Ndirangu v Republic (Criminal Appeal E062 of 2024)
[2025] KEHC 1469 (KLR) (18 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1469 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E062 OF 2024

AK NDUNG'U, J

FEBRUARY 18, 2025

BETWEEN

PETER MUKIRI NDIRANGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Appellant, Peter Mukiri Ndirangu, was convicted after trial of sexual assault contrary to Section 5(1)(a) as read with Section 5(2) of the *Sexual Offences Act* and he was sentenced to ten (10) years imprisonment. Aggrieved by the conviction and sentence, he lodged this appeal. Meanwhile, vide an application dated 18/09/2024 he seeks orders;

    i. Spent.

    ii. Spent.

    iii. Spent.

    iv. That the Appellant be admitted to reasonable bail terms pending hearing and determination of the appeal.

2. The application is based on the grounds on the face thereof and is supported by his affidavit. He deposed that there are unusual and exceptional circumstances to warrant the court to exercise its discretion to admit him to bond pending appeal. That he is 72 years old and has been of good standing; he has been using dentures due to his missing teeth and has not been able to access them which has led to his health declining since he cannot chew food properly; he was admitted to bond during trial and did not abscond and is ready to abide by conditions set by this court; his family resides in Kenya hence there are no chances of absconding court and he undertakes to attend court wherever required and that his appeal raises arguable ground and has overwhelming chances of success.

3. In response, counsel for the Respondent filed a replying affidavit dated 17/10/2024. 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 discretional 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 10 years sentence imposed, there is no likelihood that he would have served a substantial part of the sentence before the appeal is heard.

4. The application was canvassed by way of written submissions. The Appellant's counsel reiterated the averments in the supporting affidavit and added that the Appellant is 72 years old and his health has been declining since his incarceration and his health will continue to deteriorate unless this court intervenes. That he uses dentures to chew food and due to the environment in the prison, he is now experiencing challenges with his eyesight. That the appeal has high chances of success since he was convicted based on the evidence of PW2 which evidence was not convincing enough to cause a conviction.

5. 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 Appellant having being convicted by a competent court. That the applicable 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, it is 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.

6. 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. The Respondent submitted that the Appellant has not demonstrated unusual or exceptional circumstances to warrant grant of bail pending appeal because his claim that he is ailing and 72 years old and that he undertakes not to abscond if released on bond 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 10 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.

7. I have considered the application and the rival arguments by the parties. 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..."

8. 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.

9. 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:
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> > " 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."

10. 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."

11. 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.

12. Having considered the above decisions, it is trite 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. My view is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. The chances of success must be weighed on an obvious substantial point of law since at this stage, the parties do not possess the necessary latitude to argue their cases in so far as the evidence is concerned. (See the Jivraj case, supra).

13. Looking at the petition of appeal, no substantial point of law that has been raised. The Appellant's counsel only argued that the appeal has overwhelming chances of success on account that the evidence of PW2 was not convincing enough to cause a conviction.

14. As to whether there exist exceptional circumstances, it is argued that the Appellant is elderly aged 72 years old, he uses denture to chew his food and since he cannot access them, his health has been declining, that he is now facing challenges with his eyesight due to prison environment, that his health has been declining since incarceration, he is of good character and that he was out on bond during trial and attended court without fail.

15. 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. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of ill health arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.

16. One may empathize with a convict who finds themselves in prison while facing health challenges. However, as well put in the Daniel Dominic Karanja case (supra), ill heath per se is not an exceptional circumstance to warrant granting of bail pending appeal. As it were, prison authorities are obligated to look after the overall welfare of convicts including health, and, in deserving cases are mandated to seek treatment for a convict outside prison facilities.

17. As to whether the appellant would have served a substantial part of the sentence before the disposal of the appeal, I note he was sentenced to 10 years imprisonment. Going by the diary of the court in respect of appeals, it is unlikely that he will have served a substantial part of the sentence by the time the appeal is determined.

18. With the result that the application lacks merit and is dismissed.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 18TH DAY OF FEBRUARY 2025.

A.K. NDUNG'U

JUDGE