



**Wanjiru & another v Republic (Criminal Appeal 144 of 2018)
[2022] KEHC 14216 (KLR) (Crim) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 144 OF 2018
DO OGEMBO, J
OCTOBER 25, 2022**

BETWEEN

JOSEPH KINYANJUI WANJIRU 1ST APPELLANT

ELIZABETH WAIRIMU NYOIKE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant Joseph Kinyanjui Wanjiru has moved this court by way of a notice of motion application dated June 22, 2021. The application is brought under several provisions of the law including sections 347, 350, 356 and 357 of the *Criminal Procedure Code*, and articles 25, 50, 159 and 165 of the *Constitution of Kenya*. The same pleads for 1 prayer, that;

“That the honourable court be pleased to admit the applicant to bail pending second appeal and defer or suspend implementation of his sentence in the judgment of the High Court by the Honourable Judge Ngenye Macharia delivered on December 3, 2019 pending hearing and determination of this appeal either on similar bail terms existing before the subordinate court or on such other terms this court may please.”
2. This application has been supported by the affidavit of the applicant and one Elizabeth Wairimu Nyoike, his wife. By agreement and consent of the parties, this application was canvassed by way of written submissions. Both sides duly complied.
3. It was submitted by the applicant that 3 issues are up for determination in this matter.
 - i. Whether the appeal has high chances of success.



- ii. Whether there are exceptional circumstances to warrant release of the applicant on bail pending appeal.
 - iii. Whether the applicant is likely to abscond if released on bail pending appeal.
4. On the first issues, it was submitted that the appeal has high chances of success and could be rendered nugatory. Counsel relied on the case of *Jiuraj Shah versus Republic* (1986)KLR 605, on the applicable principles. A brief analysis of the evidence was made to demonstrate the likelihood of the success of the appeal filed.
5. Counsel also relied on the provision of section 357 of the *Criminal Procedure Code* on general provisions guiding grant of bail pending appeal, and also the decided cases of *Kaguma versus Republic* (2004)IEA 68, that;

“the most important issue here is if the appeal has such overwhelming chances of success that there is no justification of or of depriving the applicant his liberty.”

Also, the case of *Chimanbhai versus Republic* (1971)EA, 343, that;

“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 nonetheless the law of 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.....”

6. Secondly, on the issue of exceptional circumstances that warrant release on bail pending appeal, counsel relied on *Dominic Karanja versus Republic* (1986)KLR 612, that exceptional and unusual circumstances may be considered in grant of bail pending appeal, but that ill health *per se* would also not constitute an exceptional circumstance where there existed medical facilities for prisoners for prisoners.
7. It was lastly submitted that under article 49(1) of the *Constitution*, bail is a constitutional right, and that the applicant is unlikely to abscond if released on bail.
8. The state has opposed this application. Counsel for the state submitted that the principles of grant of bail pending appeal are settled in the case of *Jiuraj Shah Versus Republic* (1986)KLR, as follows:-
- i. Whether the appellant has an arguable appeal with overwhelming chances of success.
 - ii. Whether there exists exceptional and unusual circumstances upon which the Court of Appeal can conclude that it is in the interest of justice to grant bail, and
 - iii. Whether a substantial part of the appellant’s sentence will have been served by the time the appeal is heard.
9. It was further submitted for the orders sought to be granted, this court would have to review its own considered decision, which would be an absurdity. Reliance was made in the case of *Joseph Garanga Korir versus Republic* (2016)eKLR (Githua J) which it was held;

“Counsel has urged this court to allow this application on grounds that his intended appeal has high chances of success. Having dismissed the appellant’s first appeal, it would be ridiculous for this court to sit and start evaluating its own decision in order to make a finding whether or not the appeal against its own decision has overwhelming chances of success. Doing so in my view, will be kin to sitting on appeal against its own judgment. The argument



that the intended appeal has high chances of success should be advanced before the court that is mandated to determine the applicant's second appeal on its merits. I say so because I am aware that the applicant has a right to make a similar application to the Court of Appeal."

