



**Obara v Republic (Miscellaneous Criminal Application
E110 of 2024) [2025] KEHC 2938 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CRIMINAL APPLICATION E110 OF 2024**

**DK KEMEL, J
MARCH 14, 2025**

BETWEEN

WALTER OCHIENG OBARA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellant /Applicant herein filed a Notice of Motion dated 30/8/2024 seeking to be admitted to bail/bond pending the hearing and determination of the instant appeal. The appeal is against the conviction and sentence of Hon. J.A Ayieta (RM) in Madiany Principal Magistrate’s Court Sexual Offence Case No. E022 of 2023.
2. The Appellant’ case is that he was charged with an offence of rape contrary to Section 3 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve fifteen (15) years’ imprisonment. That he is aggrieved by the said conviction and sentence and that he has already lodged his appeal which has high chances of success. That he had been on bond pending trial before the conviction and sentence. That he had faithfully attended court without fail until the conviction and sentence. That he would like to continue being on bond pending the appeal on the same terms as those granted in the trial court. That he is ready and willing to comply with any terms and conditions to be imposed by this court. That he stands to serve a substantial portion of sentence before the appeal is determined and which is prejudicial to him. That no prejudice will be suffered by the Respondent if the application is allowed.
3. The Respondent did not file a response to the application.
4. The application was canvassed by way of written submissions. It is only the Appellant who filed submissions.
5. Mr. Ojwang Agina, learned counsel for the Appellant vide submissions dated 27/1/2025 submitted *inter alia*; that there are absolutely no compelling reasons to justify holding the Appellant in prison on



a judgment that is likely to be dismissed; that the Appellant is not a flight risk; that there is a possibility of delay in the disposal of the appeal yet the Appellant has already served seven months in jail; that the appeal has high chances of success. Learned counsel placed reliance in Section 357 (1) of the *Criminal Procedure Code* as well as cases in *Charles Owanga Aluoch v. DPP* [2015] eKLR and *Jivraj Shah v. R* [1986] KLR 605.

6. I have given due consideration to the application and submissions filed. The issue for determination is whether the application has merit.
7. 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.”

8. 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."

9. 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."

10. 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) EA 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)*."

11. . After analyzing 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*.



12. 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”.
13. 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.
14. 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.”
15. 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.
16. 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.
17. In the instant case, the Appellant has not presented any exceptional circumstances to warrant the grant of the orders sought. The Appellant’s main thrust is that he is likely to stay for a long period in custody before the appeal is determined and further that his appeal is meritorious and likely to succeed. Indeed, the Appellant does not enjoy the presumption of innocence and that the conviction and sentence imposed by the trial court is still legal and valid until the appeal is determined. As regards the success or otherwise of the appeal, I find that it is still quite early to gauge the same and that it is best to leave it at this stage and wait for the court’s opportune time to determine it when it is finally sets down the appeal for hearing. As regards the issue of delay in the determination of the appeal thereby forcing the Appellant to serve a long period of his sentence almost to term, it is noted that the lower court record has already been availed to this court and that what is remaining is for the parties to take directions on the disposal of the appeal which is usually by way of written submissions. It is thus possible to wrap up the appeal within 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.
18. In view of the foregoing observations, it is my finding that the Appellant’s application dated 30/8/2024 lacks merit. The same is dismissed. Parties are now directed to set down the appeal for hearing on priority basis.

DATED AND DELIVERED AT SIAYA THIS 14TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence of:



Walter Ochieng Obara Appellant

Ojwang Agina for Appellant

Mocha for Respondent

Ogendo Court Assistant

