Changtoek & another v Republic (Criminal Appeal E084 of 2022) [2023] KEHC 18193 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18193 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E084 OF 2022

HM NYAGA, J

MAY 30, 2023

BETWEEN

ROBERT CHANGTOEK .... 1ST APPELLANT

ALICE CHEPKORIR KETA .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The Appellants herein, Robert Changtoek and Alice Chepkorir Keta were charged before Molo Chief Magistrate's Court in Sexual Offence Case No. 20 of 2020 with the offences of defilement contrary to Section 8(1) (A) of the *Sexual Offences Act* and Benefiting from child prosecution contrary to Section 15(D) respectively. On November 18, 2022, they were convicted and sentenced to serve 15 and 10 years' imprisonment respectively.
2. Aggrieved by the said decision, the Appellants lodged this appeal. The grounds of appeal are set out in the petition of Appeal herein.
3. The appellants also filed an Application dated November 30, 2022 anchored under Section 357 of the *Criminal Procedure Code* and Article 49(1)(h) of *Constitution*. The Appellants seek that they be admitted to bail/bond pending the hearing and determination of the appeal. Among the grounds cited in the application are;
   a. That their appeal has overwhelming chances of success since the trial court in arriving at its decision to convict them heavily relied on inconsistent and contradictory evidence that was marred with discrepancies and that this court only needs to look at the Judgement, proceedings and the Petition of Appeal to verify the same;

b. That the prosecution did not prove their case beyond reasonable doubt and that the conviction & sentence meted out on them was unjustified and inimical to their right to liberty;

c. That the Appellants are law abiding citizens and will abide by all the conditions that this Honourable Court may impose on them;

d. That the Appellant are apprehensive on account of the period of the sentence meted against them that unless they are granted bail at this juncture, they will have served a substantial term of sentence and will be irreparably prejudiced when this Honourable Court ultimately upholds their appeal;

e. That bail pending appeal will enable the Appellant to present their appeal in a sober and settled state of mind which cannot be achieved while they are incarcerated and;

f. That the psychological and physical damage that will be suffered while the Appellants are incarcerated will never be undone even after a successful appeal.

4. The Application is supported by an affidavit of Samuel Kipkirui Keta who is the brother to the 1st Appellant and a husband to the 2nd Appellant sworn on November 30, 2022 reiterating the aforementioned grounds. He also averred that the alleged minor gave birth during trial but the issue was never subjected to DNA sampling and mapping to establish the person responsible for pregnancy. The applicants urged the court to allow the application as prayed.

5. The application is opposed by the Respondent through the Replying Affidavit sworn by its State Counsel, Loice Murunga, on April 20, 2023. She averred that the Application totally lacks merit and same should be struck out and or dismissed forthwith.

6. It was her deposition that the appellants upon being convicted by a competent court their presumption of innocence was compromised and that since they are facing a long period of 15 and 10 years respectively their chances of absconding are high.

7. She deponed that the intended appeal has no chances of success as the prosecution evidence was watertight and that nothing has been adduced to this court to demonstrate that the appeal has high chances of success.

8. She averred that bail pending appeal is discretional and the burden of proving the existence of peculiar or exceptional circumstances remains in the Applicants backward. That nothing has been adduced to show that there exist any exceptional circumstances to warrant granting of the orders sought.

9. She asserted that the fact the applicants did not abscond in the lower court is not a guarantee that they will not abscond if released by this court as the circumstances changed from being innocent to convicts and that this fact is also not an exceptional circumstance as there is nothing peculiar in being a person of good behavior.

10. She contended that this is an era where appeals are heard and determined expeditiously, and since the appellants were sentenced to 15 and 10 years imprisonment respectively, there is no likelihood that by the time this appeal is determined the appellants would have served a substantial part of their sentences.

11. The application was prosecuted by way of written submissions.

12. The Appellant majorly rehashed the grounds of their application and averments contained in their supporting Affidavit and submitted that they should be granted the orders sought. Citing Sections 357(1) of the *Criminal Procedure Code* and the cases of *Jivraj Shah v Republic* [1986] KLR 605, *Chimambhai v Republic (No 2)* [1971] E.A.343, and *Arvind Patel v Uganda* S.C Cr. Appeal No. 1 of

2003, it was reiterated that the Appellant were convicted on inconsistent and contradictory evidence that was marred with discrepancies evidenced in the petition and that the prosecution did not prove their case against them beyond reasonable doubt.

13. They submitted that the birth certificate in this case is dated September 11, 2019 whereas the incident took place between March 2019 and February 2020 which is an indication that the birth certificate produced by the prosecution was manufactured purposely for the case.

14. The Appellant contended that penetration is proved through the evidence of the Victim corroborated by medical evidence. That where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child in order to determine whether there was penetration. They argued that the complainant herein tendered evidence in accordance with Section 124 of the *Evidence Act* and that no DNA matching and sampling was conducted to confirm the owner of the foetus which is an indication that the conviction against them was unsafe.

15. Further citing the case of *Kaguma v Republic* [2004] 1 EA 68, the Appellants reiterated that it is evident that the conviction and sentence meted out on them was unjustified and inimical to their right to liberty and that their appeal has a high probability of success.

16. On the part of the Respondent, they referred this court to the case of *Jivraj Shah vs Republic* [*supra*] and submitted that the appeal does not have any overwhelming chances of success and that there are no exceptional circumstances to warrant grant of the orders sought.

