



REPUBLIC OF KENYA



**Ekesa v Republic (Criminal Appeal E017 of 2023)
[2023] KEHC 25724 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E017 OF 2023
WM MUSYOKA, J
NOVEMBER 27, 2023**

BETWEEN

BENJAMIN EKESA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from conviction and sentence by Hon. EA Nyaloti, Chief Magistrate,
CM, in Busia CMCSO No. 48 of 2019, delivered on 3rd August 2023)*

RULING

1. Judgment was delivered at the trial court on 3rd August 2023. The appellant then lodged an appeal herein, on 16th August 2023.
2. What I am invited to consider is an application, dated 21st August 2023, for orders that the order for removal of the appellant from the geographical jurisdiction of this court be stayed, that the appellant be admitted to bond/bail pending appeal, and, in the alternative, that there be a stay or suspension of the sentence of the trial court. The application is founded on grounds, principally that the appellant has appealed, bail pending appeal is a constitutional right, his family should not suffer because of one individual, and that the appeal is good on merits.
3. I have not seen a replying affidavit by the respondent, but that is not to say that the appeal is not opposed.
4. Parties agreed, on 12th October 2023, to canvass the appeal by way of written submissions. Both sides have complied.
5. The appellant cites Republic vs. Kanji [1946] 22 KLR 17, *Arvind Patel vs. Uganda [2003] UGSC 25* (Oder, JSC) and *Andrew Kipsigei Choge vs. Republic [2022]* eKLR, to argue that exceptional circumstances exist for him to be granted bail pending appeal, as he was not given the option of a



- fine. Section 357 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, Chimambhai vs. Republic [1971] EA 343 and *Mkirani vs. Republic [2021]* KEHC 300 (KLR) are cited for the argument that there is a right to bail pending appeal, on terms that are just.
6. The respondent cites *Daniel Dominic Karanja vs. Republic [1986]* eKLR (Nyarangi, Platt & Gachuhi, JJA) and Francis Kamote Mutua vs. Republic [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA), to argue that the appellant is a convict, serving punishment, and an appellate court should not interfere from the point of view of the welfare of the appellant or the State, on such grounds as ill-health. It is argued, based on Francis Kamote Mutua vs. Republic [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA), that the appellant court may only consider the overwhelming chances of success of the appeal to grant bail/bond pending appeal, and it is submitted that the instant appeal has nil chances of success.
 7. The appeal herein arises from an appeal from a magistrate's court to the High Court. The rules of procedure for appeals from the magistrate's court to the High Court are set out in the *Criminal Procedure Code*. The relevant provisions are in sections 356 and 357. The 2 provisions allow the High Court, and the magistrate's court, a fairly wide discretion. Bail may be granted on "such terms ... as may seem reasonable to the High Court or the subordinate court." Under section 356(2), should the appeal be unsuccessful, the appellant would still be liable to serve the suspended sentence, and the period he spent out on bail/bond, or suspension of execution of sentence, shall be excluded from the computation of the term of his sentence.
 8. The considerations discussed in *Daniel Dominic Karanja vs. Republic [1986]* eKLR (Nyarangi, Platt & Gachuhi, JJA) and Francis Kamote Mutua vs. Republic [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA), are not relevant for appeals from the magistrate's court to the High Court, and what would be more relevant are the principles enumerated in such cases as Arvind Patel vs. Uganda [2003] UGSC 25 (Oder, JSC) and Samuel Macharia Njagi vs. Republic [2013] eKLR (Abuodha, J), around the factors of the appellant being a first offender, the appeal having been admitted, the possibility of substantial delay in the disposal of the appeal, the offence not involving personal violence, the character of the appellant, the appeal not being frivolous and has a reasonable chance of success, and whether the appellant had been on bond at trial and complied with the bond terms there, among others. It was pointed out, in Arvind Patel vs. Uganda [2003] UGSC 25 (Oder, JSC), that all these factors need not be present in every case.
 9. Taking those factors into account, I have made note of the following. Firstly, the appeal herein is yet to be admitted. Secondly, I note that the appellant herein had been admitted to bond at the trial, of Kshs. 300,000.00, with one surety of like amount. Bond was processed, and he was out on bond throughout trial, and he appears to have been faithful in complying with bond terms. Thirdly, the portion of the typed proceedings on mitigation and sentence is missing, and I cannot tell the type of sentence that was imposed, neither can I determine whether the appellant was a first offender. Fourthly, the offence for which the appellant was convicted did not involve physical violence, but sexual violence. Fifthly, that once appeals are admitted here at Busia High Court, they tend to be disposed of fairly quickly.
 10. The discretion given to the High Court, and the magistrate's court, in sections 356 and 357 of the Criminal Procedure Code, is fairly broad. Of course, the caution sounded in Chimambhai vs. Republic [1971] EA 343 must be borne in mind, that the case of an appellant seeking bond pending appeal lacks the strongest elements normally available to an accused person seeking bond pending trial, namely the presumption of innocence. There is also the caution, in Francis Kamote Mutua vs. Republic [1988] eKLR (Platt, Apaloo JJA & Masime, Ag JA), that an appellant seeking bail pending appeal is actually a convicted person, serving sentence for his crime. It would appear that it would be open to the court to grant bail/bond, or suspend the sentence, pending appeal, subject to such terms or conditions as the court may deem reasonable, subject to the above cautions.



11. In exercise of that broad discretion, I do hereby admit the appellant to bond herein pending appeal, or suspend execution of the sentence herein, subject to the appellant executing a bond of Kshs. 900,000.00, with 2 sureties of like amount, or, in the alternative, to deposit cash bail of Kshs. 1,000,000.00. I direct the appellant to file the record of appeal within 14 days of delivery of this ruling, and the Deputy Registrar to call for the original trial court records forthwith. The matter shall be mentioned after 14 days, for compliance. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27TH DAY OF NOVEMBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Masiga, instructed by Masiga Wainaina & Associates, Advocates for the appellant.

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

