



**Kabuga v Republic (Miscellaneous Criminal Application E025 of 2022)  
[2022] KEHC 15702 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15702 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS CRIMINAL APPLICATION E025 OF 2022**

**SM GITHINJI, J  
NOVEMBER 28, 2022**

**BETWEEN**

**HASSAN TSUMA KABUGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the conviction and sentence by Hon. E. K. Usui Chief Magistrate  
in Criminal Case No. E040 of 2020 at the Chief Magistrate's Court at Malindi.)*

**RULING**

1. The Appellant/Applicant herein was charged before the trial Court with an offence of Rape contrary to section 3(1) (a) (c) of the *Sexual Offences Act* No. 3 of 2006. The particulars of this offence are that on December 9, 2020 at [Particulars Withheld] area Langobaya location in Malindi sub-county within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of DKS, a girl aged 8 years, without her consent.
2. In the alternative, the appellant was charged with the offence of committing an indecent act with an adult contrary to section 11(a) of the *Sexual Offences Act* No. 3 of 2006. The particulars hereof being that on December 9, 2020 at [Particulars Withheld] area Langobaya location in Malindi Sub-county within Kilifi County, the appellant intentionally and unlawfully committed an indecent act by touching the vagina of DKS a girl aged 8 years, using his penis.
3. The appellant pleaded not guilty before the trial Court. The matter proceeded to hearing and he was found guilty of the main charge of rape. Subsequently, he was convicted and sentenced to serve 10 years imprisonment.
4. Dissatisfied with the trial Court's judgment, the appellant lodged an appeal dated June 15, 2022 and thereafter filed an application dated June 16, 2022 under the provisions of section 357 of the *Criminal Procedure Code* seeking for bond pending hearing of High Court Criminal Appeal No. 20 of 2022.



The application is premised on the grounds on the face of it and supported by an affidavit sworn on June 16, 2022 by Philip Michira the appellant's advocate on record.

5. The appellant averred that his appeal has high chances of success. He further averred that he is an elderly man who suffers health conditions and if bail is not granted, his appeal may be rendered nugatory should he succeed after having served a greater part of his sentence.
6. In opposition thereto, the respondent filed grounds of opposition on several grounds such as, the intended appeal has no chance of success since the evidence tendered by the prosecution in the lower Court was overwhelming, and that due to the long sentence that the appellant is facing, his chances of absconding are extremely high.
7. The application herein was canvassed by way of written submissions. The applicant relied on the case of *Somo v R* at page 480 and submitted that he has satisfied his appeal has high chances of success given that the alleged offence was reported six days after the alleged day of the occurrence. He further averred that in the lower Court, the prosecution did not dispute that there was an existing land dispute between the complainant's son and the appellant, therefore he was framed for the said offence to settle the land dispute scores. The appellant urged this Court to allow the application herein since he is a first offender and he complied with the bond terms that were granted by the trial Court prior to his conviction.
8. The respondent on the other hand submitted that the appeal herein has no chances of success since at the trial, the prosecution proved the mens rea and all other ingredients that constitute an offence of rape, beyond reasonable doubt. He further submitted that there are no exceptional circumstances for this Court to consider in exercise of its discretion. The respondent asserted that the appellant was convicted on June 10, 2022 and sentenced to serve 10 years imprisonment; he should ensure that the record of appeal is prepared expeditiously so that the substantive appeal can be heard and determined soonest possible.

### **Analysis and Determination**

9. I have considered the application herein, the grounds on its face and the affidavit in support thereof, the grounds of opposition by the respondent and the written submissions by Counsel for parties. I am of the considered view that the issue that arises for determination is whether the appellant has satisfied the conditions laid down to warrant granting bail pending appeal.
10. It is trite that the relevant law that provides for bond pending appeal is section 357 (1) of the *Criminal Procedure Code* Cap 75 Laws of Kenya which provides as hereunder-

“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 for granting bond pending appeal were reiterated 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 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.
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. Accordingly, when it comes to what constitutes exceptional circumstances, the Court of Appeal in *Dominic Karanja v Republic* [1986] KLR 612 in dealing with an application for bond pending appeal held that the previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors; in addition, ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.
13. It is trite that this Court has discretion to grant bail pending appeal, however this discretion should not only be exercised cautiously but also judiciously. On whether the appellant’s appeal has high chances of success, I note that the appellant has only availed the trial Court’s judgment and in the absence of the lower court record, this Court cannot aptly determine whether or not the grounds of appeal disclosed in the petition of appeal herein are valid and establishes an arguable appeal with high chances of success.
14. On whether the appellant shall have served most of his sentence by the time the appeal is heard and determined, it is my finding that the current policy of quick disposal of cases does not create the possibility of delay in hearing of the appeal. In addition, approximately six months have lapsed since the appellant was sentenced to 10 years imprisonment on June 10, 2022 and there is no likelihood of him having served a substantial part of the sentence before the appeal is heard and determined. It is noteworthy that the appellant may be tempted to abscond if released on bond since he is facing a long-term sentence for a serious offence.
15. On demonstration of existence of exceptional or unusual circumstances, the applicant averred that he is an elderly man who suffers health conditions. However, it has been held in *Dominic Karanja v Republic* (*supra*) that ill health per se would not constitute an exceptional circumstance where there exists medical facilities for prisoners as is the case herein. Additionally, in the case of *Peter Hinga Ng’otho v Republic* [2015] eKLR, it was held that the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which would entitle the Court to admit an Applicant to bail pending appeal.
16. In conclusion, this court finds no merit in the application and it is therefore dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2022.**

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**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Ms. Mutua for the State
2. Appellant/Applicant



Record be prepared and served.

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**S.M. GITHINJI**

**JUDGE**

**28.11.2022**

