



REPUBLIC OF KENYA



KENYA LAW
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**Opiyo alias Omondi v Republic (Criminal Appeal 174 of 2023)
[2024] KEHC 1454 (KLR) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 174 OF 2023
DR KAVEDZA, J
FEBRUARY 19, 2024**

BETWEEN

EVANS OKOTH OPIYO ALIAS OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellant was charged with the offence of Defilement contrary to section 8(1) as read with 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. He was found guilty, convicted and sentenced to serve fifteen years' imprisonment. Being dissatisfied with the decision, he filed a petition of appeal dated April 27, 2023.
2. Simultaneously, the appellant filed a chamber summons application dated May 17, 2023, seeking his release on reasonable bail and/or bond pending the hearing and determination of his appeal. The application is premised on the grounds that are reiterated in the supporting affidavit of the applicant's advocate, Tom Achillah.
3. In the affidavit, it was averred that the appeal has high chances of success. It was also averred that the appellant was out on bond during trial where, he attended court diligently, and that the surety has not yet withdrawn the title deposited as security and he is willing to continue as surety to the appellant.
4. Additionally, the appellant averred that he suffers from a chronic illness, which requires frequent medical attention, which is not available in prison; should he continue to be incarcerated, his health is likely to be jeopardized.
5. In response, the respondent opposed the application *vide* grounds of opposition dated August 3, 2023. It was averred that the application lacks merit and maintained that the applicant was properly convicted before the trial court. It was further contended that the applicant has not demonstrated any special or



unusual circumstances to warrant him to be granted bail pending appeal. The respondent concluded that the application lacks merit and it ought to be dismissed in its entirety.

6. I have considered the application and corresponding grounds of opposition. The main issue for determination is whether the applicant has met the threshold for the grant of bail pending the hearing and determination of his appeal.

Analysis and determination

7. The provision of law that applies to bail pending appeal is section 357 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya, which provides as follows:

“(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;”

8. The principles applicable in considering whether to grant bail pending an appeal are set out in the case of [Jivrah Shah v Republic](#) (1986) KLR 605, to include:

“(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 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 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.”

9. Under article 49 of the [Constitution of Kenya](#) , an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent until proved guilty, unlike a case where one is already convicted. In the above case, the court also held that anticipated delay in the hearing of the appeal, together with other factors, might be grounds for grant of bail pending appeal.

10. I have carefully examined the grounds of appeal raised by the appellant. The applicant stated that appeal herein has a reasonable chance of success and one need only look at the determination and petition of appeal to see that the trial court erred in failing to consider relevant factors, and only took into consideration irrelevant factors, thus leading to miscarriage of justice.

11. The rationale for considering the chances of appeal were set out in *Somo v Republic* (1972) EA 480, where the court observed 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 a 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."

12. In this case, I have considered the eight (8) grounds of appeal raised. However, I am not satisfied that the said grounds disclose the existence of an appeal with overwhelming chances of success. Whereas the appellant may succeed in arguing the said grounds at the hearing of the appeal, I am not satisfied that the chances of the appeal succeeding are overwhelming. The grounds are the usual grounds and no ground stands out as one that is very likely to succeed even before the same is argued, based on the state of the record.
13. The appellant also claimed to be suffering from a chronic ailment that requires constant monitoring, management and treatment. He has however not specified the exact illness. Even so, this is not an exceptional matter, as the prison facility has not been shown to be ill-equipped to deal with his condition. I also take judicial notice that prisoners who suffer from a similar condition as the appellant do exist in prisons within Kenya. I need not state that in a few bad cases, the prison authorities do transfer them to hospitals for special treatment whenever necessary. That being the case, he can continue receiving treatment in the same facility or any other as is within the prison requirements.
14. The upshot of the above analysis is that the applicant has not demonstrated the existence of exceptional or unusual circumstances to warrant the grant of bail pending appeal. The application for bail pending appeal is dismissed.

It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF FEBRUARY 2024.

D. KAVEDZA

JUDGE

In the presence of:

Mr. Achillah for the Applicant

Ms. Ntabo for the State

Count Assistant: Joy

