



**Onchari v Republic (Criminal Appeal E032 of 2023)
[2024] KEHC 3605 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E032 OF 2023
WA OKWANY, J
APRIL 11, 2024**

BETWEEN

DAVID NYAKUNDI ONCHARI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the conviction and sentence of Hon. W. C. Waswa (SRM) Nyamira dated and delivered on 6th September 2023 in the original Nyamira Chief Magistrate's Court Sexual Offence Case No. E012 of 2023)

RULING

1. This ruling is in respect to the Application dated 24th October 2023 wherein the Applicant seeks, *inter alia*, orders to be admitted to bail pending the hearing and determination of his appeal. The Applicant also seeks an alternative order for stay and/or suspension of execution of sentence in Sexual Offence Case No. E012 of 2023 pending hearing and determination of the appeal.
2. The Application is supported by the affidavit of the Applicant's advocate, Mr. Dennis Anyoka Moturi, and is premised on the grounds that; that the appeal has high chances of success; that the Appellant did not breach the bail conditions granted by the trial court; that he is of good character and is willing to cooperate with the Court; that the Applicant is the breadwinner of his family and lives with his two minor children since their mother lives out of the country and that these reasons are exceptional circumstances warranting his admission to bail pending appeal.
3. The Respondent opposed the Application through the Replying Affidavit of Mr. David Mwangi Ndung'u, the learned prosecution counsel, who states that the averments contained in the Applicant's supporting affidavit do not conform with the prayers sought in the Application. He further states that the Applicant has not demonstrated that his appeal has overwhelming chances of success or that he is likely to serve a substantial part of his sentence before the Appeal is heard and determined having only



- served 3 months out of the 20-year sentence. He contends that the Applicant's perceived innocence ended upon conviction and that Article 49(1)(h) of the Constitution does not apply to him.
4. The Application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the Applicant has made out a case for the granting of bail pending appeal.
 5. Section 357 of the Criminal Procedure Code, Cap 75 stipulates as follows on bail 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.
 6. The circumstances under which an application for bail pending appeal may be granted were set out in the case of Jivraj Shah v Republic (1986) eKLR 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 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.”
 7. The principle that emerges from the above decision is that an applicant seeking bail pending appeal must demonstrate that there are exceptional circumstances to warrant the granting of bail; that there are overwhelming chances of success in the intended appeal or that a substantial part of the sentence will have been served by the time the appeal is heard and determined thereby rendering the same ineffectual or unnecessary in the first place.
 8. Article 49 of the Constitution of Kenya outlines the rights of an accused person as hereunder: -
 49. Rights of arrested persons
 - (1) An arrested 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.
 9. My understanding of the above Article is that it is only applicable to arrested persons charged before the court in the first instance and whose cases are still pending trial. This means that where a person has gone through a trial process and a conviction pronounced, the Article 49 becomes inapplicable since a court of competent jurisdiction would have already tried and found him guilty of the offence.
 10. The rights of an accused person under Article 49 of the Constitution stem from the principle of presumption of innocence until proven guilty. In the case of a person already convicted by a court of



competent jurisdiction, the presumption of innocence no longer applies irrespective of whether the said conviction is safe or not. In *Chimambhai v Republic* (1971) EA 343 Harris J. observed thus:-

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....”

From the above decision, it is clear that the right to bail pending appeal is not an absolute right. This means that a court considering an application for bail pending appeal must consider the circumstances of the convicted person and the possibility of the appeal succeeding before it can grant bail pending appeal.

11. In the present case, the Applicant submitted that he is a single parent and the sole breadwinner for his two minor children. He also stated that he fully complied with the bond terms granted by the trial court. He further submitted that the reasons he advanced amount to exceptional circumstances that warrant his admission to bail.
12. My finding is that the Applicant’s alleged previous good conduct or family commitments do not fall within the classification of exceptional/unusual circumstances that would warrant the granting of bail pending appeal. I note that besides merely stating that he has young children who require his attention and support, the Applicant did not present any tangible proof of the existence of the said children or that they are in dire need of his care as a single parent. In *Dominic Karanja v Republic* (1986) KLR 612 it was held thus: -

- “(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 exceptional or unusual factors. Ill health per se would also not constitute 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;
- (d)

13. Turning to the issue of whether the intended Appeal has overwhelming chances of success, the burden rests on the convicted person to demonstrate that there is an overwhelming chance of success in his appeal. I note that the Applicant filed this application alongside a Petition of Appeal but did not attach a copy of the proceedings and judgment of the trial court so as to give this court an opportunity to peruse the same with a view to determining if the appeal is arguable.
14. I find that this court cannot determine the weight of the appeal solely based on the grounds listed in the Petition of Appeal. I note that the grounds of appeal merely challenge the conviction on the basis that the prosecution did not prove its case to the required standard. I find this ground of appeal to be



general in nature and does not raise substantial points of law that can satisfy this court to arrive at the conclusion that the appeal has high chances of success.

15. The Applicant in this case was sentenced to serve 20 years imprisonment. He has, so far, served only 3 months of his 20 years sentence as at the time of he filed this application. I therefore agree with the Respondent's submissions that there is no likelihood that the Applicant would have served a substantial part of his sentence by the time the Appeal will be heard and determined.
16. For the reasons stated in this ruling, I find that the Application does not meet the threshold set for the granting of bail pending an appeal. I therefore decline to grant the orders sought in the instant application but with a rider that the applicant is at liberty to file the Record of Appeal so that the Appeal can be heard on expeditiously or on priority basis.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA THIS 11TH DAY OF APRIL 2024.

W. A. OKWANY

JUDGE

