



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL REVISION NO. E012 OF 2021

DAVIS KIPKOECH.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The Applicant in this case was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. An alternative charge was also preferred against him being committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. He pleaded not guilty to both charges and the trial proceeded to completion. He was acquitted of the offence of defilement but convicted on the alternative charge and sentenced to serve seven (7) years in prison.

2. The Applicant has now filed the present application under Certificate of urgency seeking to be released on bail pending appeal. The application is premised on Article 49(1) (h) of the Constitution and Section 357 of the Criminal Procedure Code and the following grounds:-

- i. That the Applicant was sentenced to 7 years imprisonment;
- ii. That the Applicant was dissatisfied with the conviction and sentence and has lodged an appeal in the High Court at Bomet;
- iii. That given the time it will take to hear the Appeal and the nature of the sentence if successful the appeal will be rendered nugatory; and
- iv. That the said appeal has overwhelming chances of success.

3. The Application is filed together with a supporting affidavit sworn by the Applicant in which he avers *inter alia* that he is the sole breadwinner of his family; that the appeal he has lodged has overwhelming chances of success, and; that he is ready to obey the orders given by the court in respect of his request for bond.

4. In his submissions dated 12th April 2021 the Applicant stated that his appeal had overwhelming chances of success; that he would suffer irreparable loss and damage that was not capable of being compensated by monetary terms if he was subjected to jail during the appeal as the same would also affect his education. He submitted that he had abided by the terms of the bond granted in the lower court; and that an appeal had the effect of restoring the presumption of innocence on an accused person until the case was finally determined. He prayed that the application be allowed and prayers granted.

5. The Applicant relied on the principles enunciated in the case of **Jivraj Shah vs. Republic (1986) KLR, 605**. Other judicial authorities relied upon were: **Machakos High Court Criminal Appeal No. 46 of 2019 Martin Muli Mutava vs. R; Nairobi High Court Criminal Application No. 926 of 2002, Col. Joseph Nambasi Lukhoba vs. R; Embu High Court Criminal Appeal No. 11 of 2019 Kigoro Machoro vs. R; Garsen High Court Criminal Appeal No. 10 of 2020 MNM vs. R; and Kerugoya High Court Criminal Appeal No 70 of 2017 Michael Ndwiga Kathure vs. R.**

6. In rebuttal, the Respondents submitted that bail pending appeal was not a right and that the Applicant's innocence was terminated by the conviction in the trial court. To this end the Respondent relied on the case of **Charles Omwanga Aluoch vs. DPP (2015) eKLR** and **Jivraj Shah vs. R (supra)**. Secondly, they contended that the application was devoid of merit as the appeal had no chance of success since the evidence tendered by the prosecution was overwhelming. Lastly, they contended that there were no exceptional circumstances relating to the case of the Applicant and relied on the case of **Joshua Kiarie Njuguna vs. Republic (2021)** where the court made reference to **R vs. Kanji (1946) 22 KLR**.

7. The only issue is whether the Application is merited and whether bond pending appeal ought to be granted.

8. Article 49(1) (h) of the Constitution 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.”

Criminal Procedure Code provides for bail pending appeal as follows:-

357. Admission to bail or suspension of sentence pending appeal

“(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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.”

9. The principles for determining whether to grant bail or not were aptly pronounced in the case cited to me by both parties, **Jivraj Shah vs. R. (Supra)** where the court outlined the guiding principles 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. See Raghbir Singh Lamba vs. R [1958] EA 37; Jivraj Shah vs. R [1986] eKLR; Somo vs. R (supra); Mutua vs. R (supra);

(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 See Ademba vs. Republic [1983] KLR 442, Somo vs. R [1972] EA 476, Mutua vs. R [1988] KLR 497;

(3) 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.”

10. From the above, it is clear that the court must thus be guided by the above principles and the particular circumstances of each case in determining whether or not to grant bail. As stated by the East African Court of Appeal in **Masrani vs. R (1060) EA, 321,**

“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.”

