



**Kiunga v Republic (Miscellaneous Criminal Application
E001 of 2024) [2024] KEHC 4377 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2024**

EM MURIITHI, J

APRIL 18, 2024

BETWEEN

STEPHEN KIUNGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was convicted of grievous harm contrary to Section 234 of the Penal Code, and sentenced to 10 years imprisonment.
2. He has filed a notice of motion under certificate of urgency dated 4/1/2024 in this court seeking that, “2) This Honorable Court be pleased to admit the appellant/applicant to bail pending the hearing of this appeal.”
3. In the supporting affidavit sworn by Philip Nyamori Mose, the Applicant’s advocate, he faults the trial court for imposing a maximum sentence on the Applicant without an option of a fine without considering he was a first offender. The Applicant is apprehensive that if not granted bail, his appeal, which has a high probability of success, will be rendered nugatory given that he may have served most of his sentence by the time the appeal is heard and determined. The Applicant is the sole bread winner of his family and he has 2 small children and his jobless wife to look after. The Applicant has always attended court when required and will always continue to do so if released on bail pending appeal.
4. On 16/1/2024, the Respondent filed grounds of opposition that, “The Applicant was properly convicted and sentenced before the trial court and as such he is serving a lawful sentence; Pursuant to Article 49 (1) (h) of the Constitution, 2010 an accused person 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 Applicant has already been convicted before a competent court; The Applicant’s appeal will not be rendered nugatory, neither will he be prejudiced if bail pending appeal 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 applicant was convicted on 6th December, 2023 and sentenced to serve 10 years imprisonment on 19th December, 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. Furthermore, the proceedings and the judgment have been duly certified by the court and as such there will be no delay in hearing the main appeal; 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 Applicant was lawfully convicted unless the contrary is proved; The Applicant has not demonstrated that he has an arguable appeal with high chances of success; Be as it may be, from the certified proceedings the Applicants appeal does not have a high chance of success based on the following reasons:-

- i. The prosecution proved the ingredients to the offence of grievous harm contrary to Section 234 of the *Penal Code* beyond any reasonable doubt.
- ii. The evidence of the complainant was corroborated by PW4 who produced a medical report.
- iii. There is no denial that the Applicant's conviction was on the basis of the complainant's evidence, a single witness. The trial court carefully scrutinized this evidence of a single identifying witness and was satisfied that it was free from the possibility of error or mistake.
- iv. From the proceedings, there are no significant contradictions that would necessitate this court to overturn the trial court's decision
- v. The defence put forth by the Appellant was a mere denial and from the evidence of the prosecution witnesses we find no reason why the complainant would frame or gang up to lie against the Applicant. His defence was rightly rejected by the trial court.
- vi. The trial court considered the mitigation in favour of the Applicant in respect of very serious injuries sustained by the complainant and we find the sentence to be lawful and within the provision of Section 234 of the *Penal Code*. The sentence of 10 years was lenient and not

The Applicant has not demonstrated any unusual or exceptional circumstances for the grant of bail pending appeal. The fact the Applicant did not breach the bail conditions before the trial court is not an exceptional circumstance which can warrant a decision to admit the Applicant to bail pending appeal as was held in the case of *Peter Hinga Ngoto v Republic* (2015) eKLR; Although the Applicant did not abscond during the trial, there is a high incentive to abscond now that he is convicted; In the upshot the Respondent prays that the Applicant's application is totally devoid of merit and I humbly pray that it be dismissed in its entirety.”

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: -

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that 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 Applicant was convicted on 7/12/2023 and sentenced on 19/12/2023. There is no likelihood that he will have served a substantial portion of the sentence before the appeal is heard and determined.
7. This court is minded that the compliance by the Applicant with the bail conditions by the trial court is not an exceptional circumstance, as counseled by the supreme court of India in *Krishnan v The People* quoted by (John M. Mativo I as he then was) in *Peter Hinga Ngatho v Republic* (2015) eKLR.
8. The court finds that the Applicant has not shown any exceptional circumstances to warrant his release on bail pending appeal.

Orders

9. Accordingly for the reasons set out above, the Applicant’s application dated 4/1/2024 is without merit and it is hereby dismissed.
10. However, the Applicant’s appeal will be heard on priority basis, in line with the holding in *Thambura Leornard Mucui v Republic* (2021) eKLR.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF APRIL, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Bebo & Mose Advocates for the Applicant

DPP for the Respondent

