



**Ochieng v Republic (Criminal Appeal E044 of 2024)  
[2025] KEHC 2088 (KLR) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2088 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E044 OF 2024**

**DK KEMEL, J**

**FEBRUARY 14, 2025**

**BETWEEN**

**NICHOLAS OCHIENG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Appellant herein filed an application dated 10/8/2024 seeking for an order that the Appellant be released on bond pending determination of his appeal. The application is supported by the Appellant's learned counsel Mr Dola Indidis sworn on even date.
2. The application emanates from the judgment in Madiany PMC Cr S.O. No. E002 of 2024 Republic vs. Nicholas Ochieng, wherein the Appellant was convicted and sentenced to 15 years and 10 years imprisonment for the offence of defilement contrary to section 8(4) and abuse of position of authority contrary to section 24(4) of the *Sexual Offences Act* No. 3 of 2006 respectively. The Appellant's further gravamen is inter alia; that the Appellant has a good appeal with high chances of success; that the applicant is a good and law abiding citizen and that he is not a flight risk; that there is a likelihood of delay in the provision of certified copies of proceedings and judgement that is likely to delay the filing of the record of appeal and eventual hearing of the appeal; that the Appellant is the head teacher of Kahoya Primary school and risks being dismissed by his employer if the order on bail is not granted; that the applicant has two wives and several children who depend on him for support; that the Respondent will not suffer any prejudice if the application is allowed.
3. The Respondent did not file a replying affidavit to the application but the parties agreed by consent that they file and exchange written submissions. Both parties duly filed and exchanged submissions.
4. The Appellant submitted that he is a civil servant as a head teacher at Kahoya Primary School in Rarieda Sub County and risks being dismissed if the prayers sought are not granted.



5. He went further to submit that he is a married man with two spouses and several children whom he supports as the sole bread winner. That the Appellant has a good appeal with high chances of success. That he is a law-abiding citizen and is not a flight risk and is willing to abide by any terms and conditions that may be imposed by this Honourable court upon granting of the bail/bond. That the Respondent shall not suffer any prejudice should the orders sought be granted.
6. The Respondent submitted that there are no unusual or exceptional circumstances that warrant the grant of orders sought. It was submitted that the fact that the Appellant is a head teacher and married to two spouses does not warrant issuance of the orders sought. Since that is not an unusual circumstance. Further, the offence that he is charged with is serious with severe sentence already pronounced. Thus, there is a predisposition for the Appellant to abscond. The Respondent also submitted that on the merits of the appeal, they were merely points of facts and not of law, thus there is no guarantee that the appeal will succeed.
7. Ultimately the Respondent submitted that the appeal be dismissed and the appeal listed for hearing.
8. I have considered the Appellant's application and the rival submissions. I find the only issue for determination is whether the application has merit.
9. Section 357 of the *Criminal Procedure Code* is the statute which deals with matters of bail pending appeals. The same provides as follows on bond pending trial:

“ 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.
- 3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.



9. The Court of Appeal in *Jivraj Shah v. R* (1986) KLR 605 which considered earlier decisions of the court, elaborating the factor of overwhelming chances of success held as follows:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.

10. In the case of *Peter Wanjobi Njiraini v. R*, Machakos HC Cr. Appeal No. 56 of 2015, the court considered the principles of granting bail pending appeal as follows:

“Principles for the grant of bail pending appeal

Article 49 (1) (h) provides as one of the rights of arrested persons–

“(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.”

Although the applicant’s right to presumption of innocence has been extinguished by his conviction by the trial court, the right to bail pending trial must meaningfully be taken to be co-extensive to the criminal trial process, which includes appeal. However, in determining whether there are compelling reasons for refusal of bail, the fact that the applicant is now a convict must be taken to be a compelling reason in that a convicted person is likely to abscond because his guilt has already been established and certainty of punishment which has already been imposed.

