



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ludubwi v Republic (Criminal Appeal E031 of 2022)  
[2023] KEHC 331 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 331 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E031 OF 2022  
JN KAMAU, J  
JANUARY 24, 2023**

**BETWEEN**

**ENOS MUGANGAI LUDUBWI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon F. Rashid (PM) delivered at Winam in the Principal Magistrate's Court in Sexual Offence Case No 74 of 2020 on 6th July 2022)*

**RULING**

**Introduction**

1. In his Notice of Motion dated and filed on 20<sup>th</sup> July 2022, the Appellant herein sought for orders that he be admitted to bail pending the hearing and determination of the Appeal herein to wit HCCRA No E031 of 2022.
2. He swore an affidavit in support of the said application on 20<sup>th</sup> July 2022. He averred that he was convicted and was serving a sentence of ten (10) years imprisonment that was meted upon him in Winam Sexual Offence Case No 74 of 2020. He pointed out that his appeal herein had a high chance of success as was evidenced in his Petition of Appeal. He added that he was admitted to bail throughout the proceedings of the Trial Court and that he faithfully attended court until the conclusion of the case.
3. He averred that he was not a flight risk and undertook to appear before this court as and when required. He added that he was willing to comply with any condition the court may deem fit to impose as security for his attendance at all times as and when required.
4. He emphasised that he would not flee the jurisdiction of court or flee his country or abandon his family as he was the bread winner. He contended that his incarceration was prejudicing the welfare of his four (4) children as they depended on handouts to survive yet they needed school fees.



5. He pointed out that the proceedings of the Trial Court had not been typed to enable him prepare a record of appeal. He was therefore apprehensive that he might spend a long period under confinement, a situation that would make his appeal meaningless if it was successful.
6. On 25<sup>th</sup> October 2022, the Applicant informed the court that he filed his submissions on the same date and undertook to place the same in the court file. As at the time of writing the decision herein, the said Written Submissions had not been placed in the court file. On the other hand, the Respondent filed its Written Submissions dated 17<sup>th</sup> October 2022 on 19<sup>th</sup> October 2022. This Ruling is therefore based on the Applicant's Affidavit and the Respondent's Written Submissions.

### Legal Analysis

7. The Respondent submitted that there were no inconsistencies in the Prosecution's case and that the Applicant had not demonstrated any unusual circumstances to warrant bail pending appeal. In this regard, it relied on the case of *Jivraj Shah vs Republic* [1986] KLR where it was held that in consideration of the conditions precedent for granting bail pending appeal, the principal consideration was if there existed exceptional or unusual circumstances upon which the court could fairly conclude that it was in the interest of justice to grant bail.
8. It was its argument that the Applicant's case had no probability of success and urged the court to dismiss the present application.
9. This court considered the principles of granting bail/bond pending appeal that were laid down in the case of *Jivraj Shah vs Republic* (Supra). These were that:-
  1. There must be in 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. 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.
10. Having said so, granting of bail pending appeal is at the discretion of the court. As was stated in the case of *Daniel Dominic Karanja vs Republic* [1986] eKLR, availability of sureties, ill health, suffering of a convict's family were not grounds for the granting of bail pending appeal. However, the anticipated delays in hearing an appeal, the length of the sentence, whether or not the applicant had pleaded guilty and/or admitted the offence and option of a non-custodial sentence were factors that an appellate court could take into account when considering an application for bail pending appeal.
11. At this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. It should only be concerned with the question of whether or not the appeal would be rendered nugatory if bail/bond pending appeal was not granted.
12. Notably, the Appellant herein was found guilty of a sexual offence. The offences under the *Sexual Offences Act* have no option of a fine which would prejudice an applicant if his or her appeal was found to have been successful as he or she would ordinarily have served a prison term despite having had an option of a fine.
13. Although he did not place his Written Submissions in the court file as had been indicated on 25<sup>th</sup> October 2022, this court nonetheless found and held that the Appellant herein failed to demonstrate that exceptional circumstances existed to warrant him being grant bail /bond pending appeal. The fact that he had a family that depended on him or that he attended trial without absconding were not



sufficient reason for him to be granted bail/bond pending the hearing and determination of the Appeal herein.

14. This court noted that the proceedings which he was apprehensive would not be typed on time were ready. The lower court file had also been availed to this court. The onus was on him to lodge his Record of Appeal without any delay so that he does not serve a substantial part of his sentence before his Appeal could be heard and determined.
15. It was therefore the considered view of this court that this was not a suitable case for it to exercise its discretion and grant the Appellant bail/bond pending the hearing and determination of the Appeal herein.

### **Disposition**

16. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 20<sup>th</sup> July 2022 was not merited and the same be and is hereby dismissed.
17. In view of the fact that lower court proceedings had already been typed and the lower court file placed in the file herein, the Appellant be and is hereby directed to file and serve his Record of Appeal within thirty (30) days from the date of this Ruling.
18. Matter to be mentioned on 15<sup>th</sup> March 2023 to confirm if the Appellant will have filed the said Record of Appeal and/or for further orders and/or directions.
19. Either party is at liberty to apply.
20. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF JANUARY 2023**

**J. KAMAU**

**JUDGE**

