



**Nyongesa v Republic (Criminal Appeal 67 of 2019)
[2022] KEHC 10441 (KLR) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 67 OF 2019
RN NYAKUNDI, J
MAY 20, 2022**

BETWEEN

BENARD NYONGESA ALIAS REUBEN APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction & Background

1. The appellant herein was convicted of the offence of Gang defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006 on the 26th of April 2019 and sentenced to 20 years imprisonment.
2. He subsequently filed an amended petition of appeal on the 1st of April 2021. He has now filed the current application dated the 30th of March 2021 and filed on the 26th of April 2021 seeking to be admitted to bail pending appeal.
3. The application is supported by the affidavit of one Jacob Situma sworn on the 30th of March 2021 wherein he deponed that the appellant is in possession of new and compelling evidence that was not previously available to the trial court to the effect that the chief Turbo location has given proper identity of the 1st appellant/applicant and is willing to come and testify as to the identity of the appellant herein. Mr. Situma argued that the evidence is relevant to the issues since the identity of the appellant herein formed the crux of the trial before the lower court and which question was not exhaustively and properly resolved by the lower court for want of sufficient evidence.
4. The application was vehemently opposed by the respondent through the replying affidavit of counsel Emma Okok sworn on the 23rd of June 2021. In particular, Ms Okok deponed that the evidence the appellant intends to introduce is evidence that was readily available to him during trial. She was of the view that the appellant was properly convicted and sentenced. Furthermore, Ms. Okok opined that the chief whom the appellant intends to call as a witness is a public officer who is supposed to serve



members of the public and would have been called as a defense witness during trial. She further averred that the evidence on identification was solid and the same cannot be dislodged by the evidence of the chief. She argued that in any case, the contents of the chief's letter amount to hearsay evidence as the same cannot be corroborated.

5. By direction of court, the application was canvassed by way of written submissions and parties have filed their respective submissions.

Appellant's Submissions

6. The appellant in his submissions dated the 19th of May 2021 submitted that Section 357(1) of the Criminal Procedure Code grants this court the power to admit the appellant/applicant to Bail pending appeal. In this regard, the appellant relied on the case of Stephen Ngui Kyalo vs Republic [2019] eKLR and cited the principles that guide court in the grant of bail pending appeal.
7. He thus submitted that the trial court erred both in law and in fact in convicting him without proper and or sufficient evidence since the complainant never identified him correctly as she referred to him by the names of Koech or Reuben Koech which he submitted are not his names. It was his observation therefore that he should not have been convicted since there was no evidence linking him to the crime as his identity was never resolved. He therefore opined that the prosecution failed to prove the three ingredients of defilement and in particular, the identity of the perpetrator and relied on the case of John Mutisya Mbeetu vs Republic [2018] eKLR.
8. The appellant therefore considered that his appeal has overwhelming chances of success since he intends to prove, during the appeal, that the prosecution got his identity wrong. Consequently, the appellant submitted that there is no justification for depriving him of his liberty since no prejudice will occasion to the prosecution and that he has no intention of fleeing the course of justice.

Respondent's Submissions

9. The respondent submitted that there are no unusual or exceptional circumstances to warrant the court to grant the appellant the orders sought. In particular, the respondent submitted that the appellant has not demonstrated any exceptional or unusual circumstances, where the interest of justice would favour the grant of bail pending appeal. Secondly, the respondent was of the view that the mere fact that the appellant adhered to bond terms in the trial court is not a guarantee that he will attend court for hearing and determination of the appeal. It was the respondent's further contention that the offence that the appellant has been charged with is a serious one and the weight of the already pronounced sentence is so severe that it predisposes him to abscond.
10. Secondly, the respondent submitted that there exist no circumstances indicating that the appellant's appeal is likely to succeed since the issues raised in the application are issues of fact and not law that would prima facie suggest an overwhelming chance of success. In particular, the respondent submitted that there is no substantial point of law raised by the appellant. In any case, the respondent observed that, the fact that an appeal is arguable does not mean it will automatically be allowed.
11. Lastly, the respondent submitted that considering the expeditious manner in which the appeal will be heard, there is no danger to the appellant of serving a substantial portion of the sentence and urged court to dismiss the application for lack of merit.



