



REPUBLIC OF KENYA



KENYA LAW
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**Too v Republic (Criminal Appeal E039 of 2023)
[2023] KEHC 21533 (KLR) (17 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E039 OF 2023
FN MUCHEMI, J
AUGUST 17, 2023**

BETWEEN

DAVIS KIPRONO TOO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application dated June 16, 2023 brought under section 357 of the *Criminal Procedure Code* seeks for orders for release of the applicant on bail pending the hearing and determination of the appeal. The appeal arises from the judgment in the Chief Magistrate Criminal case No. 1649 of 2019 whereas the applicant was charged with the offence of arson contrary to section 332 (a) of the *Penal Code*. He was convicted and sentenced to a fine of Kshs Three Million (3,000,000/-) or in default serve seven (7) years imprisonment on June 8, 2023.
2. The applicant in the supporting affidavit deposes that he has filed an appeal against conviction and sentence and that the appeal has very high chances of success and that he was convicted on suspicion and on circumstantial evidence. It is further argued that his petition of appeal raises substantial points of law to be argued in pursuit of the said appeal. The appellant further states that he was admitted on bail terms during the trial and he attended court diligently. The applicant urges the court to grant him the same bail terms as he was given in the trial court. The appellant states that he suffers from diabetes and that he is at risk of the disease deteriorating if he remains in custody for a longer period. It is further argued that if the applicant is not released on bond, he is likely to serve the full sentence before the appeal is heard and determined.
3. The respondent filed a replying affidavit dated July 5, 2023 to the effect that the intended appeal has no chances of success due to the overwhelming evidence against the appellant. The respondent further states that no injustice shall be visited to the applicant because he is serving a sentence which has been



meted on him by the trial court after being properly convicted. Moreover, the respondent states that following the conviction, the presumption of innocence of the applicant is no longer applicable and as such he cannot be treated as if he is being tried for the offence. Furthermore, the respondent argues that the fact that the applicant complied with the bail terms granted by the trial court is not a guarantee that he will comply with the bond terms granted to him after he has been convicted and that if anything, the risk of him absconding is higher because he has already been convicted.

4. The respondent states that although the applicant alleges that he suffers from diabetes, no medical records have been attached to support the said allegation and that in any event, that there exists medical facilities in prison for use by the prisoners, and as such, ill health does not merit grant of bond pending appeal.

The Law

Whether the applicant has met the threshold for granting bail pending appeal.

5. Section 357(1) of the *Criminal Procedure Code* provides for the granting of bail pending appeal, it states that:-

After 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.

6. The principles for granting bond pending appeal were reiterated in the case of *Jivraj Shah v Republic* [1986] KLR 605 which laid down the following principles:-
 - 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.
7. It is trite law that in considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration the several factors.

Does the appeal have overwhelming chances of success?

8. The applicant argues that the appeal has a high probability of success as he was convicted based on suspicion and circumstantial evidence.
9. In this application, only the judgment of the trial court was availed but not the proceedings. I have carefully examined the grounds of appeal as well as the judgement. Without pre-empting the appeal, I am of the view that the said grounds do not disclose the existence of an appeal with an overwhelming chances of success. However, this observation does not mean that the appeal is not arguable. The appellants will still have his day in court to argue his appeal.



Is there a possibility of delay in hearing and determining the Appeal?

10. The applicant was sentenced on 8/6/2023 to a fine of Kshs. 3 million or in default serve seven (7) years imprisonment. Thus it is highly unlikely that he shall have served a substantial part of the sentence before the appeal is heard. The court diary is accommodative of appeals whereas hearing dates are available in about two (2) months' time. As such, I am of the view that the applicant is not likely to serve a substantial part of his sentence before the appeal is heard and determined.

Demonstration of exceptional or unusual circumstances

11. In *Dominic Karanja v Republic* [1986] KLR 612 the Court of Appeal held:-
- 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 exceptional circumstances where there existed medical facilities for prisoners;
 - c. A solemn assertion by an applicant that he will not abscond if released on bail, even if it is guaranteed by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;
12. Similarly in *Peter Hinga Ngoto v Republic* [2015]eKLR it was held that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.
13. In the instant case, the applicant argued that he complied with the bond terms granted by the trial court and he suffered from diabetes which was at risk of becoming worse if he remains in custody. However, no medical report or even treatment notes were availed. It is a fact that prisons in Kenya have medical facilities. In the event that such facilities do not meet special needs of some medical cases affecting prisoners, the medical officer normally refers the patients to government facilities within the county that have the requisite facilities.
14. Being diabetic is not an exceptional or unusual circumstance since the condition can be attended to in the local medical facilities. The fact that the applicant did not breach the bail conditions in the trial court have been demonstrated as not falling within the ambit of unusual or exceptional circumstances.
15. I am of the considered view that the applicant has not demonstrated unusual or exceptional circumstances to warrant release on bail.
16. I find no merit in this application for bail pending appeal and it is hereby dismissed.
17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF AUGUST, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 17th day of August 2023

