



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. E087 OF 2021**

**HISHAM SHALLY.....APPLICANT**

**-V/S-**

**REPUBLIC.....RESPONDENT**

**RULING**

**Application**

1. The Chamber Summons application dated 5<sup>th</sup> October 2021 under Certificate of Urgency was brought under Section 357 of the Criminal Procedure Code.
2. The Applicant seeks for orders that the Applicant be released on bail/bond on such terms as this Honourable Court shall deem fit and just pending the hearing and determination of his appeal. That there be a stay of execution of the sentence/order made on 30<sup>th</sup> September 2021 convicting the Applicant pending the hearing of an appeal. That the Applicant be released from custody forthwith pending the determination of the appeal.
3. The application was premised on the filed and annexed Supporting Affidavit of Tadayo Kibaba Muyala Advocate sworn on 5<sup>th</sup> October 2021.

**Response**

4. The Respondent filed a Replying Affidavit sworn on 8<sup>th</sup> November 2021 by Edgar Mulamula the prosecution counsel at the Office of the Director of Public Prosecutions Mombasa in conduct of the matter in response to the Application dated 5<sup>th</sup> October 2021 and the Petition of Appeal dated 4<sup>th</sup> October 2021.
5. The Respondent states that the application totally lacks merit and it does not meet the legal requisite threshold of the orders that it seeks. That the intended appeal has no chance of success whatsoever as the evidence tendered by the prosecution is overwhelming, well corroborated and sufficient to warrant the conviction arrived at by the Honourable Court. That due to the nature of the offence, the Appellant is convicted and the sentence imposed of 30 years imprisonment, the Appellant's chances of absconding are extremely high. That bail pending appeal is discretionary as the Appellant's innocence was compromised upon conviction. That the Applicant has not demonstrated any peculiar and exceptional circumstances to warrant grant of the orders sought. That the sentence imposed by the court is lenient considering the nature of the offence which the Applicant was charged and convicted, and prayed that the application be dismissed.

**Applicant's Submissions**

6. The Applicant in submitting pointed out issues for determination as follows:-
  - a) Whether the Applicant has proved the existence of exceptional or unusual circumstance upon which the court can fairly conclude that it is in the interest of justice to grant bail pending appeal.
  - b) Whether it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a substantial point of law to be argue and that the sentence or substantial part of it will have been served by the time the appeal is heard, then a condition of granting bail will exist.
  - c) What guiding principles ought to guide the Court in the event that the court finds that the Applicant has not sufficiently satisfied

one or to conditions.

7. The Applicant submits on whether the Applicant should be granted bail pending appeal that the law on bail pending appeal is not in doubt as it involves exercise of judicial discretion. The court has wide discretion to grant bail pending the hearing of the Applicant's appeal and like all discretions, the discretion must be exercised judiciously. The Applicant submits that the principles guiding the exercise of that discretion have crystallized over time with courts formulating several principles and guidelines upon which bail pending appeal is anchored. In the criminal justice system bail pending appeal is profoundly enunciated under Section 357 (1) of the Criminal Procedure Code. The Applicant submits that he has complied with the above provision and has filed an appeal, he is therefore on the right trajectory in seeking the court's judicious exercise of discretion to admit him to bail pending the hearing of the appeal. On the principles guiding granting of bail pending appeal, the Applicant cites the cases of *Gerald Macharia Githuka v Republic*, Criminal Appeal No. 119 of 2004 and *Jiv Raji Shah v R*. [1966] KLR 605.

8. The Applicant submits that the concept of exceptional circumstances is well coined in the Court of Appeal Case of *Jivraj Shah v Republic* [1986] eKLR. The Applicant submits that the exceptional circumstance in this case is that he is school going and will soon be a candidate and will be sitting for KCSE exams in a year's time. That while the Applicant while in custody is losing quite a lot academically and it is only just and fair that this Honourable Court do find this as exceptional as education will determine and shape his future. The Applicant submits that the unusual and exceptional circumstances are further expounded in the case of *Arvind Patel v Uganda* S.C. Cr. Appeal No.1 of 2003 to include the character of the offender, whether the applicant is or not a first offender, whether the offence of which the applicant is convicted involved personal violence, the appeal must not be frivolous and has reasonable chances of success, the possibility of substantial delay in the determination of the appeal, and whether the applicant complied with bail conditions granted before the applicant was convicted during the pendency of the appeal.

