



REPUBLIC OF KENYA



KENYA LAW
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**Karani v Republic (Criminal Appeal E046 of 2023)
[2023] KEHC 25760 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E046 OF 2023
M THANDE, J
NOVEMBER 23, 2023**

BETWEEN

DANIEL CHARO KARANI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By an application dated 31.7.23, the Appellant seeks that he be granted bail pending hearing and determination of the appeal herein. The Appellant states that he was charged and convicted of the offences of arson, contrary to Section 332(a) of the *Penal Code* and stealing by servant, contrary to Section 281 of the *Penal Code*. Upon conviction, he was sentenced to 5 years and 2 years imprisonment respectively. Aggrieved by the decision of the trial court, the Appellant filed the instant appeal against both the conviction and sentence.
2. The Appellant states that he is apprehensive that if bail is not granted, and given the time it will take for the appeal to be heard and determined, he will have served substantial time in prison. He further states that his wife left him and went to work in the Gulf without his consent and that his minor children had been under his sole care. He does not have any relatives who can take care of his children and he does not know where and how they are. His appeal has high chances of success as he was convicted on circumstantial evidence.
3. The application is opposed by the Respondent, vide a replying affidavit sworn on 19.10.23 by Joseph Mwangi, prosecution counsel. He averred that following the Appellant's conviction and sentencing, he lost the right to presumption of innocence as guaranteed by Article 49(1)(h) of the Constitution. It was further averred that there is no appeal before the Court as no petition of appeal has been annexed as required under Section 350 of the *Criminal Procedure Code*, nor have the proceedings in the trial court been annexed. As such, the court cannot establish the veracity of the averments. Further that the Appellant has not demonstrated that there will be a delay in the hearing of the appeal. Counsel



further deposed that the averments regarding the Appellant's minor children are not supported by evidence and are intended to woo the Court through emotion. He further deposed that he handled the prosecution in the trial court and is aware that the evidence tendered by the prosecution was overwhelming and conviction was safe. As such, the appeal stands no chance of success. Lastly that no peculiar or special circumstances have been demonstrated to warrant the orders sought and that being a convict, there are high chances of the Appellant absconding. He urged that the Application be dismissed.

4. In the submissions on behalf of the Appellant, his averments in his affidavit were reiterated. It was submitted that the trial Magistrate erred in convicting him on unsound evidence and that the sentence is manifestly excessive. Further, that upon conviction on 3.3.23, the trial court cancelled the bond terms and placed the Appellant in custody awaiting sentencing. The trial Magistrate then proceeded on annual leave and the Appellant remained in custody until 9.6.23 when the trial court resumed. The 3 months were not taken into account in sentencing. He urged the Court to consider that the fact that his minor children are exposed to all manner of danger in the absence of both parents, constitutes exceptional circumstances warranting the grant of bail pending appeal. Reliance was placed on the case of *Mkirani v Republic* (Criminal Appeal E010 of 2021) [2021] KEHC 300 (KLR) (3 December 2021) (Ruling) where Mativo, J. (as he then was) restated the main consideration in an application for bail pending appeal as laid down in the case of *Jivraj Shah v Republic* {1986} KLR 605.
5. For the Respondent, it was submitted that while an accused person is entitled to bail pending appeal under Article 49(1)(h) of the *Constitution*}, the same does not apply to a person already convicted and sentenced to a term of imprisonment. Further that on the Applicant lies the burden of proving that the existence of exceptional circumstances, that the appeal has high chances of success and that there is a likelihood of serving a substantial part of the sentence before hearing of the appeal. Reliance was placed on the cases of *Masrani v R* (1960) EA 321 and *Daniel Dominic Karanja v Republic* [1986] eKLR.
6. The law empowers this Court to consider and if persuaded, grant bail pending appeal. Section 357 of the *Criminal Procedure Code* makes provision for admission to bail or suspension of sentence pending appeal. Subsection (1) provides as follows:

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.

7. In the case of *Jivraj Shah v Republic* (supra), the Court articulated the principles to consider in an application for admission to bail pending appeal as follows:

The main consideration in application seeking bail pending trial were best articulated in *Simon Mwangi Kirika v Republic*³ citing in which it was stated:



- i. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.
 - ii. 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.
 - iii. 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.
8. The Appellant contends that there exist unusual and exceptional circumstances to warrant the grant of his application, to wit, that his minor children have been left without any parent to look after them as his wife left to work in the Gulf without his consent. His children are thus exposed to all kinds of dangers. No evidence was however placed before the Court to demonstrate that the Appellant has children, their number, names or that they are minors. Further no evidence was availed to the Court to demonstrate that the Appellant has a wife and that she left for the Gulf. It has also not been stated when she left or indeed her name. The claim by the Appellant in this regard thus rings hollow.
9. On his appeal having high chances of success, the Appellant contends that he was convicted on circumstantial evidence. As such, the appeal has a high chance of success. In the case of *Mkirani v Republic* (supra) Mativo, J. (as he then was) stated:

Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. Decided cases are in agreement that before bail can be granted to an applicant for bail pending appeal there must always be a reasonable prospect of success of the appeal. However, even where there is a reasonable prospect of success bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. The proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. To apply this test properly it is necessary to balance both the likelihood of the applicant absconding and the prospects of success. These two factors are inter-connected because the less likely the prospects of success, the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail. Although the opportunity for interfering with evidence is not that real at this stage, the possibility that a convicted person may abscond when on bail pending the appeal, is increased. This aspect was not canvassed in the submissions made before me.
10. In cases such as the present case where bail is sought after conviction and pending appeal, the onus is on the Applicant to demonstrate the high probability of success of the appeal and why justice requires that he should be granted bail. Other than merely stating that he was convicted on circumstantial evidence the Appellant has not placed any material before Court to persuade it that the appeal has high chances of success.
11. The critical difference between bail pending trial and bail pending appeal is that a person seeking bail pending appeal lacks the presumption of innocence that is guaranteed under Article 50(2)(a) of the



Constitution. Such person is already convicted and perhaps serving sentence, as in the case before me. A court must consider the prospects of success of an appeal as well as the risk of the appellant absconding and strike a balance. The possibility of a convicted person absconding is very real. The Appellant did not address the Court on this aspect of absconding that was raised by the Respondent and did not controvert the claim.

12. The Appellant has claimed that by the time the appeal is heard and determined, he will have served substantial time in prison. There is however no proof that there shall be delay in the hearing of the appeal. Indeed, although the Applicant is entitled to seek bail as he has, the time expended in prosecuting and defending this Application and writing this ruling could have been utilised in hearing and determining the appeal. In any event, the mere anticipation of a delay in hearing the appeal, does not in itself constitute exceptional circumstances.
13. In the end and in view of the foregoing, I am not persuaded that there exist any exceptional or unusual circumstances to warrant the grant of bail pending appeal.
14. The Court notes that the record of appeal has been filed and served. In order to allay the Appellant's fears of delayed hearing of the appeal, directions as to the expeditious hearing of the appeal shall be given on the date this ruling is delivered.
15. In light of the foregoing, the Application dated 31.7.23 is declined.

DATED AND DELIVERED IN MALINDI THIS 23RD DAY OF NOVEMBER 2023

** _____ **

M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

..... for the Respondent

..... Court Assista

