



**Langat alias Florida & 3 others v Republic (Criminal Appeal  
30 of 2023) [2023] KEHC 26029 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26029 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL 30 OF 2023  
RL KORIR, J  
NOVEMBER 30, 2023**

**BETWEEN**

**FLORENCE LANGAT ALIAS FLORIDA ..... 1<sup>ST</sup> APPLICANT  
JOAN CHEPKOECH ..... 2<sup>ND</sup> APPLICANT  
NICHOLAS SANG ..... 3<sup>RD</sup> APPLICANT  
COLLINS SANG ..... 4<sup>TH</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Judgment in this matter was delivered on 31st May 2023 where the court found all the Accused persons (now Applicants) guilty of the 1st offence of Attempted Arson contrary to section 333(a) of the [Penal Code](#) and of the 2nd offence of malicious damage to property contrary to section 339(1) of the [Penal Code](#). The Applicants were each convicted and sentenced to serve three (3) years for count 1 and 2 years for count
2. The Applicants filed a Notice of Motion Application dated 30th June 2023 where they sought bail pending Appeal.
3. The Application was premised on section 357 of the [Criminal Procedure Code](#) and it was based on the grounds on the face of the Application and the Supporting Affidavit sworn by Florence Langat on 28th June 2023.

**The Applicants' case**

4. The Applicants stated that during their trial in the subordinate court, they were granted bond terms which they fully complied with.



5. It was the Applicants' case that they were the victims of a bad judgment. That there were several contradictions, discrepancies and inconsistencies in the Prosecution's case and the same were not addressed by the trial court.
6. The Applicants stated that their Appeal had a high chance of success and it would be rendered nugatory if bail was denied. That they have always been respectful and have never caused anyone harm.
7. It was the 1st Applicant's case that she lost her son and she was left as the sole bread winner for her grandchildren and that she was unaware of their whereabouts because she was in prison.
8. The Applicants stated that they were not a flight risk as they all had fixed abodes and had families within Minaret village in Sotik sub-county. That this court should not close its doors of mercy and should grant them the benefit of doubt
9. Despite the Prosecution being granted leave to file their response to the Application, they failed to do so.

#### **Applicants' written submissions.**

10. The Applicants submitted that there was no delay in filing the present Application. The Applicants further submitted that they were the sole bread winners for their families and that their families were suffering.
11. It was the Applicants' submission that they had been granted bail in the trial court and they did not violate the terms until the case was concluded. That if they are granted bail by this court, they will comply with the terms issued without failure.
12. The Applicants submitted that they wanted this court to temporarily suspend their sentence as they await the hearing of their appeal. That there were no compelling reasons to deny them bail. The Applicants further submitted that the court had a duty to secure fair treatment for all persons who come before it and had to protect their fundamental rights and freedoms as provided in [the constitution](#).
13. The Prosecution did not file their written submissions.
14. I have gone through and considered the Notice of Motion Application dated 30th June 2023 and the Applicants' written submissions. The only issue for my determination is whether the Applicants deserve to be granted bail pending the hearing and determination of their respective Appeals.
15. Article 49(1)(h) of the [Constitution](#) provides that:-  
An accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.
16. Section 356 of the [Criminal Procedure Code](#) provides that:-
  - (1) The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.
  - (2) If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the



term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the person, otherwise orders.

17. Section 357 of the [Criminal Procedure Code](#) provides that:-

- (1) 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.

- (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.
- (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.

18. The principles to be considered in an application for bail pending appeal pursuant to the provisions of Section 356 and 357 of the [Criminal Procedure Code](#) were set out in the Court of Appeal case of [Jivraj Shah v Republic](#) (1986) eKLR which held as follows:-

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v Republic* (1972) EA 476 which was referred to by this court with approval in Criminal Application 5 No. NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self defeating to attempt to define phrases or to establish formulae.”

19. I agree with the position of Mulwa J. in the case of [Charles Owanga Aluoch v Director of Public Prosecutions](#) (2015) eKLR where she 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 *Jivraj Shah v 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 face 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.”

20. Similarly, the Court of Appeal in the case of *Dominic Karanja v Republic* (1986) eKLR stated that:-

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see *Somo v Republic* [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.....”

### **Analysis.**

21. As stated earlier through case law, the conditions to be satisfied before a court can grant bail pending appeal can be summarised as follows:-

- i. Whether the appeal has overwhelming chances of success.
- ii. Whether there are exceptional or unusual circumstances to warrant the grant of bail pending appeal.

