



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lweya v Republic (Criminal Appeal 13 of 2023)  
[2023] KEHC 21927 (KLR) (18 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21927 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL 13 OF 2023  
A MSHILA, J  
AUGUST 18, 2023**

**BETWEEN**

**JOHN ODONGO LWEYA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before court is the application dated April 11, 2023 and brought under section 357 of the *Criminal Procedure Code*, the *Constitution of Kenya* and all other enabling provisions of law.
2. The Appellant/Applicant prays for orders that the Honourable Court be pleased to admit the Applicant to bail pending the hearing and determination of this appeal. That in the alternative the Honourable Court be pleased to suspend and/or stay the execution of sentence in Criminal Case No 2287 of 2015 pending the hearing and determination of the instant appeal. That bond terms be similar to the bond terms ordered at the trial court.
3. The application is premised on the grounds that the Applicant has preferred an appeal against the conviction and sentence of the lower court where he had been released on bail during trial and that he attended court diligently without fail. That the appeal has high chances of success. That the applicant has a young family that solely depends on him. The applicant is a law abiding citizen and is ready to abide by the conditions set by the court.
4. The application is supported by the affidavit sworn on April 11, 2023 by Idequine Wafula the advocate in conduct of the matter herein. He deposed that the appellant was charged in Kiambu Criminal Case No. 2287 of 2015 and that conviction and sentence were passed on April 4, 2023. That he has since filed an appeal which would take long to determine due to the backlog. He contended that the applicant had been placed on bail during the pendency of the lower court trial and that he complied with all the



conditions set by the trial court. Bail was said to be a constitutional right and that the applicant is ready to abide by the conditions set out by the court.

5. The respondent did not respond to the application but instead filed its written submissions; hereunder are the parties respective submissions.

### **Applicant's Submissions**

6. The Applicant submits that right to bail is provided under Article 49(1) of the Constitution and that the same is at the discretion of the court and is not absolute. Reliance was placed in the case of Hisbam Shally Vs Republic (2022) EKLK where the court addressed the issues to be considered in granting bail pending appeal.

### **Respondent's Submissions**

7. The Respondent submits the appellant having being convicted lacks the presumption of innocence. Reliance was placed on the case of Chimambhai Vs Republic (NO 2) (1971) EA 343. The respondent submitted that the trial court delved on the pertinent issues at length and arrived at its findings based on the law. The appellant having been found to be a flight risk at the trial court, the risk now becomes amplified upon conviction. It was submitted that the appellant has not demonstrated exceptional circumstances for grant of the orders sought. Reliance was placed on among others the Supreme Court of India case of Krishnan Vs The People (scz 19 Of 2011) (2011) ZMSC 17. The court was urged to dismiss the application.

### **Issues For Determination**

8. Having considered the application and the submissions by both parties, the main issue arising is whether the appellant should be granted bail pending appeal.

### **Analysis**

9. Bail pending appeal is provided for under Article 49(1)(h) of the Constitution 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. The right to bail pending appeal becomes the discretion of the court once an accused person has been convicted as different principles apply. See the case of Charles Owanga Aluoch V Director Of Public Prosecutions [2015] EKLK 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 vs R [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

“(1) 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.



- (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.”

11. In the case of *Dominic Karanja V Republic* (1986) KLR 612 the Court of Appeal 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;
- (d) .....

12. From the foregoing, the right to grant bail pending appeal is at the discretion of the court and the same should be exercised judiciously. This court has had the opportunity to peruse the record of appeal, it is its considered opinion that this court cannot at this point state with certainty that an arguable appeal with high chances of success has been disclosed by the appellant’s grounds of appeal.

13. Further, the applicant has not demonstrated to this court the existence of exceptional or unusual circumstances to warrant grant of bail pending appeal. The fact that the Applicant did not breach bail conditions in the trial court, that he is the bread winner of his family, that he is a law abiding citizen and is ready to abide by the conditions set by the court are not exceptional circumstances to warrant grant of bail pending appeal.

14. The trial court sentenced the applicant to 10 years imprisonment in Count I and 15 years imprisonment in Count II. The sentences are to run consecutively from March 7, 2023. In the circumstances, the applicant will not have served a substantial part of the sentence before the appeal is heard if the same is heard on a priority basis.

15. This court opines that this is not a suitable case for the exercise of its discretion in the applicants favour.

### **Findings And Determination**

16. In the circumstances, the court finds the application for bail pending appeal to be devoid of merit and it is hereby dismissed.

17. Hearing of the Appeal on October 5, 2023.



Orders Accordingly.

**DATED SIGNED and DELIVERED electronically at KIAMBU This 18<sup>th</sup> day of AUGUST, 2023.**

**HON. A. MSHILA**

**JUDGE**

**In the presence of;**

Mourice – Court Assistant

Odongo – Applicant present

Ogola – for the Applicant

Muriuki – for the State

