



REPUBLIC OF KENYA



**Ita & another v Republic (Criminal Appeal E002 of 2023)
[2023] KEHC 18045 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E002 OF 2023
LM NJUGUNA, J
MAY 31, 2023**

BETWEEN

WILLIAM NGARI ITA 1ST APPLICANT

CYRUS NGURU 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court is an application by the appellant/1st applicant dated the 6/3/2023 wherein she seeks for prayers that:
 - i. Spent.
 - ii. The applicant be granted bail pending the hearing of the appeal herein.
 - iii. This Honourable Court do make any other order it deems fit in the circumstances.
2. The application is premised on the grounds on its face and it's supported by the affidavit of the 1st applicant.
3. The applicant has stated that he was tried and convicted on 13.02.2023 and thereafter sentenced on 21.02.2023 to a jail term of three years by Hon. Wangeci Ngumi in Siakago Criminal Case No 650 of 2020. That having been dissatisfied with the conviction and sentence, he has lodged an appeal; it was his case that he is a lawyer by profession having graduated from Kenyatta University in December 2021 and as such, he is of good conduct hence not a flight risk. He averred that an admission to bond/bail term will afford him a chance to join the Kenya School of Law to pursue Advocates Training Programme and that, given the time it will take to hear the appeal herein and the nature of the sentence, if successful, the appeal will be rendered nugatory if he is not granted bail pending appeal.



4. In response, Ms. Mbevi, counsel for the respondent filed grounds of opposition to wit that the application has no merit as the orders sought herein are discretionary and not absolute as the applicant's innocence was compromised upon conviction. That the applicant has not demonstrated any peculiar and exceptional circumstances to warrant grant of the orders sought herein. Additionally, that the appeal has no chance of success as the evidence tendered by the prosecution was overwhelming and that there is no probability that the applicant will serve the sentence before the appeal is heard and determined.
5. The application proceeded by way of written submission as had been directed by this court.
6. The applicant submitted that an accused person has the right to be released on bond or bail, on reasonable terms pending a charge or trial, unless there are compelling reasons. Reliance to support this proposition was placed *inter alia* on the case of [Charles Lwanga Aluoch v Director of Public Prosecution](#) [2015] eKLR. That the appeal is grounded on denial of the appellant/applicant's right to a fair hearing and disregard of procedural safeguards which guarantee the right to a fair trial. It was enumerated *inter alia* that; the trial magistrate denied the applicant an opportunity to adduce and challenge the prosecution's evidence and further, the trial magistrate proceeded to hear and determine the case despite this court ordering stay of proceedings.
7. It was further submitted that the appeal has a probability of success. Reliance to support this proposition was placed on the case of [Moitchand v Republic](#) [1972] eKLR. Additionally, the applicant submitted that he has demonstrated through his affidavit exceptional circumstances on the basis of which, the court can grant him bail pending appeal *inter alia* that he is a law student awaiting to join Kenya School of Law to undertake Advocates Training Programme. This court was therefore urged to take judicial notice that the disposal of an appeal could take some time owing to the backlog of cases in this country. Reliance was placed on the case of [Abdulabhi v Republic](#) [1971] EA 346. As such, the applicant prayed that the application herein be allowed.
8. The respondent submitted that though it is a constitutional right of an accused person to be admitted to bail, it is worth appreciating the fact that the applicant/appellant is now a convict and therefore the threshold for an application for grant of bail pending appeal is much higher than that of an accused person. Reliance was placed on the case of [Jivraj Shah v Republic](#) (1986) eKLR. On whether there exists unusual or exceptional circumstances to warrant grant of bail pending appeal, it was stated that none was demonstrated. That no evidence was attached to show that indeed the applicant is a lawyer awaiting to join Kenya School of Law and further, it is trite that previous good character is not an exceptional or unusual factor while relying on the case of [Dominic Karanja v Republic](#) [1986] eKLR.
9. On whether the appeal has an overwhelming chance of success, it was submitted that the appeal is grounded on denial of rights to a fair hearing but the proceedings are evident that the applicant's rights under article 50 of the [Constitution](#) were upheld and that the court considered the law and evidence in convicting the applicant. That the applicant was given an opportunity to cross examine all prosecution witnesses and to mount a defence. On whether the applicant would be prejudiced by serving a substantial part of his sentence before the appeal is heard, it was submitted that the appellant has barely served one month out of the three year term. That the appeal herein can be heard on a priority basis and the same be dispensed with at the earliest time possible and further, the applicant did not advance sufficient grounds to satisfy this court that justice would not be served if he is not granted bail pending appeal. In the end, the respondent urged the court to dismiss the application for want of merit.
10. I have considered the application herein and I find that the main issue for determination is whether the same is merited.



11. Article 49(1)(h) of the Constitution of Kenya, 2010 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.

12. In the case of Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR, 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 Jivraj Shab v R [1986] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

- “(1) The principle 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 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.”

13. Also, 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”

14. The Applicant submitted that he has complied with Sec 357 (1) of the Criminal Procedure Code by filing an appeal, therefore, on the right trajectory in seeking the court’s judicious exercise of



the discretion to admit him to bail pending the hearing of the appeal. On the issue of exceptional circumstances, the Applicant stated that he is a law student awaiting to join Kenya School of Law to undertake Advocates Training Programme and therefore he should be given that opportunity by being released on bail. The Applicant further submitted that he is of good character and not a flight risk; additionally, that the appeal raises vital points of law with overwhelming chances of success and that the Applicant fully complied with the bail terms and conditions as was granted by the trial court until his conviction.

15. The Respondent in the Grounds of Opposition stated that the intended appeal has no chances of success and with the conviction and sentence of 3 years imprisonment, there is no probability of the sentence meted out being served before the appeal is heard and determined. That the Applicant's innocence was compromised upon conviction, and that the Applicant has not demonstrated any peculiar and exceptional circumstances. [See *Hisbam Shally v Republic* [2022] eKLR].
16. The court has perused the record of appeal and the proceedings by the trial court. Though no exceptional circumstances have been advanced by the applicant, the court notes that he is a lawyer by profession and he is waiting to join the Kenya School of Law to undertake Advocates Training Programme. The court will allow him to join the said programme pending the hearing and determination of the appeal.
17. In conclusion, the application herein is allowed. The Applicant may be released on a bond of Kshs 150,000/= with one surety of similar amount or cash Kshs 100,000/=. The Applicant shall attend the hearing of the appeal and in default the bail herein granted will be forfeited. The Applicant shall also be of good conduct in the society during the currency of the appeal.
18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF MAY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent

