



REPUBLIC OF KENYA



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**Kipruto v Republic (Criminal Appeal E072 of 2022)
[2023] KEHC 309 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E072 OF 2022
RN NYAKUNDI, J
JANUARY 27, 2023**

BETWEEN

ELPHAS KIPRUTO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the original conviction and sentence in
Eldoret Chief Magistrate's Court Criminal Case No E572 of 2022)*

RULING

Coram: Hon. Justice R. Nyakundi

D.K Korir & Associates for the appellant

Mr Mugun for the state

- 1 The applicant approached this court vide a notice of motion dated November 22, 2022 seeking the following orders;
 1. Spent.
 2. That this honourable court be pleased to admit the appellant to bail/bond pending hearing and determination of the appeal herein on such terms as the honourable court shall deem fit, appropriate and expedient in the circumstances.
 3. That costs of this application be borne by the respondent.

Brief Facts

- 2 The applicant was charged with the offence of threatening to kill contrary to section 223(1) of the [Penal Code](#). the particulars of the offence are that on March 6, 2022, at Kaptumo village, Kapkoi



location, Kesses sub county within Uasin Gishu County, without lawful excuse uttered the words “*wewe sio mama yangu na nitahakikisha nimekuua wakati wowote*” to Constantine Melly, words that were meant to cause fear to the said Constantine Melly.

- 3 The appellant was convicted on his own plea of guilty and was sentenced to serve 3 years in prison. Being aggrieved with the conviction and sentence he filed a petition of appeal dated May 26, 2022.
- 4 The applicant then approached this court for bail pending appeal under article 51 of the [Constitution](#), section 356 and section 357 of the [Criminal Procedure Code](#).

Applicant’s Case

- 5 Learned counsel for the applicant filed submissions on the application on July 20, 2022. He submitted that the principles and guidelines upon which bail/bond pending appeal are anchored were discussed in the case of [Charles Owanga Aluoch vs Director of Public Prosecutions](#) [2015] eKLR. On the basis of the principles set in the case law, he crafted his issues for determination and submitted that the appellant’s appeal herein is likely to be successful on account of a substantial point of law.
- 6 In his supporting affidavit sworn on November 22, 2022, the appellant stated that his appeal is likely to succeed on account of a substantial point of law namely; that the learned trial magistrate failed to satisfy herself that the procedure stipulated in section 207 of the [Criminal Procedure Code](#) and the case of [Adan vs Republic](#) (1973) EA 445 and 446 had complied with before convicting the appellant on his own plea of guilty.
- 7 Counsel contended that although the trial court’s record indicates that the substance of the charges and every element were read out to the appellant in a language that he understood, the court failed to state which language the appellant understood. The court record clearly shows that the trial court neither indicated the language in which the charges and facts were read and explained to the appellant nor the language that he understood. Learned counsel maintained that the plea was not unequivocal.
- 8 Learned counsel submitted that there are exceptional or unusual circumstances to warrant the honourable court to exercise its discretion and grant the appellant bond/bail pending appeal. The complainant, one constantine Meli who is the biological mother to the appellant has since forgiven him and is ready to welcome him back to the family. This is evidenced by the copy of minutes of the family meeting held on May 11, 2022 which is marked as annexure “EK 1” to the appellant’s supporting affidavit. The reconciliation of the parties is an exceptional or unusual circumstance and he urged the honourable court to promote reconciliation between the family members herein considering that the offence in question is one of a private and personal nature. This is in tandem with the provision of article 159 (2) (c) of the [Constitution](#) which promotes alternative dispute resolution.
- 9 Learned counsel submitted that there is a high likelihood that the sentence herein or a substantial part of it will have been served by the time this appeal is heard and determined. The trial court sentenced the appellant herein to 3 years imprisonment without an option of a fine on May 16, 2022 as a result of which he lodged the instant appeal on May 27, 2022. Seven (7) months later, the said appeal has not made any substantial progress and as such there is a likelihood that the said sentence are a substantial part of it will have been served by the time the appeal is heard and determined.
- 10 Counsel concluded by citing [R vs Kanji](#) [1946] 22 KLR, as cited with approval in [Julius Kamitu Alex v Republic](#) [2019] eKLR where De Lestang, Ag, J (as he then was) and praying that the court allow the application as prayed.
- 11 There were no submissions on record for the respondent.



Analysis and Determination

12 The appellant is seeking bail pending appeal from his sentence and conviction.

13 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."

14 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."

15 The principles for granting bond pending appeal are well set out in the case of Jivraj Shah v Republic [1986] eKLR which include;

"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.

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.

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."

16 Upon considering the application and the relevant principles to be applied in determining whether to grant bail pending appeal, the court is of the strong view that the case is ripe for bail to be granted. It is evident that the appeal might take a substantial time of the sentence to be determined. Further, the complainant has forgiven the appellant as per the minutes of the family meeting held on May 11, 2022. The court is keen on encouraging alternative dispute resolution as a method of ensuring reconciliation and therefore this case presents an opportunity to do so.

17 Further, upon examining the record of the trial court, without pre-empting the outcome of the appeal, the appeal has high chances of success as the equivocality of the plea is questionable.

18 In the premises, it is in the interests of justice to allow the application as prayed. In the premises, the application is hereby allowed and the applicant is hereby released on bond of Kshs 300,000/= with one surety pending the determination of this appeal.

19 Each party shall bear its own costs.

20 It is so ordered.



DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF JANUARY 2023.

R. NYAKUNDI

JUDGE

In the Presence of Appellant

Mugun for the State

