



**Okumu v Director of Public Prosecution (Criminal Appeal
E025 of 2023) [2023] KEHC 22979 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E025 OF 2023
SC CHIRCHIR, J
SEPTEMBER 29, 2023**

BETWEEN

DENNIS OKUMU APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. What is coming up for consideration is Notice of motion dated 11th May 2023. Through the motion, the Applicant seeks to be admitted to bail pending appeal. It is supported by the grounds appearing on the face of the application as well as the supporting affidavit of K. Wandallah, the Advocate for the Appellant.

The Applicant's Case

2. The Applicant states that he was charged with the offence of rape, convicted and sentenced to a prison term of 4 years; that he was aggrieved by the outcome and has since filed an Appeal against the Judgment. He commits to faithfully attend court when required. He has further deponed that his appeal has overwhelming chances of success. He further asserts that the Application has been made in good faith, and in the spirit of decongestion of prisons.
3. In his submissions, the Applicant reiterated the fact that the Appeal has high chances of success on interalia the fact that the plea was ambiguous and the charge sheet. He also alleges that the age of the victim was not proved.
4. It is further submitted that the trial having failed to go by the of the law, Underscores the presence of exceptional circumstances warranting bail. It is further submitted that the applicant is likely to serve the sentence before the appeal can be heard.



Respondent's Case

5. The responder did not file a response or written submission but was granted an opportunity to submit orally. It is the respondent's submissions that the Applicant has failed to file a record of Appeal and that without the said record this court is not in apposition to determine if the Appeal has high chances of success, as alleged.
6. The respondent further submits that the right to bail pending appeal is not a constitutional right as the Applicant has been convicted by a court of competent jurisdiction.
7. It is finally submitted that the Applicant has not provided enough material for this court to make a determination on whether the applicant is deserving of the bail pending appeal.
8. In response the Applicant submits that granting of bail is discretionary and there is no reasons as to why the discretion should not be exercised in favour of the Applicant

Determination

9. I have considered the application as well as the parties' submissions. The applicant was charged with the offence of rape contrary to section 3(1)(a)(b) and (3) of the *sexual Offences Act* No. 3 of 2006. He was convicted on his own plea of guilt and sentenced to 4 years in prison.
10. He was dissatisfied with the judgment, filed a petition of appeal and subsequently filed the present Application.
11. Factors to consider when granting bail pending appeal have been the subject of many past decisions of the superior courts. The court in the case of *Simon Mwangi Kirika vs. R* (2006) e KLR. while citing with approved the case of *Jivray Shah – vs - Republic* (1986) KLR 605 set out the considerations as follows:
 - i. Existence of exceptional or unusual circumstances.
 - ii. If the appeal is likely to be successful on account of some substantial point of law to be argued.
 - iii. If the sentence of substantial part of it would have been heard by the time the appeal is heard.
12. Equally, it is important to remember that when bail after conviction is sought, the onus is on the Applicant to show why the discretion should be exercised in his favour. It is not, as argued by the applicant herein, that the respondents should show cause why discretion should not be exercised. Put differently, bail pending trial is a basic right under Article 49 of *the constitution*, and at that stage, the burden of falls on the prosecution to convince the court on why that right should be taken away. However, on bail pending appeal, bail is a matter of discretion and the burden shifts to the Applicant to prove why he is deserving of the exercise of discretion.
13. There are no usual or exceptional facts upon which this court can exercise the discretion to grant bail. Indeed, the applicant has not made any effort at demonstrating that such circumstances do exist.
14. Consequently, the Applicant has failed to prove his case and the Application for bail is hereby disallowed.

DATED , SIGNED AND DELIVERED IN AN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF SEPTEMBER, 2023.

S. CHIRCHIR



JUDGE

In the presence of:

E. Zalo- court Assistant.

Mr. Wandallah for the Appellant

Ms. Osoro for the Respondent

