Wafula v Republic (Miscellaneous Criminal Application E112 of 2023) [2025] KEHC 1719 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1719 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E112 OF 2023

JRA WANANDA, J

FEBRUARY 21, 2025

BETWEEN

GEOFFREY WAFULA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. I have no copy before me but the Applicant states that by the Judgment delivered on 6/12/2023, in Eldoret Chief Magistrate's Court Criminal Case No. 92 of 2020, he was convicted of the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act*. He states further that he was sentenced to serve 40 years imprisonment and that being dissatisfied with the conviction and sentence, filed an Appeal, namely, Eldoret High Court Criminal Appeal No. E117 of 2023.

2. What is now before the Court for determination is the Applicant's Notice of Motion dated 19/12/2023 whereof the Applicant seeks orders as follows:

   i. [.....] spent

   ii. That the Applicant be admitted to bail and/or released on bail pending hearing and determination of High Court Criminal Appeal No. 117 of 2023.

   iii. That costs of this application be provided for.

3. The Application is filed through Messrs Wanjiku Karuga & Co. Advocates, is based on the grounds stated on the face thereof, and is supported by the Affidavit sworn by the Applicant.

4. In the brief Affidavit, the Appellant deponed that the Appeal has very high chances of success as the prosecution did not supply him witness statements thus, he did not have a chance to cross-examine witnesses. He deponed further that he risks serving substantial number of years or the entire 40 years imprisonment before the Appeal is heard and determined, and that he is a father and the sole provider

of his family, which stands to suffer prejudice if the Application is not allowed. In conclusion, he deponed that he will abide with any terms that this Court may impose in granting bail.

Response by the State

5. The State/Respondent opposed the Application vide the Grounds of Opposition dated 12/11/2024 filed through Prosecution Counsel, Okaka A. Leonard. The grounds cited are that the sentence being served is due to conviction which ought to be presumed proper, that the trial Court bond/bail observance or being a breadwinner for a family is neither exceptional nor unusual circumstances, and that the challenge on sufficiency of evidence or how the opportunity to cross-examine was exercised, does not ipso facto, translate to overwhelming chances of success. He contended further that no likelihood exists of the Applicant serving a substantial part of his 40 years imprisonment before the Appeal is heard and that the Application does not meet the requisite threshold and principles for grant of the orders sought.

Hearing of the Application

6. The hearing of the Application was delayed for a long time due to the absence of the typed transcripts of the lower Court proceedings. This, although unacceptable, is a problem that has for a long time bedevilled and affected the Judiciary's quest to render expedited justice to citizens. The same is a result of inadequate resources, and personnel, and is by extension, a consequence of the inadequate funding allocated to the Judiciary as an arm of Government.

7. Eventually, the Applicant's Counsel, Ms. Karuga, perhaps fatigued by the endless wait for the typed proceedings, asked the Court to proceed to determine the Application even without such proceedings. Mr. Okaka, appearing for the State, agreed. It was the view of both Counsels that being an Application for bail, the Court may not even require the typed proceedings or the lower Court file. In the circumstances, I accepted the request. The Counsels then informed me that neither would be filing any written Submissions

Determination

8. The issue that arises for determination herein is "whether the Applicant should be released from prison, on bond and/or bail pending the hearing and determination of his Appeal".

9. I begin by quoting Article 49(1)(h) of *the Constitution* which provides as follows:

> " 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.

10. On its part, Section 357(1) of the *Criminal Procedure Code* provides as follows:

> " 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 Court of Appeal, in the case of JivRaji Shah vs. R [1986] KLR 605, guided that:

> " 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. The decision in Somo v Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7-86.

12. The Court of Appeal, also, in the case of Dominic Karanja v Republic (1986) KLR 612 held as follows:

> " (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) ....."

13. I also cite the case of Masrani v R [1060] EA 321, where it was held that:

> " 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."

14. Further, in the case of Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR, Hon. Lady Justice J. Mulwa J, held as follows:

> " 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. .....

15. From the above guidelines, it is clear that a different test from that applied in bail pending trial is applied when dealing with Applications for bail pending Appeal. When considering the latter, the Court has

discretion which, needless to state, must be exercised judicially, taking into consideration the relevant factors as set out in the above authorities. The Court must also appreciate that the Applicant person has by then become a convicted person, and more caution has to therefore be exercised before deciding whether or not to grant him/her bail.

16. What constitutes "exceptional circumstances" were dealt with in the case of R vs. Kanji [1946] 22 KLR, where De Lestang, Ag. J (as he then was) held as follows:

> " The appellant's Appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an Appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the Appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his Appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail."

17. The rationale for considering the chances of success of the Appeal were set out in Somo v R [1972] EA 480 in which the Court observed as follows:

> " There is little if any point in granting the application if the Appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the Appeal court.
>
> I have used the word "overwhelming" deliberately for what I believe to be a good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his Appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his Appeal will prove successful, he must show that there is an overwhelming probability that it will succeed."

18. In the present case, the major ground of Appeal advanced by the Applicant in alleging the Appeal's "overwhelming chances of success" seems to be the one that the Prosecution never supplied him with witness statements. Unfortunately, as aforesaid, the record of the lower Court case or at least, even the typed proceedings thereof, were never availed for my interrogation. I am therefore denied the opportunity to peruse the relevant material which would have enabled me to determine whether the Appeal has any "overwhelming" chances of success. In the circumstances, the Applicant, being the one who seeks a relief, where the material placed before the Court is insufficient, it is he who will have to suffer the consequences. On this ground alone, the Application cannot succeed.

19. I have however also considered the grounds of Appeal preferred. Whereas the Appellant has set out various grounds that may be valid and may well succeed at the hearing of the Appeal, there is nothing extraordinary therein. The same are the usual grounds of Appeal normally raised in these kinds of cases. While the Appeal may well succeed, the grounds cannot be said to amount to "overwhelming chances of success" within the meaning contemplated by that phrase.

20. As regards "exceptional circumstances", I cannot find any. The fact that the Applicant is the bread winner of his family, is not an exceptional circumstance to warrant admission to bail pending Appeal.

21. I have also taken into consideration the fact that the Applicant has already been convicted and is therefore serving a lawful sentence. The offence of defilement for which he is in jail is also a serious one and releasing the Applicant when no "exceptional circumstances" have been demonstrated will send a wrong signal regarding the Court's condoning of such an offence.

Final Orders

22. In conclusion, this Court finds no merit in the Application, and the same is accordingly dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Kemboi h/b for Ms. Wanjiku Karuga for the Applicant

Mr. Okaka for the State

C/A: Brian Kimathi

Eldoret High Court Misc. Criminal Application No. E112 of 2023