Determination

12. Having considered the application, the affidavits and submissions made by parties, it is quite clear that the only issue for determination is whether this court should grant the appellant bail pending the hearing and determination of his appeal.
13. The Right to Bail is anchored under Article 49(1)(h) of *the Constitution* which 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. However, the above provision is only limited to a case where an accused person is facing trial at the first instance. Consequently, where there is an appeal, an accused person cannot rely on the said provision. Patrick Kiage in his book *Essentials of Criminal Procedure in Kenya*, LawAfrica Publishing 2010 at 129, notes that unlike pre-trial bail which is grounded on the constitutional presumption of innocence in favour of the accused person, bail pending appeal does not exist as of right and is only issued in exceptional circumstances.
15. In this regard, the court in *Charles Owanga Aluoch vs. Director of Public Prosecutions* [2015] eKLR 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.”
16. The above holding in my opinion is premised on the fact that in bail pending appeal, the presumption of innocence is no longer operative since the presumption at this stage is that the conviction was proper unlike in bail pending trial where there exists the presumption of innocence. See Patrick Kiage [supra] at 130. Thus, in bail pending trial, the prosecution carries the burden of showing court why an accused person should not be granted bail while in bail pending appeal, that burden shifts to the appellant to show why he or she should be granted freedom pending the appeal.
17. The Bail and Bond Policy at 4.30 further confirms this position by placing the burden on the applicant/appellant to establish that the appeal has high chances of success or that he or she is likely to serve a substantial part of the sentence before the appeal is heard and thus entitled to bail pending appeal.
18. It is for the above reason that a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. See *Josbua Kiarie Nguguna v Republic* [2021] eKLR. Similarly, the principles governing the grant of bail pending appeal differ from those that govern bail before conviction. See, PLO Lumumba, *A Handbook on Criminal Procedure in Kenya*, LawAfrica, 2005 at 32.
19. It was thus held in *Masrani vs. R* [1060] EA 321 that:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”



20. In this regard, it is instructive to refer to Section 357(1) of the Criminal Procedure Code which 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.”

21. Thus, in *Charles Owanga Aluoch vs. Director of Public Prosecutions* [Supra], the court held that:

“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. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
2. 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 argued 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.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.”

22. This position was restated in *Mutua vs. R* [1988] KLR 497, wherein the Court of Appeal stated:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.”

23. However, as held in *Shah v R* 1976 CA [UR], even where the above circumstances exist, bail is not always automatic and the court rather than granting bail can expedite the hearing of the appeal. Simply, it is the discretion of court whether or not to grant bail pending appeal.

24. In the exercise of this discretion, the court is guided by the following factors as laid down in *Somo v R* [1972] EA 476, *Jivraj Shah vs R* [1986] eKLR and *Chimabbai vs. R* [1971] EA:

- a. Whether the appeal has overwhelming chances of success.
- b. There are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion and
- c. There is a high probability of the sentence being served before the appeal is heard.

25. However, as rightly observed by the Court of Appeal in *Dominic Karanja v Republic* (1986) KLR 612, the main ground/the most fundamental ground for consideration is whether the appeal has an overwhelming chance of success.



26. In the instant application, I am convinced that the applicant has established unusual or exceptional circumstances to warrant the grant of the orders sought. This is because, of identification of a perpetrator in criminal matters is critical. Moreover, taking a look at the contents of the chief's letter dated the 8th of January 2021, there is prima facie evidence to suggest that the appellant has an arguable case. This is because the chief's letter points towards a pattern where the complainant has made similar accusations against other people and further that the appellant was framed. Certainly, the letter raises critical issues that the court need to address and which go to the core of the instant appeal.
27. The upshot of it all is that the applicant has met the threshold for grant of bail pending appeal and the interest of justice tilts in his favour. Accordingly, the application is allowed with orders that;
- a. The applicant herein be and is hereby admitted to bail pending appeal.
 - b. That the applicant be and is hereby released on a cash bail of 500,000 in default a bond of 1 million with one surety of similar amount.
 - c. That in case of security deposit, the Deputy Registrar to assess and approve the same.
 - d. That the applicant shall not move out of the jurisdiction of this court until the appeal is heard and determined.
 - e. That the applicant shall appear for mention before the Deputy Registrar once every week.
 - f. That the appellant shall attend court at all times whenever his appeal is heard or mentioned for whatever reason.
 - g. That the appeal be fixed immediately for directions and hearing.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF MAY 2022.

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R. NYAKUNDI
JUDGE

