



**Kyalo v Republic (Criminal Appeal E018 of 2023)  
[2023] KEHC 27328 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CRIMINAL APPEAL E018 OF 2023  
SN MUTUKU, J  
OCTOBER 25, 2023**

**BETWEEN**

**CYRUS KYALO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This ruling relates to a notice of motion application dated March 14, 2023 brought by the Appellant under certificate of urgency. The Application seeks bail pending the appeal. The grounds in support of the application are found on the face of it and in the supporting affidavit sworn by Dorcus Mueni who describes herself as the mother and guardian of the Appellant.
2. Summarized, the grounds in support of the application are that the Appellant was found guilty and convicted for the offence of grievous harm contrary to section 234 of the *Penal Code* in Kajiado Criminal Case No. E417 of 2021 Republic v. Cyrus Kyalo where the victim was Rajith Ranaweer Tharaka; that the appellant has a good appeal with high chances of success; that he is a young person and a university student; that he was on bond during the pendency of the criminal case in the lower court and he dutifully attended court until the matter was fully determined and that he is a person of high integrity.
3. The application was placed before the Judge in Machakos on March 20, 2023. The appellant was directed to serve the application and parties to file submissions. parties were directed to appear before me for further directions.
4. On September 25, 2023, I confirmed that submissions have been filed and gave a ruling date. I have not seen a Replying Affidavit by the Respondent.
5. The Appellant filed his submissions dated April 24, 2023. He has submitted that in granting bail pending appeal, courts take into account considerations that the applicant is a first offender; the



- character of the applicant; whether the appeal raises substantial issues and has reasonable chances of success; the possibility that the appeal may take substantial time before it is determined; whether the applicant had complied with bail terms granted before conviction and whether the offence for which the applicant is convicted involves personal violence.
6. It was further submitted that the applicant meets the above considerations; that he had no previous criminal convictions and that the appeal is not frivolous and has reasonable chances of success.
  7. The applicant relied on *George Wambugu Thumbi v. Republic*, Nyeri Criminal Appeal No. 1 of 2018; *Francis Macharia Nzeki alias Macha v Republic*, Machakos Criminal Appeal No. Eoo5 of 2020; *Hisbam Shally v. Republic*, Mombasa Criminal Appeal No. 87 of 2015 and *A. H. H v. Republic*, Garissa Criminal Appeal No. 86 if 2015 to illustrate the considerations for bail pending appeal.
  8. The Respondent opposed the application through its written submissions dated 27<sup>th</sup> June 2023. The Respondent has submitted that the application lacks merit; that the intended appeal has no chances of success for the reasons that the evidence tendered by the prosecution is overwhelming, well-corroborated and sufficient to warrant the conviction. It was submitted that bail pending appeal is discretionary because the appellants innocence has been compromised through conviction and therefore the burden of proof lies on the appellant to show exceptional circumstances to warrant grant of bail pending appeal.
  9. It was further submitted that the appellant was convicted of grievous harm contrary to section 234 of the *Penal Code* which offence attracts life sentence and therefore the appellant has high chances of absconding; that there is no possibility that the appellant will serve a substantial part of the sentence before the appeal is determined because the policy is to expeditiously dispose of cases before the court.
  10. The Respondent cited *Onsongo v Republic* Criminal Appeal No. E046 of 2022 where the court relied on *Chimambhai v Republic* 1971 EA 343 where the court stated that:

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...”
  11. The Respondent also cited *Dominic Karanja v Republic* (1986) eKLR. .In this case, good character of an applicant and the hardships if any facing his family were not considered exceptional circumstances and that an assertion that the applicant will not abscond if released on bail is not sufficient ground for releasing a convicted person.
  12. Counsel for the Respondent distinguished the authorities cited by the Appellant with this case by showing that in the *George Wambugu Thumbi* case, the offence was driving under the influence of alcohol which is not a felony and had pleaded guilty; that his grounds of appeal were that the plea was unequivocal; that in Francis Macharia Nzeki case, the appellant raised a ground of appeal that his plea was unequivocal; that in *Hisbam-Shally case*, the appellant proved that he was a candidate about to sit for his KCSE examination and in AHH case, the applicant was a minor suffering from Schizophrenia and that his sentence was unlawful under the *Childrens Act* (now repealed).



## Determination

13. Bail pending appeal is discretionary. The right to bail available to an accused person appearing in court to face criminal charges in the first instance is provided under article 49 (1) (h) of the *Constitution*. That right is not absolute. It can be denied where compelling reasons exist. This is recognized in court in various authorities including *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 principal 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.”
14. As submitted by the Respondent, circumstances change once an accused has been convicted. He is no longer presumed innocent, and the applicable principles change. This view was expressed in *Masrani v R* [1060] EA 321, where the court stated 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.”
15. I have considered the issues raised by the applicant and the grounds he has relied on in this application. It is my considered view that the applicant has not demonstrated that there exist exceptional or unusual circumstances to warrant the granting of bail pending this appeal. The fact that he is a student or that he is traumatized in jail is not, in my view, exceptional or unusual circumstances. Neither is the argument that the determination of this appeal may take long.
16. Consequently, I decline to grant this application. I urge the appellant and his counsel to fast track the appeal by urgently filing the Record of Appeal and serve it on the Respondent to enable this court to give directions as to the hearing of the appeal.
17. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> OCTOBER 2023.**

**S. N. MUTUKU**



**JUDGE**