9. The Applicant submits that the Applicant has fully complied with all the requirements for him to make an application for grant of bail pending appeal. One of the requirements is filing of the Petition of Appeal. That the Applicant's Petition of Appeal poses substantial points of law to be argued in pursuit of the said appeal. The Applicant also submits that the sentence or substantial part of it will have been served by the time the appeal is heard considering the fact that the Applicant has already started serving sentence.

10. The Applicant submits that it is now established principle of law that the Applicant need not demonstrate that all the conditions for admission to bail pending appeal have been met, but the Applicant having satisfied a combination of two or more conditions sufficiently qualified to admission to bail pending appeal. The Applicant cited the cases of *Samuel Macharia Njagi v Republic* [2013] eKLR and *Arvin Patel v Uganda* S.C. Cr. Appeal No. 1 of 2003. The Applicant submits by urging the court to allow this application and admit the Applicant to reasonable bail terms pending the hearing and determination of the appeal herein.

#### **Respondent's Submissions**

11. The Respondent submits that the grounds upon which the Appellant relies on in the Petition of Appeal include failure to conduct *voire dire*, uncorroborated evidence of the minor and contradictions in the prosecution witnesses evidence, ingredients for the offence not met, key witnesses not called, disregard of the defence evidence, magistrate approaching the case with a predetermined mindset and proceeding on wrong basis of the law, failure to consider the report by the probation officer and harsh sentence. On the contrary, the Respondent submits on grounds of appeal instead of submitting on the application for bail pending appeal. This court will therefore rely on the Respondent's Replying Affidavit to the application herein in making its determination.

#### **Analysis and Determination**

12. This court has considered the Applicant's Chamber Summons Application dated 5<sup>th</sup> October 2021 brought under Certificate of Urgency, the Replying Affidavit sworn on 8<sup>th</sup> November 2021 and submissions by both parties.

13. **Article 49(1)(h) of the Constitution of Kenya, 2010** provides that:-

#### **An accused person has the right**

**(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.**

14. In the case of *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR, 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 vs. R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:**

**“(1) The principle 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.”**

15. Also, in the case of *Dominic Karanja v Republic (1986) KLR 612* stated that:-

**“(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;**

**(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;**

**(c) 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”**

16. The Applicant submitted that he has complied with Sec 357 (1) of the Criminal Procedure Code by filing an appeal, therefore, on the right trajectory in seeking the court’s judicious exercise of the discretion to admit him to bail pending the hearing of the appeal. On the issue of exceptional circumstances, the Applicant is school going and will be sitting for KCSE exams in a year’s time. Therefore, being in custody, the Applicant is losing a lot academically. The Applicant further submitted that he is of great character, he is a first offender, that the offence upon which the Applicant was convicted did not involve the violence, that the appeal raises vital points of law with overwhelming chances of success, and that the Applicant fully complied with the bail terms and conditions as was granted by the trial court until his conviction.

17. The Respondent in the Replying Affidavit stated that the intended appeal has no chances of success, that with the conviction and sentence of 30 years imprisonment, the Appellant’s chances of absconding are extremely high, that the Applicant’s innocence was compromised upon conviction, and that the Applicant has not demonstrated any peculiar and exceptional circumstances.

18. This court has perused the record of appeal and in consideration on the issue that the Applicant is a school going student and having produced proof of the same in the lower court that he is almost sitting for his final exams, this court finds that to be an exceptional circumstance and in that consideration grants the application to allow him to study and sit for KCSE pending the hearing and determination of the appeal.

19. In conclusion, this court allows the application herein. The Applicant may be released on a bond of Kshs. 150,000 with one surety of similar amount. The Applicant shall attend the hearing of the appeal and in default the bail herein granted will be liable for cancellation. The Applicant shall also be of good conduct in the society during the currency of the appeal. Mention on 28.2.2022 before the Deputy Registrar and thereafter every 30 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 27<sup>TH</sup> DAY OF JANUARY 2022**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**

**In the presence of:-**

Ogwel- Court Assistant

Mr. Mulamula present for the Respondent

Mr. Muyala for the Applicant – No appearance

Appellant present in person

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**