11. In *Boke Chacha v. Republic*, Kisii H.C. Cri. Appeal No. 244 of 2012, the court considered the principles for the grant of bail pending appeal as follows:

“According to authorities on bail pending appeal, bearing in mind that the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal, the criteria for consideration is:

- a. Whether there exists exception or unusual circumstances which justify grant of bail in interest of justice. See *Jivraj Shah v. R* (1986) KLR 605.
- b. Such exceptional circumstances exist where the appeal has overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard. See *Jivraj Shah, supra*; *Mutua v. R* (1988) KLR 497; and *Somo v. R* (1972) E.A 476.
- c. The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See *Dominic Karanja v. R* (1986) KLR 612.



- d. A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal. See Dominic Karanja, *supra*.”
12. After analysing the Applicant’s circumstances and juxtaposed with the guidelines in the foregoing authorities, I find that the correct test for bail pending appeal is the exceptional circumstances test in *Jivraj Shah (Supra)* which is more encompassing of the grounds for the grant of bail pending appeal, in which the ground of overwhelming chances of success is one of the sufficient grounds that the court may consider granting bail pending appeal despite the applicant now not enjoying the pre-judgment presumption of innocence which supports the provision of bail pending trial under Article 49 (1) (h) of *the Constitution*.
13. The appellate court shall, therefore, look for any existing exceptional circumstances including the overwhelming chances of success or the existence of a prima facie arguable point or “a set of circumstances that exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard”.
14. The issue before the court is whether there are exceptional circumstances in the nature of an overwhelming chance of success of appeal; a possibility of the appellant serving substantial portion of the sentence before the determination of his appeal, or otherwise, so as to justify the grant in the discretion of the court in the grant of bail pending appeal in this case.
15. Every accused person has a right to appeal an adverse judgment to a higher court under Article 50 (2) (q) as follows:
- “2. Every accused person has the right to a fair trial, which includes the right—
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”
16. This right to consideration by a higher bench, if meaningful, must come with it a protection from substantial and detrimental execution of a sentence imposed by the impugned judgment appealed against from which is a constitutional right. This would ensure that the appeal, if successful, is not rendered nugatory, in the oft-used civil law terminology. However, the necessary safeguards for the eventual implementation of the sentence finally found deserving on the offender upon determination of his appeal, under statute and case-law, are recognized in the right of appeal and must be observed.
17. In the case of *Francis Mitbika v. R (2018) eKLR, Meru Criminal Appeal No. 77 of 2018* the court held that when it appears there is prima facie point of law, it is incumbent to grant bail.”
18. In the instant case, I agree with the Respondent that there are no unusual or exceptional circumstances that warrant the grant of orders sought. The fact that the Appellant is a head teacher and married to two spouses with many children does not warrant issuance of the orders sought. Even though the Appellant has contended that his employer might terminate his services to his detriment, he must also reckon the glaring fact he no longer enjoys the presumption of innocence having been lawfully convicted. The Appellant still has a right to engage his employer upon success of the appeal for reinstatement into his job. As regards the success or otherwise of the appeal, I find that it is still quite early to gauge the same and it is best to leave it at this stage and wait for the court’s opportune time to determine it when it is finally set down for hearing. As regards the issue of delay in the determination of the appeal thereby forcing the Appellant to serve out a long period of his sentence almost to term, it is noted that the record of the lower court (record of appeal) has already been availed to this court and hence,



what is remaining is for parties herein to take directions over the disposal of the appeal which is by way of written submissions. It is therefore possible to wrap up the appeal in a short period. If those are the circumstances obtaining, then I find that the Appellant should gear his energies towards the expeditious disposal of the appeal.

20. In view of the foregoing observations, it is my finding that the Appellant's application dated 10/8/2024 lacks merit. The same is dismissed. Parties are now directed to set down the appeal on priority basis.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of :

Nicholas Ochieng.....Appellant

Bola Indidis.....for Appellant

M/s Kerubo.....for Respondent

Ogendo.....Court Assistant

