



REPUBLIC OF KENYA



**Owuor v Republic (Criminal Appeal E078 of 2024)
[2025] KEHC 7335 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E078 OF 2024**

CW MEOLI, J

MAY 22, 2025

BETWEEN

MIKE MUHANGA OWUOR APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Mike Muhanga Owuor, (hereafter the Applicant) was tried and convicted in Ngong S.O. No. E083 of 2021 on 7th August 2024 for the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. He was sentenced on for 15 years imprisonment.
2. Dissatisfied, with the outcome, the Applicant has now filed an appeal to this Court. Followed by a Notice of Motion dated 12th August, 2024 (hereafter the motion), brought inter alia under Rule 3 of the High Court (Practice and Procedure) Rules, section 357 of the *Criminal Procedure Code* (CPC) and Article 159 of *the Constitution* of Kenya. Seeking bail pending the appeal; and in the alternative, an order to stay and/or suspend execution of sentence pending appeal.
3. The motion was supported by the Applicant's affidavit of even date, stating that he is currently serving his prison term; that being dissatisfied with the decision of the lower court he had preferred an appeal; that the grounds of appeal disclose an appeal that has high chances of success; that if he is not granted bail pending appeal he will suffer irreparable damage and great prejudice and the appeal if successful will be rendered nugatory. Recounting that he had been admitted to a cash bail of kshs. 100,000/- in the lower court, he asserted that the bail amount is still being held by the court and that no prejudice will be suffered by the Respondent in the event the orders sought are granted.
4. This motion was opposed by the Respondent through grounds of opposition dated 11th September, 2024. To the effect that the application lacks merit, is misconceived, unsubstantiated and amounts to an abuse of process of the court, the Applicant having been properly convicted after the prosecution



- discharged its burden of proof beyond reasonable doubt. Additionally, 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.
5. The motion was canvassed by way of written submissions. The Applicant's submissions are dated 9th October, 2024. Asserting that his appeal has high chances of success, he contended that his conviction was based on evidence, which did not rise to the requisite standard of proof beyond reasonable doubt. And therefore, that if denied bail, he will be prejudiced in the event the appeal succeeds, especially because he is likely to serve a substantial period of the sentence while awaiting the determination of his appeal.
 6. Here pointing out that he is a young man with a young family and old parents who will also suffer irreparable damage if bail is denied. Further asserting that that bail is a constitutional right that should not be denied unless there are compelling reasons, the purpose thereof being to secure the attendance of a person in criminal proceedings. He asserted that he has a specific abode being a Kenyan and hence will not abscond but present himself before court when required to do so. He cited in his support Criminal Appeal No. E011 of 2021 Yahya Ahmed Shee alias Basode v Republic.
 7. For their part, the Respondent by their submissions dated 15th October 2024 identified the following issues for determination:
 - a. Existence of exceptional or unusual circumstances to warrant grant of bail pending appeal.
 - b. Likelihood or overwhelming chances of success of the Appeal.
 - c. Whether the Applicant will have served a substantial part of the sentence by the time the Appeal is heard and determined.
 8. It was their submission that the granting of bail pending appeal is discretionary, the Applicant having lost the presumption of innocence after conviction and sentence. On whether there were exceptional or unusual circumstances to warrant the grant of bail pending appeal, they submitted that family circumstances such as raised here do not constitute the exceptional, special or peculiar circumstances. As to the appeal having high chances of success, they reiterated that the trial evidence proved the prosecution case beyond reasonable doubt. Adding that the real weight of the said evidence adduced can only be gauged through a thorough evaluation during the appeal before any conclusions can be made.
 9. Disputing the likelihood of inordinate delay in the hearing of the appeal, the Respondent asserted that typed proceedings could be availed for purposes of perfecting and hearing the appeal in a timely fashion. Thus, the Respondent contended that the Applicant has not demonstrated the requisite considerations for his release on bail pending appeal and that the motion ought to be dismissed.
 10. The court has considered rival positions taken by the parties through the 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.
 11. 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. Therefore, the right to bail pending appeal as provided by Sections 356 and 357 of the *Criminal Procedure Code*, is at the



discretion of the appellate 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.

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:

.....”

12. In the case of *Charles Owanga Oluoch 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.”

13. Here, the Applicant has asserted that his appeal has high chances of success because the prosecution evidence at the trial did not satisfy the standard of proof beyond reasonable doubt, thereby justifying his conviction. These assertions were not demonstrated in the Applicant’s material in support of his motion.

14. The underlying rationale for the consideration of the chances of success of an appeal, in an application of this nature, was spelt out by Trevelyan J (as he then was) in the case of *Somo v 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.”

15. Subsequently in the case of *Dominic Karanjav Republic* [1986] KLR 612 , 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.”

16. The Applicant has also raised matters concerning his personal circumstances such as his age, nationality and family responsibilities. With respect, these do not constitute exceptional or unusual circumstances. On the question whether the Applicant would have served a substantial part of his sentence by the time the appeal is heard, thereby resulting in prejudice, the possibility appears remote given the sentence of 15 years imprisonment imposed by the lower court. His appeal is already before this court and in all probability, it seems unlikely that the Applicant would have served a substantial part of his sentence before his appeal is heard.
17. In the circumstances, the court is not persuaded that the Motion dated 12th August 2024 is merited. The motion is hereby dismissed.
18. The court directs the Applicant to file the record of appeal to facilitate the expeditious perfection and hearing of his appeal.

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. Okumu h/b for Mr. Nyangito

For the Respondent: Mr. Kilunda

C/A: Lepatei

