



**Njeru & another v Republic (Criminal Appeal E096 of 2022)
[2022] KEHC 12054 (KLR) (17 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E096 OF 2022
EM MURIITHI, J
AUGUST 17, 2022**

BETWEEN

PAUL MURITHI NJERU 1ST APPELLANT

NICHOLAS MWIRIGI MITHIKA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. This court has previously considered the principles applicable in applications for bail pending the hearing and determination of an appeal in Machakos HC CRI Appeal No 56 of 2015, Peter Wanjohi Njiraini v R, this Court examined the principles for the grant of bail pending appeal as follows:

“Principles for the grant of bail pending appeal

3. Article 49 (1) (h) provides as one of the rights of arrested persons –

“(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.”

4. Although the applicant’s right to presumption of innocence has been extinguished by his conviction by the trial court, the right to bail pending trial must meaningfully be taken to be co-extensive to the criminal trial process, which includes appeal. However, in determining whether there are compelling reasons for refusal of bail, the fact that the applicant is now a convict must be taken to be a compelling reason in that a convicted person is likely to abscond because his guilt has already been established and certainty of punishment which has already been imposed.



5. In *Boke Chacha v Republic*, Kisii HC Cri Appeal No. 244 of 2012, I considered the principles for the grant of bail pending appeal

“According to authorities on bail pending appeal, bearing in mind that the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal, the criteria for consideration is:

- a. Whether there exists exception or unusual circumstances which justify grant of bail in interests of justice. See *Jivraj Shah v R* (1986) KLR 605.
- b. Such exceptional circumstances exist where the appeal has overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard. See *Jivraj Shah, supra*; *Mutua v R* (1988) KLR 497; and *Somo v R* (1972) E A 476.
- c. The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See *Dominic Karanja v R* (1986) KLR 612.
- d. A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal. See *Dominic Karanja, supra*.”

Application of Principle to the present case

2. While relying on *Samuel Macharia v R* [2013] eKLR, the applicants have called to their aid the principle established in *Somo v R, supra*, that the appeal has overwhelming chances of success and exceptional circumstances exist to justify grant of bail and urged that the risk of losing their teaching jobs is for the young teachers who are the sole providers for their families as exceptional circumstances. At paragraphs 7-13 of the respective Supporting Affidavits sworn by the applicants on 21/7/2022 which are in the same terms, [save that the 2nd applicant’s wife is a trained TSC teacher who is yet to be employed], the applicants state as follows:

- “7. That I believe I have an arguable and promising appeal in view of the grounds set out in the above mentioned petition of appeal filed herein on 19th July, 2022.
8. That other than that I am newly employed as a teacher, I am also the sole breadwinner of a young family comprising of one wife and one child aged one (1) year old. A copy of the child’s birth certificate is annexed as “PMN5”.
9. That my wife is a housewife without any source of income.



10. That in view of the strict TSC Rules/Regulations and given that I am a newly employed teacher, I risk losing my job unless the Honourable Court releases me on bond pending the hearing and determination of our joint appeal herein.
 11. That I can't imagine losing a job that I labored and waited for over five (5) years after college for an offence (as I shall demonstrate to the Honourable Court at the hearing of this appeal), I sincerely never committed.
 12. That my young family also stands to suffer if the instant application is not allowed.
 13. That as the proceedings (annexture "PMN3") will show, I was out on bond for a period of close to six (6) years during trial and I never absconded."
3. In response, the DPP has by replying affidavit of B. Nandwa Prosecution Counsel on 27/7/2022 urged that the application is without merit for not disclosing overwhelming chances of success of appeal or other exceptional circumstance, at paragraphs 3-9 thereof as follows:
- "3. That the Applicants/Appellants were convicted and sentenced in two counts. Count 1 was for the offence of Gang defilement contrary to section 10 of the Sexual offences Act No 3 of 2006 whereby the applicants/appellants were convicted and sentenced to serve 15 years imprisonment where as Count 2 the applicants/appellants were convicted and sentenced to serve 2 and a half years in prison for the offence of administering substance with intent to stupefy contrary to section 27(1)(a) as read with section 27(3) of the Sexual offences Act
 4. That the applicants/appellants had been convicted rightly and does not have a fundamental right to be released on bail or bond.
 5. That the applicant/appellant has been convicted rightly, as there are no inconsistencies in the witness statements and the evidence on record.
 6. That the applicants/appellants Appeal does not have any overwhelming chances of success and the same has not been demonstrated by the applicants/appellants.
 7. That it is unlikely that the applicants/appellants shall have served their sentence before the Appeal is heard and that the retributive purpose for the sanction set for the offence of gang defilement and the offence of administering substance with intent to stupefy would not be served if the applicant/appellant was let out on bail pending Appeal.
 8. That the fact that the applicants/appellants are teachers employed by the Teacher Service Commission is not an exceptional or unusual circumstance which justify the applicants/appellants to be released on bail pending Appeal.
 9. That this Application is an abuse of the court process and should therefore be dismissed."
4. Counsel for the applicants, Mr. Ndubi and for the DPP, Ms. Nandwa, made oral submissions on the application on 27/7/2022 and ruling was reserved for 17/8/2022.



