



REPUBLIC OF KENYA



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**Mburu v Republic (Criminal Appeal E039 of 2023)
[2024] KEHC 2757 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E039 OF 2023
HM NYAGA, J
MARCH 14, 2024**

BETWEEN

DANIEL WAINAINA MBURU APPLICANT

AND

REPUBLIC REPUBLIC

RULING

1. The Application before me is the Notice of Motion dated 6th December, 2023. It seeks the following orders;
 - i. That this Application be certified urgent and its service be dispensed with in the first instant.
 - ii. That the Honourable Court be pleased to admit the Applicant to bail pending hearing and determination of the instant appeal.
 - iii. That in the alternative the Honourable Court be pleased to order stay and or suspension of execution of sentence in MCCH S0/E OF 2022 pending hearing and determination of the instant appeal.
 - iv. That the Appellant be released on bond terms similar to the bond terms ordered at the trial court.
 - v. That costs of this Application be borne by the Respondent.
2. The Application is propped by the grounds set out on its face and is supported by the Affidavit of sworn by George Kirumba Mbiyu, Advocate for the Applicant.
3. The Applicant's case is that he was charged before Nakuru Chief Magistrate's Court vide MCCH SO/ E009 of 2022 with the offence of Sexual Assault Contrary to Section 5(1) (A) (1) (2) of the [Sexual Offences Act](#). That after a full trial, he was found guilty, convicted and sentenced to thirteen (13) years



imprisonment. That being aggrieved by the conviction and sentence of the trial court, he has preferred this Appeal.

4. The Applicant further avers that this Appeal has high chances of success as evidenced by the filed Petition of Appeal.
5. The Applicant also states that he had always attended court and he will do so if he is granted bail pending appeal. That he is willing to provide a suitable surety.
6. The Respondent did not file a response, but did respond to the submissions filed by the Applicant. I will summarise each as hereunder.
7. For the Applicant, it is submitted the consideration for the grant of bail pending appeal is founded in the principles set out in *Ademba v Republic* 1983 eKLR where the Court of Appeal held that;

“.....bail pending appeal may only be granted if there are exceptional or unusual circumstances.. the likelihood of success in the Appeal is a factor taken into consideration in granting bail pending appeal is a factor taken into consideration in granting bail pending appeal..”

8. Also cited was the decision in *Dominic Karanja v Republic* (1986) eKLR where it was held that;

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

(b) The previous good character of the applicant and the hardships if any facing his family were not an exceptional circumstance where there existed medical facilities for prisoners;

(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.”

9. Counsel for the Applicant further cited the case of *Charles Owanga Oluoch v The DPP* [2015] eKLR where it was held thus;

“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 consideration 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 *JivRaji Shah v R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

“(1) The principle 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 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.”
10. The Applicant argues that looking at the evidence adduced during the hearing, it is clear that the Appeal has very high chances of succeeding, and thus the reason the Applicant should be granted bail pending Appeal.
11. For the Respondent, it is submitted that the Application is not merited. The Respondent cited the case of *Jivraj Shah v Republic* [1986] eKLR on the principles to be applied in determination whether to grant or deny bail pending Appeal. In that case it was held that;
- a. The existence of exceptional or unusual circumstances upon which the court can fairly conclude that it just to grant bail.
 - b. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful an account of some substantial point of law to be urged.
 - c. The sentence or a substantial part of it will have been served by the time the appeal is heard.
11. It is submitted that there are no unusual or exceptional circumstances that warrant the grant of the orders. That the fact that the Applicant attended court during the trial is not a guarantee that he will attend court.
12. It is further submitted that the offence the Applicant was convicted on is a serious one, with a severe sentence already pronounced. Thus, there is a predisposition for the Applicant to abscond.
13. On the merits of the Appeal, it is submitted that the same only raises points of facts and not law. That it is not guaranteed that the Appeal will succeed.
14. It is further submitted that the Applicant was only convicted on 3rd October, 2023. That at present Appeals are being expeditiously determined upon admission. Therefore there is not likelihood that the Applicant will serve a substantial sentence before the Appeal is heard and determined.
15. In conclusion, the Respondent urged the court to dismiss the Application have the Appeal listed for hearing.
16. Bond or bail pending Appeal is provided for under Section 357 of the *Criminal Procedure Code* (CPC). It provides;

“ 357. Admission to bail or suspension of sentence pending appeal

- (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: Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a



person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

- (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.
- (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.”

11. It is clear that this court has powers to grant bond/bail pending Appeal.
12. The principles for the grant or denial of bond/bail pending Appeal were set out in [Jivraj Shah v Republic \(supra\)](#), [Ademba v Republic \(supra\)](#) and [Dominic Karanja v Republic \(supra\)](#).
13. Thus the considerations for the court to grant or deny bond pending appeal are;
 - a. That the Appeal has overwhelming chances of success.
 - b. The previous good character of the Applicant
 - c. The existence of exceptional or unusual circumstances.
 - d. The sentence or substantial part of it will have been served by the time the Appeal is heard.
11. I have considered the Appeal filed. Evidently, it does not raise any substantial or weighty point of law. It is essentially founded on facts and the findings of the trial court.
12. At this stage, the court ought to be cautious not to try and determine the Appeal. This should await the appropriate time.
13. The grounds adduced by the Applicant call for the court to re-evaluate the evidence as it is obliged to (see [Okeno v Republic](#)).
14. In my opinion, there are no exceptional or unusual circumstances that would necessitate the grant of the orders sought.
15. Whereas the previous good record of the Applicant is a ground for consideration, that alone is not sufficient to warrant the grant the orders sought.
16. It must be remembered that during the trial, the Applicant was presumed to be innocent. Right now he has been convicted by the Court of competent jurisdiction. Thus, the Application of Article 48 (1) (h) of the [Constitution](#) do not apply to the Applicant.
17. At present, this court is handling Appeals at a very exceptional rate. There are really no unreasonable delays in determining the same. The Applicant was only convicted in October 2023, to serve a sentence of 13 years.
18. I am of the opinion that this is an Appeal that can be heard and determined in the shortest time possible.



19. Consequently, I disallow the application with no orders as to costs.
20. The Applicant to proceed to prepare the Record of Appeal.
11. The Lower Court filed to be availed forthwith.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF MARCH, 2024.

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**H. M. NYAGA,
JUDGE.**

In the presence of;

C/A Oleperon

State counsel Ms Okok

Applicant present

