



REPUBLIC OF KENYA



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**Mwaura v Republic (Criminal Appeal E074 of 2024)
[2025] KEHC 2513 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E074 OF 2024
AK NDUNG’U, J
FEBRUARY 17, 2025**

BETWEEN

ISAAC MBURU MWAURA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

Ruling on Bail Pending Appeal

1. The Appellant herein, Isaac Mburu Mwaura was convicted after trial of defilement contrary to Section 8(1) (4) of the *Sexual Offences Act* and he was sentenced to fifteen (15) years imprisonment. He has appealed to this court and pending the disposal of his appeal, he has applied to be released on bail vide an application dated 21/11/2024 for orders that;
 - i. Spent.
 - ii. The Honorable court be pleased to admit the Appellant to reasonable bail or bond terms pending hearing and determination of the appeal.
 - iii. In the alternative the Honorable court be pleased to stay and/or suspend the execution of the sentence in Rumuruti Magistrate’s Court SOA Case No. E022 of 2024 pending the hearing and determination of the instant appeal.
2. The application is supported by an affidavit of Isaac Mburu Mwaura, the Appellant herein. It is deposed that he was charged with defilement and it was alleged that the complainant got pregnant. A DNA test was conducted which excluded him as a biological father to the complainant’s child which shows that the complainant lied as to paternity of her child. The court however disregarded the DNA results and proceeded to convict him which necessitated the filing of this appeal on the grounds that the trial court failed to consider the DNA results, court erred convicting based on evidence of the



complainant which had been proved not to be credible, court failed to consider that there was another assailant who was not named, court erred finding that there was penetration in April whereas there was no conclusive proof to that fact, court failed to note that the complainant's family had attempted to extort from him Kshs.250,000/- before the matter was reported, court failed to take into consideration the circumstances under which the incident is alleged to have taken place, his defence was disregarded and sentence was severe.

3. That throughout the proceedings, the trial court demonstrated open bias against him which was also manifested in the judgment showing that the court had formed its mind before the conclusion of the matter for reasons that he was once forced to proceed with the matter in absence of his counsel, the court made comments when the defence made an application for DNA, and that he held that DNA test were irregularly submitted to him and he did not direct another DNA test to be carried out.
4. That from the above, the appeal has overwhelming chances of success and it will be a miscarriage of justice to continue subjecting him to improper conviction and the sentence. That he is a teacher by profession and he stands to be interdicted or dismissed from employment if he fails to report and due to the nature of the charges. He has a young wife and very young children and if at all he is dismissed from employment, his family will be gravely prejudiced. That he is a law abiding citizen and he was out on bond and religiously attended all court proceedings and he therefore undertakes to adhere to directions this court may grant.
5. In response, counsel for the Respondent filed a replying affidavit dated 16/12/2024. She deponed that the application lacks merit and does not meet the legal threshold for granting of the orders sought on account that granting of bail/bond is discretionary as the Appellant has been found guilty and the principle of presumption of innocence does not apply. That the Appellant has not demonstrated that his appeal has overwhelming chances of success, he has not demonstrated any peculiar or exceptional circumstances to warrant grant of the orders sought and given the 15 years sentence imposed, there is no likelihood that he would have served a substantial part of the sentence before the appeal is heard.
6. Parties were ordered to canvass the application by way of written submissions. The Appellant's counsel reiterated the averments in the replying affidavit and discredited the complainant's testimony and the findings by the trial court and submitted that from the foregoing, the Appellant's appeal has extremely high chances of success and he should therefore be submitted to reasonable bail terms pending determination of the appeal. She maintained that he is a teacher and should he fail to report to work within a reasonable time, he risks being dismissed from employment and he will suffer severe hardship as a sole breadwinner of his young family.
7. As to overwhelming chances of success of the appeal, she argued that conviction was based on the complainant's evidence which evidence was of a single witness whose testimony was uncreditworthy based on the DNA results and no reason was given by the court why it placed high reliance on the minor's evidence. The complainant did not mention the father of her child during the report to the police and during her testimony which shows a clear intention to absolve him from the crime. Nobody witnessed the defilement despite the fact that Appellant's children were at home and neighbours would have likely seen her. Her evidence was very shaky and the Appellant was entitled to an acquittal as was held in the case of *Simon Gichuki Maina v Republic* (Criminal Appeal 50 of 2015) [2016] (KLR). She submitted that the magistrate was determined to convict the Appellant for he disregarded the DNA report on the basis that it was irregularly produced but did not order for another DNA test to be done. That he relied on unrelated precedent just to support his preconceived notion and therefore the court was severely biased and prejudiced against the Appellant. The evidence was not sufficient and there are serious question of law and fact raised which could overturn the conviction. Reliance was placed on



the case of *Charles Owanga Aluoch v Director of Public Prosecutions* (Criminal Appeal 164 of 2013) [2015] KEHC 5903 (KLR) where bail was granted based on the chances of the appeal succeeding.

8. On special circumstances, she argued that he is a teacher employed by TSC and if he fails to report to school and given the fact that he was convicted of defilement, he stands to be dismissed and is unlikely to get his job back even if the appeal succeeds and his family risk of being rendered destitute since he is the breadwinner. That he religiously attended court despite the fact that the offence carries a hefty punishment and he is therefore a good candidate for bail pending appeal.
9. The Respondent's counsel on the other hand argued that granting of bail pending appeal is discretionally under section 357 of the *Criminal Procedure Code* since the presumption of innocence does not apply, the Applicant having been convicted by a competent court. That the discretion must be exercised judiciously and within the law as was observed in *Francis Kamote Mutua v Republic* (1988) eKLR. As to whether the appeal has overwhelming chances of success, she submitted that the burden is on the convicted person to demonstrate that the appeal has chances of success as provided under the *Bail and Bond Policy Guidelines* Paragraph 4.30 and the principle is that the success of an appeal is pegged on account of some substantial point of law to be argued as was held in *Jivraj Shah vs Republic* (1986) KLR 605. That the Appellants' grounds of appeal do not highlight any substantial point of law that when raised during the appeal, is likely to succeed since the grounds are the usual grounds and none that stands out as likely to succeed even before the same is argued. Further, the Appellant has gone ahead to extensively argue the appeal instead of highlighting a substantial point of law that will likely be successful.
10. Further, the conviction was proper as all the ingredients of the offence were proved and the evidence was clear and direct and therefore the appeal does not have overwhelming chances of success that would warrant granting of bail pending appeal. She submitted that the Appellant has not demonstrated unusual or exceptional circumstances to warrant grant of bail pending appeal because his claim that he is a teacher by profession and he stands to be interdicted and/or dismissed, that he is the sole bread winner, and that he will religiously attend court do not qualify as an unusual or exceptional circumstances as was held in *Dominic Karanja v Republic* (1986) KLR 612. That he was sentenced to 15 years imprisonment and it cannot therefore be said that he will have served a substantial part of his sentence by the time the appeal is heard and determined.
11. I have considered the application and the rival arguments by the counsels herein. I have also perused the attached trial court judgment. Section 357 of the *Criminal Procedure Code* provides for the grant of bail pending appeal or suspension of sentence by the High Court or the subordinate court which convicted or sentenced that person. Under subsection 1 it states;

“(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...”
12. The *Bail and Bond Policy Guidelines* provide at page 27, paragraph 4.30 that with respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.



13. The court of appeal in *Epungure v Republic* (Criminal Appeal E015 of 2021) [2021] KECA 343 (KLR) while discussing on the right to bail pending appeal stated that;

“As conceded by the applicant in his written submissions, Article 49(1)(h) provides for the right to bail of an accused person. An arrested or accused person has a right to bail or bond since, as provided under Article 50(2)(a), such a person is entitled to the constitutional right to the presumption of innocence. A convicted person, on the other hand, does not enjoy the right to presumption of innocence since, as the Court observed in *Mary Ngechi Ng’ethe v Republic* [2021] eKLR:

“5. However, in exercising such discretion, the Court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him/her by the Constitution and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong and the sentence illegal. Therefore, as it has been stated time and time again bail pending appeal will only be granted in rare and exceptional circumstances.”

14. It therefore follows that right to bail pending appeal is not an outright right but it is given in exceptional cases. The principles to be considered in determining whether an applicant should be granted bail pending appeal were set out in the case of *Jivraj Shah case* (*supra*) which are 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 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.”

15. Similarly, the Learned Judge in *Mkirani v Republic* (Criminal Appeal E010 of 2021) [2021] KEHC 300 (KLR) quoted The Supreme Court of India in the case of *Krishnan v The People* {SCZ 19 of 2011}, {2011} ZMSC 17 where the court enumerated the following conditions to be satisfied in an application for bail pending hearing of an appeal:

“i. Bail is granted at the discretion of the court.

ii. The court must be satisfied that there are exceptional circumstances that are disclosed in the application.

iii. The fact that the appellant due to delay in determining the appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances.



- iv. It is important to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict, and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.
 - v. It is not for the court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.
 - vi. The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an application to bail; pending appeal.
16. Having considered the above decisions, I must point out that grant of bail pending appeal is at the discretion of the court guided by the above principles and that the discretion must be exercised judicially.
 17. It will be noted from the *Jivraj case* (supra) that one of the principles to be considered in determining whether to grant bail pending appeal is that the appeal has overwhelming chances of success on account of some substantial point of law to be argued in the pending appeal.
 18. The Appellant’s counsel extensively submitted and argued on the merits of the appeal. The counsel was supposed to show that the appeal has high chances of success on account of some substantial point of law to be argued. Even the case relied upon by the counsel *Charles Owanga Aluoch* (supra) the court noted inter alia that

“...as appears on the face of the supplementary petition of appeal, it is evident that several points of law have been raised and that could result to the court varying the trial courts judgment”.
 19. In the instant appeal, all issues raised are matters of fact which must await ventilation at the hearing of the appeal with no particular point of law standing out.
 20. As to whether there exist exceptional circumstances, the Appellant’s counsel argued that the Appellant is a teacher employed by TSC and he risks losing his job and if that happens, he will suffer irreparable damage and his family will be at risk of being rendered destitute since he is the main bread winner. Further, he religiously attended court during trial without fail and hence a good candidate for bail pending appeal.
 21. The court in *Daniel Dominic Karanja v Republic*(supra) held that;

“The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see *Somo v Republic* [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.”
 22. There are therefore no exceptional circumstances to warrant granting of bail pending appeal.
 23. As to whether he would have served a substantial part of the sentence before the disposal of the appeal, he was sentenced to 15-years imprisonment and it is apparent that he would not have served a substantial part of the sentence before the appeal is heard and determined.



24. I am persuaded that the applicant fails to achieve the legal threshold for the grant of bail pending Appeal. The application lacks merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY, 2025.

A.K. NDUNG’U

JUDGE

