



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. E025 OF 2021

MICHAEL CHEGE NJOROGE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. This is a Ruling on the Notice of Motion dated 25th March, 2021. The application is filed by the appellant. He has brought the application under the provisions of **Section 357(1)** of the Criminal Procedure Code which provides as follows: -

“(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.”

2. From the above provisions it becomes obvious that the appellant seeks to be admitted to bond/bail pending his appeal. The appellant was convicted on 9th March, 2021 of the offence of rape contrary to **Section 3(1)(a) and (b)** and **Section 1(3)** of the **Sexual Offences Act**.

3. The appellant erred to submit that he had a right to be released on bond/bail under **Article 49(1)(h)** of the Constitution. The appellant stands convicted as stated above. He is therefore does not fall within the ambit set out under **Article 49(1)(h)** of the Constitution. That Article gives that right for bail/bond to arrested persons, either awaiting to be charged with an offence or one who is being tried for a criminal offence but not yet convicted. The relevant Section for one who is convicted is **Section 357(1)** of the Criminal Procedure Code.

4. The jurisprudence of application for bail pending appeal has been restated severally by the courts. I will begin by considering the holding of the case **CHIMAMBHAI VS. REPUBLIC 1971 EA 343** which sets out the starting consideration of such an application. It was held in that case:

“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...”

5. That case reveals that the appellant having been convicted lacks presumption of innocence. The right not to be denied reasonable bail unless there are exceptional circumstances, is rooted in the presumption of innocence. The holding of the above case further requires a court to make inquiry on the chances of success of the pending appeal. This view was restated by the Court of Appeal in the case **JUVRAY SHAH V. REPUBLIC (1986) eKLR** as follows:-

“..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.”

6. In the case **PAULINE RUGURU KITHUMBI VS. REPUBLIC (2019) eKLR** provided yet another consideration in application for bond/bail pending appeal as follows: -

“JIVRAJ SHAH V REPUBLIC (supra) which laid down the principles 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’.”

ANALYSIS

7. I have considered the appellant’s application juxtaposed with the trial court’s proceedings and judgment. The appellant’s presumption of innocence was present before he was convicted. That conviction is enforceable until it is reversed. It follows that, as the above case law shows after his conviction, the appellant bares the onus to justify his release on bail.

8. The appellant in his affidavit in support of his application deponed that he is a family man, the sole bead winner and he is not a flight risk.

9. No evidence is presented to this Court to indeed prove the appellant is a family man. However, even if there was that proof, in my view, without any other circumstances, it does not satisfy the proof special circumstances to state one is a family man or woman.

10. The court is also required to consider the likelihood success of the pending appeal. Having considered the judgment of the trial court and on a prima facie basis, I do not find there are not high chances of success of the appellant’s appeal. Further, I wish to dissuade the appellants in his argument that denial of bail pending appeal is a violation of his constitutional rights. In this regard, I rely on a Canadian case which responds to that argument, that is, **R. VS. FARINACCI, 1992 CanLII 1136 (ONCA)** as follows:-

“Justice does not require prescience. Before trial, if there was just cause to deny bail, even though the accused is acquitted at trial, there has been no violation of the principles of fundamental justice. In the same way, if a conviction is overturned on appeal and the appellant was denied bail pending appeal, there would have been an injustice only if bail was unjustly denied.”

11. Having considered the application, I am not persuaded the appellant has satisfied the burden of proof to justify his release on bail.

DISPOSITION

12. The notice of motion dated 25th March, 2021 is disallowed and is dismissed.

13. At the reading of this Ruling, a date shall be fixed for direction on the hearing of the appeal.

RULING DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF FEBRUARY, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

Appellant: - Present

For appellant: - Mr. Kabene HB Ms. Naswa

For Respondent (DPP) : - Mr. Kasyoka

RULING delivered virtually.

MARY KASANGO

JUDGE