10. It was also submitted that the applicant has not shown any exceptional circumstances to warrant a grant of bail pending appeal and that sickness is not one such circumstance.
11. Also that in view of the sentence, there is no risk of the applicant serving out his sentence before the appeal is determined. The application was submitted to be an afterthought, having been brought over 1 year and 9 months after the conviction.
The court was urged to dismiss this application.
12. I have considered the submissions by both the applicant and respondent sides. As agreed by the 2 sides, the rules for grant of bail pending appeal are well settled, that it must be shown that the appeal is likely to be successful on account of some substantial point of law, and that the sentence or part of it, will have been served by the time the appeal is heard, see *Jiuraj Shah versus Republic* (1986)KLR. These are basically the 2 issues that the applicant must prove if bail pending appeal is to be granted herein.
13. It is worth noting that this application seeks bail pending a 2nd appeal. The first appeal the applicant filed before this court was dismissed on December 3, 2019 by the Honourable Justice Ngenye Macharia. In the judgment of the honourable judge, which I have had the benefit of reading, the judge made considered determination on the grounds raised in the appeal. The applicant, by asking this court by way of this application, to determine that the applicant's 2nd appeal filed at the Court of Appeal is arguable and has high chances of success, the applicant is basically inviting this court to interrogate a considered finding of a judge of concurrent jurisdiction. Neither the *Constitution of Kenya*, nor any statute grants unto this court any such jurisdiction.
14. Counsel for the respondent has referred this court to the case of *Joseph Garang Korir versus Republic* (2016)eKLR, in which the court held *inter alia*, that the argument that the intended appeal has high chances of success should be advanced before the appeal court. I align myself with this finding for the sole reason (as found therein, that it would be ridiculous and absurd for this court to sit and start evaluating the decision of a judge of concurrent jurisdiction to make a finding on whether or not an appeal against that decision has overwhelming chances of success. I therefore find that the arguments and submissions of the applicant on this score falls short.
15. On the 2nd limb, I have considered the nature of the sentence meted out against the applicant. The applicant was sentenced to serve upto 20 years imprisonment by the lower court. On 1st appeal, the same was reduced to a term of 15 years imprisonment. I see no possibility of the applicant serving out the sentence or substantial part of the same before the hearing and determination of the appeal filed at the Court of Appeal.
16. In this application, the applicant has raised the ground that there are exceptional circumstances in this matter that warrants his release on bail pending a 2nd appeal. It is noted that whereas statements were made to this end in the affidavits in support of the application, no submissions were made on the same. This court however, is to determine whether the issue of ill-health is an exceptional circumstance that would warrant issue of order of bail pending appeal or 2nd appeal. Decisions on this matter.
17. In the case of *Dominic Karanja versus Republic* (1986)KLR, cited by the applicant in the submissions, the court clearly found that ill health *per se* would not constitute an exceptional circumstances where there exists medical facilities for prisoners. (see also HCC ACEC Appeal No E012/2021, *Concelia Aoko Ondiek versus Republic*)



18. Further apart from the statements deponed to regarding the health of the applicant, no attempt was made at giving the nature of the said ailment. Similarly, no attempt was made at proving that the existing prison medical facilities and any other referral medical facilities cannot handle the applicant's medical condition, if at all.
19. I am in the circumstances, not convinced that the applicant has shown any good or sufficient ground that would warrant the issuance of an order of bail pending a 2nd appeal as prayed for in this application. I find this application dated June 22, 2021 lacking in any merit. The same is wholly dismissed. Orders accordingly.

D. O. OGEMBO

JUDGE

25TH OCTOBER, 2022.

Court:

20. Ruling read out in presence of the applicant (Kamiti medium), Ms. Obure for Mr. Kanjama for the applicant and Ms. Akunja for the state.

D. O. OGEMBO

JUDGE

25TH OCTOBER, 2022.

