the constitution* guarantees an accused person the right to bail, there has to be sufficient grounds advanced for the same since in the case of the applicant, presumption of innocence does not apply after conviction. It relied on the case of *Daniel Dominic Karanja v Republic* [1986] KECA 37 (KLR) and urged the court to dismiss the application.
7. The issue for determination is whether the application has merit.
8. To begin with, it must be well understood that an appellate court can only grant bail pending appeal on discretionary basis according to Article 49(1)(h) of *the Constitution* of Kenya which 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.”
9. On appeal, the appellant/applicant is no longer awaiting trial but rather, he has already been convicted and sentenced and is awaiting hearing of the appeal, thus invoking the application of Section 357 of the Criminal Procedure Code which provides:

“ 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...”

This was the position in the case of *Masrani v R* [1060] EA 321, where it was held thus:-

“ 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.”
10. The principles guiding grant of bail pending appeal are set out 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.”
11. The applicant was released by the trial court on bond of Kshs.200,000/= or alternative cash bail of Kshs.50,000/= but in the course of the proceedings, warrants of arrest were issued because he did not attend court on several occasions. The cash bail he paid was forfeited and when he appeared before court, he proved that he had been involved in an accident and was admitted in hospital where he was undergoing treatment including surgical procedures. The court noted the documents he produced to prove that he was unwell and when the case proceeded he did not, at any point fail to appear before court. In this application, the applicant stated that he is still in need of medical attention following the accident and that being incarcerated does not help him to get better quickly.
 12. On establishment of exceptional circumstances, I am guided by the case of *Dominic Karanja v Republic* (1986) KLR 612 where the court labored to explain what exception circumstances encompasses. The court stated:
 - “(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)
 13. In my view, and from the perusal of the treatment notes annexed to the affidavit, the same do not reflect serious injuries. Further, it has not been alleged that the facilities at the prison cannot handle his condition.
 14. I find that the application has no merit and is hereby dismissed.
 15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE



..... for the Appellant/Applicant

..... for the Respondent

