



**Maina v Director of Public Prosecutions (Criminal Appeal  
13 of 2023) [2023] KEHC 20784 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20784 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL 13 OF 2023  
LM NJUGUNA, J  
JULY 26, 2023**

**BETWEEN**

**DENNIS MURIMI MAINA ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**RULING**

1. The appellant/applicant was charged with the offence of assault causing grievous harm contrary to section 234 of the [Penal Code](#) and he was convicted and sentenced to 5 years imprisonment. Being dissatisfied with the decision of the trial court in Siakago Criminal Case No. 720 of 2021, the appellant/applicant has filed a petition of appeal alongside a notice of motion dated 13<sup>th</sup> June 2023 seeking orders that:
  - a. The Appellant/Applicant be admitted to reasonable bail/bond terms pending the hearing and determination of the appeal herein.
2. The application is accompanied by a supporting affidavit setting out the grounds upon which the said application is premised. These grounds are, inter alia, that the appeal filed appears prima facie and that he is suffering psychologically and physically and is apprehensive that if the appeal is heard when he is still incarcerated, he may not be in a sober state of mind to present his appeal. That he is also apprehensive that by the time this appeal is heard and determined, he will have served a significant period of the sentence.
3. The respondent filed grounds of opposition in which it stated that the application lacks merit as it does not meet the threshold for granting of the orders sought which are discretionary. That the appellant/applicant has not presented any exceptional circumstances to warrant granting of the orders sought and that the appeal lacks merit.



4. The court directed that the application be dispensed with by way of written submissions. The court record shows that both parties complied.
5. In his submissions, the appellant relied on section 357(1) of the *Criminal Procedure Code* and Article 50(2)(q) which provide for granting of bail. He also relied on the case of *Jivraj Shab Vs Republic* [1986] KLR 605 and Dominic Karanja Vs Republic (1986) KLR 612. He submitted that the conditions for granting of bail were set out in the case of *George Wambugu Matbeka Vs. Republic* (2018) eKLR where the court held:

“The granting of bail pending appeal is discretionary, depending on the circumstances of each case. That is why in other cases for instance Samuel Macharia Njagi Vs Republic [2013] eKLR) the same High Court allowed a similar application following Arvind Patel Vs Uganda S.C Cr. Appeal No. 1 of 2003.

I also draw guidance from this case where the Supreme Court of Uganda, Justice Oder, set out the circumstances under which bail pending appeal could be granted:

- a. The character of the offender
- b. Whether the applicant is or not a first offender;
- c. Whether the offence of which the applicant is convicted involved personal violence;
- d. The appeal must not be frivolous and has reasonable chance of success;
- e. The possibility of substantial delay in the determination of appeal and;
- f. Whether the applicant complied with bail conditions granted before the applicant's conviction.”

Being guided by this case, the appellant submitted that if an accused satisfies two of these conditions, the court may grant bail on that basis. In his case, he stated that he had not forfeited bail terms before and therefore this court should grant him bail pending appeal.

6. The appellant further stated that his appeal has an overwhelming chance of success because it challenges both the conviction and sentence in that the trial court disregarded the pre-sentencing report which recommended a non-custodial sentence. In arguing that the appeal has merit, the appellant relied on the cases of *Pauline Ruguru Kitumbi vs. Republic* (2019) eKLR and *Chimambhai Vs. Republic* (1971) EA 343. He further stated that he has already served a substantial part of the sentence and that if he remains incarcerated during the appeal, he will have limited capacity to present his appeal with sobriety. In support of his right to appeal and the presumption of innocence until proven otherwise, he relied on the case of *Gerald Macharia Githuku Vs Republic* [2007] eKLR and *George Wambugu Thumbi Vs Republic* [2018] eKLR.
7. In its written submissions, the respondent submitted on the circumstances under which bail pending appeal should be granted and relied on the cases of *Jivraj Shab Vs Republic* [1986] KLR 605 and *Dominic Karanja Vs Republic* (supra). In response to the appellant/applicant's allegation that the evidence tendered at trial ought to have been corroborated, the respondents stated that the evidence was sufficient to convict him and that his rights under Article 50 of *the Constitution* of Kenya 2010 were upheld. It is also the respondent's case that the appellant/applicant herein has failed to convince the court that his rights will be infringed on, if bail pending appeal is not granted.



8. I take note of the averments made herein as well as the petition of appeal and I do find that the only issue for determination is whether or not the appellant/applicant has satisfied the parameters for admittance to bond/bail pending appeal.

9. To begin with, it must be well understood that bail pending appeal is a discretionary remedy. This being a departure from 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.”

10. 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 Rules 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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.”

This was the position in the case of *Masrani Vs 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.”

11. The principles guiding granting of bail pending appeal are set out in the case of *Jivraj Shah Vs Republic* [supra] as follows:-

- a. The principal 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.
- b. 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.
- c. 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.



12. On exceptional circumstances, I am guided by the case of *Dominic Karanja Vs Republic* (1986) KLR 612 where the court labored to explain what exceptional 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. The appellant/applicant herein stated that he carefully adhered to the bail terms given by the trial court in persuading this court to grant him bail pending appeal and he made a solemn promise to comply with the bail terms if the court grants the orders. He also stated that he is suffering psychologically and physically and this will impede his presentation of the case on appeal.

14. As to issue of a prima facie case, I have perused the petition of appeal and judgment of the trial court and have noted the appellant/applicant’s grounds for appeal. This court will give him the benefit of doubt and release him on bond pending the hearing and determination of the appeal.

15. I do allow the application. The appellant shall be released on cash bail of Kshs. 50,000/= or in the alternative, bond of Kshs. 200,000/= plus a surety of a similar amount.

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF JULY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