Determination

Seriousness of the charge of defilement

5. The applicants are convicted of the offence of defilement of a nine-year old. The societal revulsion of the offence requires that the offence be suitably punished upon conviction for deterrence. Release on bail for reasons other than compelling reasons of exceptional and unusual circumstances in accordance with the authorities is in appropriate. As noted above, such exceptional circumstances may exist because of overwhelming chances of success of the appeal or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard.

Chances of success of petition of Appeal

6. The court has considered the joint Petition of Appeal herein for the two applicants dated July 18, 2022. While it sets up serious issues for consideration including the competency of the charge alleged to be on a non-existent offence; the defectiveness of the charge sheet; and the general sufficiency of evidence to convict, all of which are fit to be investigated on appeal, I am at this stage not able to hold that the appeal has overwhelming chances of success.
7. The court has also noted the Notice of Enhancement dated 29/7/2022 filed by the DPP and giving notice to the applicants of the DPP's intention to seek the enhancement of the sentence passed on the applicants, but that aspect of the case is only relevant at the hearing of the Petition.

Unusual circumstances

8. The court has considered the proffered exceptional circumstances and with respect, does not find that the risk of loss of a teaching, or any other job for that matter, upon conviction is exceptional circumstances: it is the natural consequence of conviction and imprisonment for a term of years, as is the inability to provide for their families consequent upon the conviction. There is nothing unusual in that situation as to warrant the exercise of the court discretion to grant bail pending appeal.

Possibility of full hearing of the appeal within reasonable time

9. The court has noted that the record of the trial court is ready as certified copy of the proceedings and judgment are attached to the applicants' application, and consequently, the hearing of the appeal itself may be expedited in the interest of early determination of the question of the appellant's guilt. The court considers that the applicants' guilt for the very serious offence of joint defilement of a child already established by the trial court, or otherwise, should be determined in a finalized manner by way of hearing of the appeal. In the meantime, and there being no risk that the applicants will have served a substantial portion of the fifteen-year sentence before the hearing and determination of the appeal, the applicants should continue to serve sentence.
10. This is the course that the court recently followed in a case of grievous harm in *Thambura Leonard Mucui v R*, Meru HCCRA No E025 of 2020 of 11/2/2021, where the court said:

26. This case does not disclose an overwhelming chance of success of the appeal nor any exceptional circumstances to warrant the grant of bail pending appeal. The prima facie issue offered by counsel for the appellant on the ground of want of mens rea is, with respect, not well founded. However, without prejudging the appeal which is yet to be heard so as not to embarrass the



court that hears the appeal, the court finds that the appeal raises an issue of the circumstances surrounding the commission of the offence which may at the hearing be found meritorious, if not against the conviction, at least in mitigation as to severity of the sentence of imprisonment for thirty (30) years. In such circumstances, the remedy appears to me, with respect, to be the expedited disposal of the matter by the full hearing of the appeal.”

The court shall, therefore, order expedited hearing of the appeal herein.

ORDERS

11. Accordingly, for the reasons set out above, the court makes the following Orders and directions:

1. The applicants’ application for bail pending appeal by Notice of Motion dated 21/7/2022 is declined.
2. The Appeal shall be set for hearing on priority basis on 22/9/2022.
3. The Deputy Registrar is directed to obtain the trial court file and Record of Appeal.

Orders accordingly.

DATED AND DELIVERED THIS 17TH DAY OF AUGUST 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Ndubi, Advocate for the appellants.

Ms. B. Nadwa, Prosecution Counsel for the DPP.