17. The respondent reiterated that the Appellants' chances of absconding during trial were minimal as they were presumed innocent but circumstances have since changed as they are now convicts and probability of them absconding is high.

18. The respondent argued that the Appellants were just being people of good character by diligently observed the bail conditions before the subordinate court and that being a person of good character does not amount to an exceptional circumstance.

19. The respondent further argued that it cannot be established at this stage that the Appellants' Appeal has a high chances of appeal since it is yet to respond to the Appeal for consideration by this court and that even if there was overwhelming chances of success which is denied, it is not enough to persuade this court to release the Appellants.

20. The Respondent contended that there will be no undue delay in disposal of this matter and urged this court to dismiss this Application and the Appeal be set down for hearing.

Analysis & Determination

21. The singular issue for determination is whether the applicants have established threshold for grant of bail pending appeal.

22. Bail pending appeal is only grantable at the discretion of the court upon defined principles and proof of set conditions.

23. 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."

24. However, a different test applies where the matter before the Court is an application for release on bail pending the hearing and determination of the appeal. Section 357(1) of the *Criminal Procedure Code* provides as follows:

> "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."

25. In *Masrani v R* [1960] EA 321 it was held that:

> "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."

26. In *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR where 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 *Jiv Raji Shah v R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:
>
> (1) 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) It appears *prima facie* from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.
>
> Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued."

27. This position was restated in *Mutua v R* [1988] KLR 497, the Court of Appeal stated:

> "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."

28. In *Jivraj Shah v Republic* [*supra*] cited by both sides, the Court of Appeal further held that:

> "There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court 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 urged, and that the sentence or a substantial part of it, will have been served

by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v Republic* [1972] EA 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued."

29. It is therefore patent that there is different test applied in bail pending trial and bail pending Appeal. The court in determining an application for bail pending appeal, exercises its discretion judiciously and must establish, whether the appeal has overwhelming chances of success, whether there are exceptional or unusual circumstances to warrant the Court's exercise of its discretion and whether there is a high probability of the sentence being served before the appeal is heard.

30. What constitutes exceptional circumstances were dealt with in *R v Kanji* [1946] 22 KLR, where De Lestang, Ag. J (as he then was) held that:

> " The appellant's appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail."

31. According to Trevelyan, J in *Somo v R* [1972] EA 476:

> " ...the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance. ...
>
> Good character alone, can never be enough. There is nothing exceptional or unusual in having such a character."

32. The rationale for considering the chances of success of the appeal was given in *Somo v R* (*supra*) at page 480 as follows:

> " There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word "overwhelming" deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed."

33. Similarly, In *Dominic Karanja vs Republic* [1986] KLR 612 the Court of Appeal held: -

> "The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see *Somo v. Republic* [1972] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal."

34. Further in the case of Bgm Hc Misc Cr Appeal No. 163 Of 2012 it was stated that;

> "... in determining whether the appeal has overwhelming chances of success, the court is not determining the appeal or confirming the success or otherwise of the appeal, but it is simply saying that, from the material before the court for purposes of the application for bail only, there are high or overwhelming chances of the appeal to be successful."

35. From the above decisions, it is clear the court should not comment on the particular issues in dispute in the main appeal in order to avoid determining the appeal on the basis of the limited arguments offered for purposes of bail pending appeal or taking a stand on an issue without full scale arguments at the hearing of the appeal. See Bgm HCCR Appeal No. 185 of 2012 *Joram Njoroge Ng'ang'a vs Republic*.

36. There are, of course instances where there is an issue that is so prominent that even at a stage like this the appellate court can safely conclude that the appeal has a high likelihood of success. A few illustrations that come to mind right away would be; where an appellant was convicted on a non-existent offence or repealed section of the law, or where there is undisputed material before the court that the appellant was a child, and this was not noted by the trial court.

37. In this case, I have considered the petition of appeal and meticulously perused the proceedings of the trial court together with the judgment thereof and I am satisfied there is no prominent issues that stand out to convince me that the appeal has an overwhelming chance of success.

38. In citing inconsistencies and contradictions in the prosecution case against the appellants, the court is being asked to re-analyse the evidence afresh at this stage, without having heard the respondent. This is a matter that went to full trial before the trial court. The prosecution adduced its evidence and the appellants were given an opportunity to defend themselves. This is a case that the court will have to deal with the appeal on its merits on matters evidence.

39. As regards the exceptional circumstances and being guided by specifically the cases of *Dominic Karanja vs Republic* (*supra*) & *Somo v R* (*supra*), it is my position that the previous good character of the Appellants or solemn assertion that the Appellants religiously attended court during their trial, are not exceptional circumstances. These are the minimum expectations required of any law abiding citizen.

40. Further, the application does not disclose whether or not the appeal has been admitted. The lower record file is yet to be transmitted to this court for perusal for that purpose.

41. To my knowledge, there is no serious backlog of Criminal Appeals and once the appeal is admitted, the same will be heard and disposed of without undue delay.

42. In light of the foregoing, I find no merit in this application and it is dismissed.

43. The Appellant should fast track the process of preparation of the record of appeal in order to expedite the process of the hearing of their appeal.

44. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Murunga for state

Ms Njogu for Appellants