



**Njoroge v Republic (Criminal Appeal E050 of 2024)
[2025] KEHC 4705 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E050 OF 2024
LN MUTENDE, J
APRIL 7, 2025**

BETWEEN

JAMES KINUTHIA NJOROGE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. James Kinuthia Njoroge, the Applicant, through an application dated 7TH November, 2024 seeks bail pending hearing and determination of appeal lodged on 5th November, 2024, following conviction and sentence. The Applicant was charged following allegations of having committed defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* for which he was convicted and sentenced to serve 10 years imprisonment. He had also been charged with an alternative count of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The application is premised on grounds that: The complainant's evidence was not corroborated and the case was not proved beyond reasonable doubt; evidence tendered was contradictory; crucial witnesses were not called and there was no plausible explanation given; and, that the trial court did not consider evidence of the minor that he came up with allegations because he wanted to be transferred from the school.
3. That based on the foregoing the appeal has a high chance of succeeding.
4. It is also urged that the appellant was out on bond during trial and he complied with bail terms; he has chest problems which have persisted; and considering that proceedings have not been typed, the appeal may take long which will make the Applicant suffer irreparable damages as he will have served a substantial part of the sentence. The application is supported by an affidavit deposed by Ms. Njoki Mureithi, learned counsel for the Applicant.



5. The Respondent through Ms. Gladys Kariuki, learned prosecution counsel filed a replying affidavit opposing the application. It is deposed that the appeal does not raise any substantial or weighty points of law. That no exceptional circumstances were raised in the application as much as the Applicant did not abscond at the lower court; hence the application should be dismissed.
6. The argument by the Applicant was advanced through written submissions where it is urged that the application herein is deserved as it raises exceptional and unusual circumstances to enable the court infer the conclusion that it is in the interest of justice. That it is uncontroverted that the Applicant's health has been deteriorating over the years. That on the face of the Memorandum of Appeal filed, it raises overwhelming chance of succeeding, points of law and flaws by the trial court which are likely to vary the judgment.
7. That although the Applicant was convicted and in effect lost the constitutional right to bail as enshrined in Article 49(1)(h) of *the Constitution*, undeniably he dutifully complied with bail terms set. In this respect he relied on Peter Hinga Ngatho v Republic [2015] KEHC1902 (KLR) where it was held that:

“The Appellant is a Kenya Citizen and no sufficient reasons have been offered to show that he will abscond if released on bail/bond...”
8. Also cited is the case of Charles Owanga Alouch v DPPs...[2015] KEHC 5903 (KLR) where it was stated that:

“I am therefore persuaded that the appeal discloses substantial merit. The State in opposing the application opined that in view of the seriousness of the sentence imposed upon the Appellant, there are high chances that he may be tempted to abscond. This is a genuine concern. However, during the trial, the Appellant complied with all the terms imposed by the court. He was aware of the sentence that he would be meted to him if convicted. This did not tempt him to abscond. Though chances are higher now that he has been convicted, taking all the circumstances in their totality, I shall exercise my discretion and give him the benefit of doubt.”
9. I have considered the application, supporting affidavit, response thereto and submissions by the Applicant through learned Counsel Ms. Njoki Mureithi. The application is brought pursuant to the provisions of Section 357 of the *Criminal Procedure Code* which enact that:
 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.
10. As appreciated, the Applicant has indeed lost the Constitutional right of bail as enshrined in Article 49(1)(h) of *the Constitution*. At the appellate stage the court deals with an offender who has lost the presumption of innocence having been convicted and is serving a lawful sentence, hence different principles apply.
11. The appellate court has discretionary power to grant bail pending appeal, however the Applicant must demonstrate that: his appeal has high chances of success; his case is exceptional; and, he is likely to serve the sentence during pendency of the appeal.



12. The conditions are read disjunctively and courts have focused on the proof of exceptional circumstances in the appellant's case as a material ground.
13. In *Jivraj Shah v Republic* [1986] eKLR the Court of Appeal laid down the principles 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.”
14. The Bail and Bond policy guidelines provides that:

“the burden is on the convicted person to demonstrate that there is an overwhelming chance of success.” (See page 27 paragraph 4.30)
15. The Applicant contends that the appeal has high chances of succeeding based on evidence that the court will be interrogating on appeal to reach an informed decision. Without privy of the entire record to tell what exactly was stated and evidence given following cross-examination, it may be premature to state that the appeal has overwhelming chance of succeeding.
16. As to whether the applicant case is exceptional or of unusual circumstances; the alleged circumstances have not been pointed out. The only assertion is the alleged chest problem that the Applicant claims he has resulting in his health deteriorating supporting evidence.
17. In *Dominic Karanja v Republic* [1986] KLR 612, the court held that ill health per se does not apply where there exist medical facilities for prisoners. It delivered itself thus:
 - “(a) (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)



18. Whether the sentence may be served before the appeal is determined. It is stated that the appellant was sentenced on 22/10/2024 to serve 10 years imprisonment. Considering that the court is determining appeals filed in the year 2024 and 2025, it is apparent that the Applicant will not serve the full term before this appeal is determined. The matter may be heard on priority basis.
19. The upshot of the above is that the applicant has not demonstrated grounds for granting bail pending appeal. In the result, the application is accordingly dismissed.
20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF APRIL, 2025.

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L.N. MUTENDE

JUDGE

