



REPUBLIC OF KENYA



**LKM v Republic (Criminal Appeal E125 of 2023)
[2024] KEHC 458 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E125 OF 2023
EM MURIITHI, J
JANUARY 23, 2024**

BETWEEN

LKM APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from conviction and sentence of the Senior Principal Magistrate’s Court at Tigania
(Hon. P. M. Wechili, P.M) delivered on 5/9/2023 in Sexual Offence Case NO. E010 of 2022)*

RULING

1. The appellant was convicted of the offence of Rape contrary to section 3(1)(a)(c) of the [Sexual Offences Act](#) No. 3 of 2006 and was sentenced to ten (10) years imprisonment on 5/9/2023.
2. He has approached this court vide an application dated 19/9/2023 seeking that:
 - “2. The Honorable court be pleased to extend the bond terms imposed on the trial court on the appellant/Applicant pending the hearing and determination of the appeal or in the alternative,
 3. The Honorable Court be pleased to give reasonable bail/bond terms to the appellant pending the hearing and determination of the appeal.”
3. He is apprehensive that his appeal, which has high chances of success, will be rendered nugatory should bail/bond be denied as he will have served the sentence or substantial part of it before the appeal is heard and determined. He is a family man and the sole bread winner who suffers from Asthma and needs specialized treatment. The trial court granted him a bond of Ksh.150,000 with one surety of a similar amount and he attended court without fail when required to do so. He is ready and willing to comply with reasonable bail/bond terms to be imposed by the court and no prejudice will be occasioned to the Respondent if the application is allowed. He is not a flight risk and there was no probative value



of the evidence relied on to convict him. He is a person of good reputation and standing in the society with a fixed abode in Kathangari village, Machegene location and he has all along cooperated with the trial court during the hearing until judgment and conviction and undertakes to do the same pending the hearing and determination of his appeal.

4. The respondent opposed the application by Grounds of Opposition dated 27/10/2023 and paraphrased as follows:

“The appellant was properly convicted and sentenced before the trial magistrate and as such he is serving a lawful sentence; Pursuant to article 49 (1) (h) of *the Constitution*, 2010 an accused who is facing a criminal charge has a right to bond because he is presumed to be innocent till proven guilty unlike in this case where the appellant has already been convicted before a competent court; The appellant’s appeal will not be rendered nugatory, neither will he be prejudiced if bail is not granted since this court has powers to quash the conviction in the unlikely event that they overturn the decision to convict him. Additionally, the appellant was convicted on 28th August, 2023 and sentenced to serve 10 years imprisonment on 5th September, 2023. As such, there is no possibility that the appellant would have served a substantial portion of his sentence of 10 years before the appeal is heard and determined; The grant of bail pending appeal is at the court’s discretion which must be exercised judiciously. Tied to this, bail pending appeal is not a constitutional right as there is a presumption that the appellant was lawfully convicted unless the contrary is proved; The appellant has not demonstrated that he has an arguable appeal with high chances of success; Be as it may be, from the proceedings the appellant appeal does not have a high chance of success based on the following reasons:-

- i. The prosecution proved the ingredients to the offence of rape contrary to section 3(1)(a)(c) of the *Sexual Offences Act* No. 3 of 2006 beyond reasonable doubt
- ii. The evidence of the complainant was corroborated by PW2 and PW4 who produced a medical report
- iii. The alibi defence by the appellant was not raised at the earliest opportunity so as to be tested on cross-examination. Additionally, the alibi defence was conjured to respond to the prosecution’s evidence and did not raise any reasonable doubt to the consistent and corroborated evidence by the prosecution.

The appellant has not demonstrated any unusual or exceptional circumstances for the grant of bail pending appeal. The fact that the appellant did not breach the bail conditions before the trial court is not an exceptional circumstance which can warrant a decision to admit the appellant to bail pending appeal as was held in the case of *Peter Hinga Ngoto v Republic* (2015) eKLR; The appellant has not annexed any medical report to show that he is suffering from asthma which requires specialized medical attention. In addition, there exists sufficient medical facilities within the prison and if need be at Meru Level 5 hospital for treatment; Although the appellant did not abscond during the trial, there is a high incentive to abscond now that he is convicted.”

Determination

5. The principles to be considered in an application for bail pending appeal pursuant to the provisions of sections 356 and 357 of the *Criminal Procedure Code* were set out in *Jivraj Shah v R* (1986) KLR



605 which considered earlier decisions of the Court and expounded on the factor of overwhelming chances of success and held as follows: -

“ [T]he 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. The decision in *Somo v Republic* (1972) EA 476 which was referred to by this court with approval in Criminal Application 5 No. NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self defeating to attempt to define phrases or to establish formulae.”

6. The appellant contends that his appeal has high chances of success, because the trial court relied on evidence which had no probative value to convict him, he requires specialized treatment for his asthmatic condition, he is a family man whose abode is fixed and a person of good standing in the society coupled with the fact that he never jumped bail during trial, to warrant his denial of bail pending appeal.
7. The appellant was convicted on 25/8/2023 and sentenced on 5/9/2023 to 10 years imprisonment. The appellant’s apprehension is that he will have served the entire sentence or a substantial part thereof before his appeal is heard and determined. This contention is not realistic. We are now in January, 2024, and it is this court’s view that if the hearing and determination of the appellant’s appeal is expedited, his fears afore-stated will be averted.
8. The court finds that the appellant has not shown any exceptional circumstances to warrant his release on bail pending appeal. There exists medical facilities in prison for treatment of his asthmatic condition, and even where the services the appellant may require are not available therein, a referral can always be made for his transfer to another facility outside the prison. It has simply not been demonstrated that the prison authorities are unable to deal with the ailment of asthma which the appellant urges requires specialized treatment, and, therefore, no exceptional circumstances exist in that regard.

Orders

9. Accordingly for the reasons set out above, the appellant’s application dated 19/9/2023 is without merit and it is dismissed.
10. However, the appellant’s appeal will be heard on priority basis, in line with the holding in *Thambura Leonard Mucui v Republic* (2021) eKLR.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:



Mr. Masila E. Masila Principal Prosecution Counsel for the DPP.

M/S Kuria Karatu & Co. Advocates for the appellant.

