



**Yegon v Republic (Criminal Appeal E048 of 2021)
[2022] KEHC 10501 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E048 OF 2021**

**RL KORIR, J
JUNE 22, 2022**

BETWEEN

CHARLES YEGON APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Application before me has been brought through a Notice of Motion dated January 11, 2022 and filed in Court on 1 January 9, 2022. It is premised on section 357 of the [Criminal Procedure Code](#), Cap 75. The Applicant makes the following prayers:-
 - 1) Spent
 - 2) That the appellant be granted bail pending appeal or in the alternative, the execution of the sentence appealed against be suspended pending the hearing of the appeal.
 - 3) That necessary direction be given.
2. The Application is filed alongside the Supporting Affidavit of the applicant dated January 19, 2022. It is based on the following grounds:
 - (1) That the applicant was dissatisfied with the judgment and sentence in the principal magistrate's court at Bomet in Criminal 882 of 2017 and has already appealed against it.
 - (2) That the Applicant has an arguable appeal.
 - (3) That the Applicant's appeal may be rendered nugatory if the orders sought are not granted.
 - (4) That for the entire period of the trial, the appellant/applicant has never missed any single attendance in court.



- (5) That the appellant is/ will be ready to abide by all the terms and conditions that the honorable court may impose.
3. This Application was canvassed by way of written submissions.

Applicant's Submissions

4. Counsel for the applicant submitted that during the trial in the subordinate court, the applicant complied with the terms of bond and was willing to abide by any terms that the appellate Court would impose in granting him bail. Counsel also submitted that the offence which the applicant was convicted of was non-violent in nature. That section 357(1) was to the effect that an appellant would be protected in cases of wrongful conviction thus restoring his presumption of innocence. It was his further submission that the circumstances of the appeal disclosed substantial merit and that the appeal had high chances of success. Lastly, he submitted that delays in hearing and determining an appeal may be a ground for granting bail pending appeal and that the court should consider this in light of the applicant's 2-year sentence.

Respondent's Submissions

5. The respondent submitted that the right to bail is enshrined under *the Constitution* in article 49(1) and that it was not absolute but based on the court's discretion. They submitted on 3 issues being: whether the appeal has overwhelming chances of success, whether there were exceptional or unusual circumstances to warrant the court's exercise of its discretion and whether there was a high probability of the sentence being served before the appeal was heard.
6. Firstly, the respondent submitted that the applicant did not raise any points in law that would demonstrate that the Appeal had overwhelming chances of success and that the grounds raised in the appeal were not unusual. That the court should be cognizant that the conviction emanated from a properly constituted court and the applicant was legally undergoing punishment.
7. Secondly, they submitted that, the fact that the applicant complied with the terms of bond in the lower court and that he never failed to attend court was not exceptional or unusual circumstances to warrant the Court to grant the prayers in his favour. They cited the case of *Somo v Republic* [1972] E.A. 476.
8. Lastly, the respondent submitted that the applicant did not discharge his burden of proving that he was likely to have served a substantial part of the sentence before the appeal would be heard since at present, they had not pursued court for admission of the appeal. That the 2-year sentence was not harsh considering the circumstances and it was unlikely that he would have served the sentence by the time the appeal was heard.

Issues For Determination

9. From my perusal of the grounds raised in this Application, the Petition of Appeal and the respective submissions of the parties, the only issue for my consideration and determination is whether the Application is merited.



Whether The Application Has Merit.

10. Bail pending appeal is provided for under section 357 of the [Criminal Procedure Code](#) which states 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.”

11. The principles that guide bail pending appeal were outlined in the case of [Jivraj Shah v Republic](#) [1986] eKLR 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 exist.

(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.”

12. The right to bail is enshrined in [the Constitution](#) under article 49 as rightfully quoted by the Applicant’s counsel. The said Article provides that: -

“49. Rights of arrested persons

(1) An arrested 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.”

13. This right is available to persons who are yet to be convicted because it is premised on the principle of presumption of innocence until the person is proven guilty. I take cognizance that after conviction, that presumption of innocence no longer stands. This was aptly stated in the case of [Chimambhai v Republic](#) [1971] EA 343 where Harris J. observed thus: -

“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.....”

14. As such, the right to bail pending appeal is not absolute as rightfully submitted by the respondent because the applicant has already been tried by a court of competent jurisdiction and convicted. This



appellate Court must therefore be careful not to interfere with the exercise of the trial court's discretion, unless there were exceptional circumstances that warranted the granting of bond pending appeal. It was incumbent on the applicant to demonstrate the three principles as outlined in the case above.

15. The Applicant in this case submitted that his adherence to the terms of bail in the lower court and attendance of court sessions without fail were exceptional circumstances that warranted his prayer for bail. I rely on the Court of Appeal decision in *Dominic Karanja v Republic* [1986] KLR 612 in this regard, where it was stated inter alia: -

- “(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;
- (d)

14. It follows then that his assertion of previous good conduct is not an exceptional circumstance and is thus insufficient to persuade this court to grant him bail pending the intended appeal.

15. Secondly, it is incumbent on the applicant to demonstrate that the intended appeal has overwhelming chances of success. The Bail and Bond policy guidelines at page 27 paragraph 4.30 state that it is the burden of the convicted person to demonstrate that there is an overwhelming chance of success in his appeal.

16. In this case, the applicant filed a Petition of Appeal dated 2December 2, 2021. His main grounds are that the case against him was not proven to the required standard; that the trial magistrate erred in law and facts by relying on extrinsic evidence which was not adduced during the trial; and that she introduced extraneous matters in dismissing the applicant's defense. The applicant has annexed the judgment delivered by Hon. L. Kiniale on December 9, 2021. No proceedings have been filed for my perusal. Thus, I am unable to determine whether the grounds raised in the Petition of Appeal disclose exceptional and unusual circumstances and whether the subsequent appeal has overwhelming chances of success.

17. Based on the foregoing, it is my finding that the applicant has not discharged his burden of proving that the appeal has overwhelming chances of success. He was convicted by a court of competent jurisdiction and there is nothing in his grounds of appeal to demonstrate prima facie that his appeal has overwhelming chances of success.

18. The applicant was apprehensive that he was likely to serve a substantial part of his sentence before the appeal was heard and determined, thereby rendering it nugatory. This assertion is not backed by any evidence. The applicant has failed to demonstrate how his case will be delayed.

19. In the end, I find that this Application lacks merit and is hereby dismissed. The applicant is directed to file his Record of appeal for expeditious disposal of his intended Appeal.



20. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 22ND DAY OF JUNE, 2022.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Kipngetich holding brief Mr. Miruka for the Applicant, Mr. Murithi for the Respondent, and Kiprotich (Court Assistant).

