Isaack v Republic (Criminal Appeal E079 of 2024)
[2025] KEHC 6908 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6908 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E079 OF 2024

CW MEOLI, J

MAY 22, 2025

BETWEEN

SUIYANKA KILEA ISAACK ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Suiyanka Kilea Isaack, the appellant/applicant (hereafter the Applicant) was convicted on 5TH August, 2024 and sentenced to serve twenty years imprisonment for the offence of Defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*.

2. Dissatisfied, with the lower court's determination, he lodged a petition of appeal dated 13th August, 2024. Followed by the Notice of Motion dated 22nd August, 2024 (the motion). The motion invokes Articles 19, 22, 25(a)(b)(c), 39,48,49,50,51 and 159(2)(d) of *the Constitution* of Kenya and sections 356 and 357 of the *Criminal Procedure Code* and seeks that the Applicant be granted bail on reasonable bail and/or bond terms pending the hearing and determination of the appeal.

3. The motion was supported by an affidavit sworn by the Applicant on 22nd August 2024. To the effect that he was charged with the offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual offences Act*; that he was subsequently convicted and sentenced to serve 20 years imprisonment and is currently in prison; that he is not a flight risk and had always attended court sessions; and that he is ready and willing to abide by any terms and conditions that may imposed by the court regarding his release on bail. Adding that he is the bread winner of his family consisting of a wife and two children and that his imprisonment has occasioned continued harm and financial strain to cause his family.

4. He also deposed that due to the nature of his work he developed chest problems made worse by imprisonment due to overcrowding in the prisons and difficulty in obtaining treatment. Asserting

further that he has an arguable appeal with a high chance of success, he contended that his current detention is a violation of his constitutional right to freedom and liberty, as shall be proved in his appeal. And that the Respondent shall not suffer any prejudice if he is given the orders sought.

5. The motion was opposed through grounds of opposition dated 14th October, 2024. The Respondent dismisses the motion as misconceived and unsubstantiated and without merit; that the Applicant was properly convicted before the trial court after the prosecution discharged its burden of proof beyond reasonable doubt; that the Applicant has not demonstrated any special or unusual circumstances to warrant the grant of bail pending appeal; and that the motion should be dismissed in its entirety.

6. The motion was canvassed by way of written submissions. Through submissions dated 15th October 2024 the Applicant addressed two issues, namely, whether the appeal has overwhelming chances of success; and whether there are exceptional circumstances warranting release of the Applicant on bail pending appeal.

7. On the first question, the Applicant cited section 357(1) of the *Criminal Procedure Code* which provides for bail pending appeal. He further relied on the case of Jivraj Shah vs. R [1966] KLR 605 on the principles governing the grant of bail pending appeal.

8. The Applicant asserted that the prosecution case at the trial was marred by loopholes which the lower court failed to address, and that the evidence tendered by the prosecution did not prove the charge against him beyond reasonable doubt. Further arguing that he was not informed of his rights expressly provided under Article 50(g)(h) and (j) of *the Constitution*; that he was not represented by an advocate and therefore his constitutional rights were infringed. The court was urged to evaluate the evidence adduced in the trial court and in interest of justice admit the Applicant to bail on favourable terms.

9. On the second issue, the Applicant citing the Court of Appeal case of Dominic Karanja -vs- Republic [1986] KLR 612 argued that the granting of bail pending appeal is discretionary and that the discretion must be exercised judicially. Here restating depositions to the effect that he was a young man with a young family that depend on him , as well as his chest complications requiring medical attention. And that because he and the victim hail from the Maa community, they are willing to settle the matter amicably through the mediation of their local chief.

10. On their part, the Respondent filed submissions dated 14th October, 2024, addressing three questions , namely, the existence of exceptional or unusual circumstances to warrant the grant of bail pending appeal; the likelihood or overwhelming chances of the appeal succeeding; and whether the Applicant will have served a substantial part of the sentence by the time the Appeal is heard and determined.

11. On the first issue the Respondent asserted that the Applicant has not demonstrated exceptional circumstances to warrant the grant of bail pending appeal. And that allegations touching on his poor health and being a bread winner for his family did not constitute exceptional, special or peculiar circumstances to warrant the grant of bail pending appeal.

12. As to whether the appeal has overwhelming chances of success, they submitted that the evidence at the trial proved beyond reasonable doubt, the offence preferred in the lower court. Moreover, the weight of the evidence adduced at the trial will require a thorough evaluation at the hearing of the appeal before any conclusions can be made thereon.

13. On the third question, it was stated that the possibility of inordinate delay in hearing the appeal was unlikely. The Respondent concluded by arguing that the Applicant has not met the legal threshold to warrant his release on bail pending appeal and that the motion ought to be dismissed.

14. The court has considered rival positions taken by the parties through their affidavit in support of the motion, grounds of opposition and the submissions. Accused persons are entitled to bail under Article 49(1)(h) of *the Constitution*. The provision states that "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." This right underscores the equally important right of such an accused to be presumed innocent until proven guilty.

15. However, in the case of a convicted person, the presumption of innocence has been extinguished and in its place is the presumption that such person was properly convicted after his trial. Thus, bail pending appeal as provided for by Sections 356 and 357 of the *Criminal Procedure Code* is at the discretion of the court, and governed by established jurisprudential principles. The sections provide as follows, respectively:

''356

1)

The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court. (2)....

357. (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:

....."

16. In the case of Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR it was held that:

> " 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. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of Jivraj Shah vs. R [1966] KLR 605 [supra], the principal considerations for granting bail pending appeal were stated 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."

17. Here, the Applicant has merely stated that his appeal has high chances of success. He has alluded to the fact that the evidence adduced by the prosecution witnesses did not prove the charges against him beyond reasonable doubt, thereby justifying his conviction. He further alleges that his constitutional rights under article 50(g)(h) and (j) were infringed. No attempt was made to demonstrate the asserted loopholes in the prosecution case.

18. The underlying rationale for the consideration of the chances of success of an appeal, in an application seeking bail pending appeal, was spelt out by Trevelyan J (as he then was) in the case of Somo –vs- R. [1972] EA 476, at pg. 480 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 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 overwhelming probability that it will succeed."

19. Subsequently in the Dominic Karanja case (supra) the Court of Appeal reiterated that:

''The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances."

20. On the question whether the Applicant would have served a substantial part of his sentence by the time the appeal is heard, the possibility appears unlikely given the sentence of 20 years imprisonment. His appeal is already before this court and in all probability, it appears unlikely that he would have served a substantial part of his sentence before his appeal is heard.

21. The Appellant's claim concerning efforts to settle the matter amicably through reconciliation is neither here nor there. Such resolution is not available for the offence for which he was convicted and would have no place in the appeal.

22. In the result, the court finds no merit in the motion dated 22nd August 2024 and will dismiss it. The court directs the Appellant to file his record of appeal so that his appeal can be perfected for hearing within good time.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 22ND DAY OF MAY 2025.

C.MEOLI

JUDGE

In the presence of:

The Applicant

For the Applicant: Mr. Mogaka

For the Respondent: Mr. Kilunda

C/A: Lepatei