### **Whether the Appeal has overwhelming chances of success.**

22. I am persuaded by the case of *Joshua Kiarie Nguguna v Republic* (2021) eKLR, Odunga J. (as he then was) where he stated:-

“The rationale for considering the chances of success of the appeal was given in *Somo v R* (*supra*) at page 480 as follows:

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I



have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”

23. Similarly, the court in *Sammy Libechi v Republic* (2008) eKLR held that:-

“.....I am fully alive to the fact that should I be satisfied that the appeal had an overwhelming chance of success, there would be no good reason to keep the applicant behind bars pending the hearing and determination of his appeal.

24. The Bail and Bond Policy Guidelines provide at page 27, paragraph 4.30 that:-

With respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.

25. The onus fell on the Applicants to persuade this court that they had arguable appeals. I have gone through the grounds contained in the Petition of Appeal dated 13th June 2023 and the grounds of Appeal filed by the 1st and 2nd Applicant filed on 23rd June 2023 and I note that they have raised numerous grounds as to why they were dissatisfied with the Judgment of the trial court.

26. It would be prejudicial to discuss the merits or demerits of the grounds of Appeal at this stage. However, from my perusal of the grounds of Appeal raised by the Applicants at a prima facie level, I am satisfied that their Appeals are arguable. It is my finding that the Applicants have satisfied the first condition for the grant of bail pending appeal.

### **Whether there are exceptional or unusual circumstances to warrant the grant of bail pending Appeal**

27. The second condition that the Applicants had to satisfy was the existence of exceptional or unusual circumstances to warrant the court’s consideration.

28. The Applicants submitted that they had abided dutifully by the bond terms issued by the trial court and they had not violated them. That if they were given bail by this court, they would also comply with the bail terms. Various authorities have held the position that abiding by previous bond or bail terms is not an exceptional circumstance. The Supreme Court of India in the case of *Krishnan v The People* (SCZ 19 of 2011), (2011) ZMSC 17 stated:-

“.....The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an application to bail; pending appeal.”

29. In *Dominic Karanja v Republic* (supra), the Court of Appeal held that:-

“.....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.....



30. The Applicants submitted that they were the sole bread winners in their families and that their families were suffering as they were in prison. Courts have held that being a sole bread winner is not an exceptional circumstance. I associate myself with the sentiments of Ibrahim J. (as he then was) in *John Njuguna Kinyanjui v Republic* (2008) eKLR, where he held:-
- “.....The fact that he is employed and is likely to lose his employment or that he is the sole bread-winner for his family do not amount to exceptional circumstances.”
31. Similarly in *John Njiru Njue v Republic* (2017) eKLR, Muchemi J. held that:-
- “The fact that the applicant is the sole bread winner of his family and his purported medical condition do not amount to exceptional or unusual circumstances.”
32. The conditions to be satisfied before a court grants bail pending appeal are quite stringent compared to bail pending trial. The court must always remind itself of the fact that the Accused persons have been lawfully convicted and sentenced. The Court of Appeal in *Mutua v Republic* (1988) KLR 497 stated:-
- “It must be remembered that an applicant for bail pending appeal (emphasis mine) has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.
33. The same was restated by Onyiego J. in *John Koyi Waluke & another v Republic* (2020) eKLR, where he stated:-
- “For a court to grant bail pending appeal, it has to bear in mind that the applicant is no longer innocent. In other words, his/her benefits for release on bail terms under Article 49 (1) (h) of *the Constitution* are limited.”
34. That said, this court has discretion on whether or not to grant the Applicants bail pending appeal. The same was held in John Koyi Waluke (supra) where the court held:-
- “.....The court has however the discretion to grant or not to grant a bail application depending on the circumstances of each case.....”
35. Similarly, the Court of Appeal in the case of *Mutua v Republic* (1988) KLR 497 held:-
- “.....It is trite that when considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judiciously.....”
36. I have considered the circumstances of this case. In particular, that the Applicants and the complainants in this matter were neighbours who had a dispute over land. Needless to state, their dispute properly belongs to the Environment and Land Court and the Succession Court. While this court will no doubt deal with the criminal appeal on merits, I find it just in the circumstances of this case to grant bail pending determination of the appeal.
- i. Each Applicant shall make a cash bail of Kshs. 50,000/= and provide one security of similar amount.
  - ii. Each Applicant shall maintain peace and harmonious co-existence.
  - iii. The Appellants shall file their record of Appeal within 30 days.



37. Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 30<sup>TH</sup> DAY OF NOVEMBER ,  
2023**

**R. LAGAT-KORIR**

**JUDGE**

Ruling delivered in the presence of Mr. E.K. Korir holding brief for Mr. Nyaingiri for the Appellant.

