



**Njoroge v Republic (Criminal Appeal E056 of 2024)
[2025] KEHC 8845 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8845 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E056 OF 2024
CW MEOLI, J
JUNE 19, 2025**

BETWEEN

PAUL MWANDU NJOROGE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence in Loitokitok S.O. No E011 of 2023)

RULING

1. Paul Mwandu Njoroge, the Appellant herein (hereafter the Applicant), was tried and convicted before the lower court for two counts under the *Sexual Offences Act*. To wit, defilement Contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* in respect of a minor, EJ and sexual assault Contrary to Section 5(1)(a)(I) as read with Section 5(2) of the *Sexual Offences Act* regarding the second minor EN. He was sentenced to serve 20 years and 10 years imprisonment, respectively, on the two counts. The sentences were to run concurrently.
2. Aggrieved with the outcome, he filed a petition of appeal dated 12.06.2024. And subsequently the motion dated 19.06.2024 seeking bail, on the same bail terms imposed by the lower court, pending the hearing and determination of the appeal. The motion invokes Articles 49(1)(h), 50(2)(q) and 159 of the *Constitution* and Sections 123 and 124 of the *Criminal Procedure Code*.
3. The motion is premised on the grounds on its face, as amplified in Applicant's affidavit, stating that the trial court had granted him bail in the sum of Kshs. 30,000/-; that the sentence imposed by the trial court was harsh; and that his appeal has high chances of success. He further deposed that he is an elderly man aged 71 years in poor and deteriorating health and on constant medication; that no prejudice will be occasioned to the Respondent if the application is allowed; and that his proposed surety was ready and willing to stand as surety for him pending hearing and determination of the appeal. Moreover, that a cash bail of Kshs. 100,000/- deposited in the lower court had not been withdrawn by the depositor



- and was still available. He stated that no prejudice shall be suffered by the Respondent in the event the orders sought are granted.
4. Through grounds of opposition dated 26.06.2024, the Respondent opposed the motion as misconceived, unsubstantiated, devoid of a demonstration of any special or unusual circumstances to warrant the grant of bail pending appeal.
 5. Directions were issued for the motion to be canvassed via written submissions. By his submissions dated 18.07.2024, the Applicant invoking Section 357 (1) of the *Criminal Procedure Code* stated that for bail pending appeal to be granted, the applicant ought to demonstrate exceptional circumstances. In that regard citing the case of *Simon Mwangi Kirika v Republic* Criminal App No Nai 3 of 2006 (UR) in which the decision in *Jivraj Shab v Republic*[1986] eKLR 605 was relied on, as well as the Indian case of *Krishman v The People* (SCZ 19 of 2011).
 6. Counsel for the Applicant asserted that the exceptional circumstances here are that the Appellant is 71 years old and suffering from severe syphilis and is asthmatic and a first-time offender whose appeal on conviction and sentence has high chances of success. Counsel argued that it is established that an applicant need not demonstrate all the conditions for admission to bail pending appeal and that, where two or more conditions are satisfied, there is sufficient qualification for admission to bail pending appeal. For the proposition, counsel cited *Samuel Macharia Njagi v Republic* [2013] eKLR. He therefore contended that the Applicant had demonstrated exceptional circumstances and the court ought to admit him to bail pending Appeal.
 7. The Respondent's submissions are dated 1. 10. 2024 and address three issues as follows:
 - 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. On the first issue they argued that the asserted deteriorating health of the Applicant does not amount to an exceptional circumstance. And that health issues generally do not constitute exceptional, special or peculiar circumstances to warrant the granting of bail pending Appeal.
 9. As to whether the appeal has high chances of success, the Respondent submitted that the evidence at the trial proved the prosecution case beyond reasonable doubt. And that the weight of the evidence adduced will require a thorough evaluation upon appeal before a concrete decision can be made thereon.
 10. On the third question it was submitted the court currently has no backlog and hence inordinate delay in hearing the Appeal is unlikely. Finally, reiterating that the Applicant's case does not satisfy the legal threshold to warrant his release on bail pending appeal, urged that the motion be dismissed.

Analysis and Determination

11. The court has considered rival positions taken by the parties through the affidavit in support of the motion, grounds of opposition thereto 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.



12. 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:

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- 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)

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- (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:
.....”

13. 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 v 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.”

14. Here, the Applicant has asserted that his Appeal has high chances of success, without any attempt to demonstrate this assertion through material in the affidavit sworn in support of his motion. It is not merely enough to assert that an appeal has overwhelming chances of success; this is a critical factor



to be demonstrated by the successful applicant. 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. Regarding exceptional or unusual circumstances, the Applicant emphasized his advanced age, and alleged deteriorating health. Annexures to the Applicant’s affidavit marked “PN2” were proffered as evidence of the latter. First, no recent medical records have been tendered to show progressive deterioration of the Applicant’s health. Secondly, the records relied upon indicate that the Applicant was treated in September 2023 for what is described as “inflamed testicles” and there is no diagnosis therein of syphilis or other severe disease, as asserted by the Applicant. With respect, the fact that the Applicant is advanced in age or suffering some infirmity does not constitute exceptional or unusual circumstances.
17. 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 20 years imprisonment imposed by the lower court in respect of the first count. The record of appeal has been filed and, in all probability, it seems unlikely that the Applicant would have served a substantial part of his sentence before his appeal is heard.
18. In the circumstances, the court finds no merit in the motion dated 19.06.2024 which is hereby dismissed. The court will hereafter proceed to give directions for the expeditious disposal of the Appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 19TH DAY OF JUNE 2025.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Kinge

For the Respondent: Mr. Kilunda



C/A: Lepatei

