



REPUBLIC OF KENYA



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**Kimaku & 4 others v Republic (Criminal Appeal E003 of 2022)
[2022] KEHC 3018 (KLR) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E003 OF 2022**

LW GITARI, J

APRIL 21, 2022

BETWEEN

DEBORAH KARIGU KIMAKU 1ST APPELLANT
LUCY MUTHONI KIRAGU 2ND APPELLANT
GEORGE MUTEMBEI 3RD APPELLANT
CHABARI RUCHIANGA 4TH APPELLANT
JULIUS MUTHENGI 5TH APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellants/Applicants herein were jointly charged with the offence of arson contrary to Section 332(a) of the Penal Code in Chuka Chief Magistrate's Court Criminal Case No. 696 of 2020.
2. After a full trial, the five (5) Appellants were found guilty of the offence, convicted accordingly, and were each sentenced to serve eight (8) years imprisonment. The Appellants/Applicants being aggrieved by the aforesaid conviction and sentence have filed an appeal against the decision of the trial court which is now pending before this court.
3. Vide a Notice of Motion application dated 15th February 2022, the Appellants applied for orders to be released on reasonable bond and/or bail terms pending the hearing and determination of their appeal.
4. The application is supported by the respective affidavits of the Appellants, all sworn on 15th February 2022. From the face of the application, the main grounds on which it is premised on are That:
 - a. The appeal has very high chances of success.



- b. The 1st Applicant is mentally unstable and subjecting her to prison would prejudice her appeal since she needs to attend Kajuki Health Centre monthly for her medication.
 - c. The 4th Applicant is 90 years old and his incarceration might expose him to other illnesses.
 - d. The 5th Appellant has a stomach condition that requires attention and care at Kenyatta Hospital and his incarceration would make it difficult to prosecute his appeal.
 - e. The 2nd and 3rd Appellants each have young families with school going children who are dependent on them.
 - f. The Appellants have a statutory right to bail pending appeal and will attend court at all times if the present application is allowed.
5. The State, through the office of the Director of Public Prosecutions has opposed the application vide a Replying Affidavit sworn on 15th March 2022 by Ms. Jane K. Maari. Ms. Maari deposed that the Respondent is not opposed to the application as against the 1st, 4th, and 5th Appellants due to the special conditions of the said Appellants. According to her, the trial court ought to have considered an option of fine or other available sentences against the three mentioned Appellants. She further deposed that the Respondent is opposed to the application as against the 2nd and 3rd Appellants. Ms. Maari further deposed that the appeal by the 2nd and 3rd Appellants does not have any chances of success and that the 2nd and 3rd Appellants have not demonstrated any special/exceptional circumstances to warrant grant of bail/bond pending appeal.
6. At the hearing of the application, both parties opted to rely on the respective affidavits filed in support and opposition of the application.

Issue for determination

7. Having considered the present application, the affidavits sworn in support and in opposition of the application, as well as the annexures thereto, the only issue for determination before this court is whether the Appellants have met the minimum threshold for this court to exercise its discretion and release them on bail/bond terms pending appeal.

Analysis

8. The position of the law on bond pending appeal is provided for under Sections 356 and 357 of the [Criminal Procedure Code](#). Sections 356 applies to bond pending entering of an appeal and Section 357 refers to an application for bail after entry of an appeal. The Applicants herein have correctly invoked the provisions of Section 357 of [Criminal Procedure Code](#) because they have already lodged an appeal. Section 357(1) provides as follows:

“After 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...”

9. The use of the word “may” indicate that the power to grant bond pending appeal is discretionary. The main factors that this court should consider in exercising that discretion are:
- a. That the appeal has high or overwhelming chances of success;



- b. Existence of an exceptional or unusual circumstance in the case warranting the release of the Appellant on bond pending appeal.
10. The Court of Appeal in the case of *Daniel Dominic Karanja v Republic* [1986] eKLR held as follows regarding the determination of such an application:
- “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 relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardships, 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.
11. The above principles were reiterated in the case of *Jivraj Shah v Republic* [1986] KLR 605 as follows: -
- i. The principal contribution 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.
 - 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.
12. It thus follows that the presumption of innocence does not apply to the present application because the Appellants are presumed to have been properly convicted until this court, sitting as an appellate court, finds otherwise. The sentences meted out against the Appellants are also presumed to be proper unless it can be proved that the same are not backed by law. Thus, the factors to be considered in this application for bond/bail pending appeal are different from those considered in an application for bond/bail pending trial where bail is a constitutional right which can only be denied if there are compelling reasons not to release on bail.

Does the appeal have high chances of success?

13. In such an application, the burden is on the Appellants/Applicants to demonstrate that the appeal has high chances of success. In this case, the Applicants have merely stated that their appeal have high chances of success without demonstrating the same. They have largely based their present application in the existence of exceptional circumstances which they contend warrants their release on bail/bond terms.

Are there exceptional circumstances warranting release of Appellants on bail/bond terms?

14. In the present case, the 1st Appellant deposed that she has a chronic mental illness that requires her to visit a clinic for monthly injections. She has attached to her affidavit a letter dated 1st February 2021 from Chuka District Hospital which confirms that she has had schizophrenia, a chronic mental illness,



since 2003. She has also attached treatment notes from Kajuki Health Centre evidencing that she is on medication and goes for monthly checkups.

15. On the other hand, the 4th Appellant deposed in his affidavit that he is 95 years old and thus exposed to illness. He contends that he has started falling ill and that the physical damage that he is likely to suffer while incarcerated can never be undone should his appeal succeed.
16. Finally, the 5th Appellant deposed in his affidavit that he has a stomach condition that requires frequent medical attention at Kenyatta Hospital. He attached some of his treatments notes to substantiate his claim. I note that the treatment notes provided are dated 2016. It is however the 5th Appellant's contention that he forgot some of his other treatment notes at his business place in Narok. The state has however not opposed the application and contends that the sentence was too harsh.
17. In view of the respective claims by the Appellants, it is my view that the 1st and 4th & 5th Appellants have demonstrated special circumstances to warrant their release on reasonable bail/bond terms pending the hearing and determination of the appeal.

Conclusion

18. From the foregoing, it is my view that with respect to the 2nd, & 3rd the application does not meet the threshold for the grant of bail pending appeal.

I therefore order as follows:

- 1) The 1st, 4th & 5th applicants shall be released on a bond of Kshs.100,000/- plus one like surety each pending the hearing and determination of this appeal.
2. The application by 2nd and 3rd applicants is without merits and is dismissed.
3. The Deputy Registrar will avail the lower court record for admission of the Appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 21ST DAY OF APRIL 2022.

L.W. GITARI

JUDGE

21/4/2021