11. It is also clear that bail is not an absolute right especially where a subordinate court has tried a case and arrived at the conclusion that the accused person was culpable and entered a conviction. The issue of presumption of innocence towards such a person is also no longer tenable at that point. I therefore disagree with the submissions of the Applicant’s counsel that the intended appeal had the effect of restoring the presumption of innocence until guilt is proven. This position is buttressed by the Court of Appeal decision in the case of **Chimambhai vs. Republic (1971) EA, 343** (per Harris J) who observed as follows:-

“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.....”

12. From the Applicant’s supporting affidavit, he avers that he is unmarried and the sole bread winner in his family with siblings who depend on him as the eldest son. He also avers that he had previously been granted bail by the trial court and he abided by the terms to the conclusion of the trial.

13. I do not consider the factors deponed upon by the Applicant as demonstrating exceptional circumstances. There is nothing exceptional in being a first born or breadwinner or in having observed the conditions of bond in the lower court. I am guided by the observation made by the Court of Appeal in **Dominic Karanja vs. Republic (1986) KLR 612** which held that:-

“(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. This was also the position in the case of **Peter Hinga Ngatho vs. Republic (2015) eKLR** where 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 can warrant a decision to admit an applicant to bail pending appeal. The applicant had not proved any exceptional circumstances to warrant grant of bail pending appeal.”

15. I find no existence of any exceptional circumstances in the present Application.

16. The second facet is to consider whether the grounds which are raised by the Applicant in his Appeal raise a valid point of law and whether the appeal has overwhelming chances of success. In the **Jivraj Shah case (supra)**, the court went further to state in respect to the case having an overwhelming chance of success that there was actually no difference between this aspect and a set of circumstances which would disclose substantial merit in an appeal with the effect being that the appeal is eventually allowed. The proper approach would then be the consideration of the particular circumstances and weight and the relevance of the points to be argued.

17. I have perused the Memorandum of Appeal filed on 29 March 2021 and have noted that of paramount importance is that the Applicant challenges the decision of the trial court on the basis that the evidence provided was not watertight and thus the prosecution did not prove the offence to the required standard. In addition, the Applicant explains in his Memorandum that the decision of the trial court was not based on merit but on uncorroborated and inconsistent evidence.

18. I find the above to be a generalized and unparticularised submission. It does not *prima facie* disclose the points of law that would aid the court in seeing the likelihood of success in the appeal without hearing the appeal itself.

19. A critical issue raised by the Applicant is that his appeal may be rendered nugatory as he might have served a substantial part of his sentence by the time the appeal is heard and determined.

20. In addressing this concern, the court must engage in a balance of the existing circumstances and the fact that the accused person has been lawfully convicted and ought to be serving his sentence. As the Court of Appeal in **Mutua vs. R (1988) KLR 497** stated:-

“It must be remembered that an applicant for bail pending appeal (emphasis mine) 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.”

21. In balancing the scales of justice in an application of this nature it must be remembered that the grant of bail at any stage of trial or proceedings is an exercise of judicial discretion. In the case of **Charles Owanga Aluoch vs. Director of Private Prosecutions (2015) eKLR**, the court summed up this position thus:-

“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. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored.....”

22. I have taken into consideration the fact that the Accused has been convicted by the trial court and is serving a lawful sentence. I have also taken into consideration his right of appeal where he is dissatisfied. Further I have, as stated before, observed that there are no exceptional circumstances that would require this court to grant bail. I am persuaded that the interests of justice will be served where the Applicant pursues his Appeal and obtains a final determination expeditiously.

23. In the final analysis, I am disinclined to grant the Applicant bail pending appeal. I have found no basis to conclude that the Appellant’s appeal will be rendered nugatory. To this end therefore, the Applicant is directed to take all urgent steps to have his appeal admitted for expeditious hearing and disposal.

24. The application is dismissed.

25. Orders accordingly.

RULING DELIVERED DATED AND SIGNED THIS 29TH DAY OF JULY, 2021

.....

R. LAGAT-KORIR

JUDGE

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