



**Korir alias Hila v Republic (Criminal Appeal E005 of 2024)
[2024] KEHC 9333 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E005 OF 2024
JK SERGON, J
JULY 25, 2024**

BETWEEN

HILLARY KORIR ALIAS HILA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the whole Judgment and Orders of the Kericho Chief Magistrate's Court Criminal Case No. E024 of 2023 delivered on 14.12.2023 at Kericho Law Courts)

RULING

1. The appellant filed a notice of motion dated 13th May, 2024 seeking the following prayers:
 - a. Spent
 - b. That this Honourable Court be pleased to order that the appellant/applicant be released on bail pending the hearing and determination of the appeal herein on such terms as the court may deem fit to impose.
 - c. That further and/or in the alternative to the foregoing this Honourable Court be pleased to order that the execution of the sentence entered against the appellant/applicant in Kericho Criminal Case No. E024 of 2023 on 30.1.2024 be suspended pending hearing and determination of the appeal herein.
 - d. That this Honourable Court do grant such further and/or other orders as it might deem fit and just.
2. The application is supported by grounds on the face of it and the supporting affidavit of Hillary Korir, the appellant/applicant herein.



3. The appellant avers that he was charged and convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*, No. 3 of 2006 *vide* a judgement delivered on 14.12.2023 and sentenced to 8 years imprisonment, which sentence he is currently serving. The appellant being aggrieved by the said conviction and sentence preferred an appeal *vide* Kericho High Court Criminal Appeal No. E005 of 2024 which is pending hearing and determination.
4. The appellant avers that there exists exceptional or unusual circumstances and that it is in the interest of justice that bail be granted pending hearing and determination of the instant appeal.
5. The appellant avers that the appeal has overwhelming chances of success and raises substantial points of law and more so that the ingredients forming the offence of defilement were not proven beyond reasonable doubt to wit; the age of the complainant, proof of penetration; and positive identification of the assailant.
6. The appellant avers that unless bail is granted as prayed, the sentence herein or a substantial part of it will be served by the time the appeal is heard and determined.
7. The appellant avers that he is ready and willing to abide by the bail terms set by this Court
8. The appellant avers that he is presently sick and has been diagnosed with chronic gastritis, which requires specialised treatment not available at the Prison Health Center.
9. The prosecution filed grounds of opposition dated 10th July, 2024 in response to the application for bail pending appeal anchored on several grounds;
 - (i) The appellant has already been convicted and therefore has no absolute right to bond as provided for under article 49 of the *Constitution*.
 - (ii) The appellant was convicted and sentenced rightfully and therefore the appeal did not have a high chance of success.
 - (iii) That the mere fact that the appellant had been diagnosed with chronic gastritis which requires specialised treatment not available at the Prison Health Center and was ready and willing to abide by any terms and conditions the court shall impose for his release on bond pending appeal did not amount to exceptional or unusual circumstances to warrant grant of bail pending appeal as envisaged in the case of *Jivraj Shah v Republic* (1986) KLR 605 (*infra*) in which the court cited the conditions for granting bail pending appeal.
10. The matter came up for inter partes hearing on 11th July, 2024. The parties made oral submissions, which I have duly considered.
11. Mr. Korir the Learned Counsel holding brief for Mr. Cheruiyot for the appellant submitted that he would be relying on the grounds set out in the application for bail pending appeal dated 13th May, 2024.
12. Mr. Musyoki the Learned Prosecutor submitted that the application was opposed and that he would be relying on the grounds of opposition dated 10th July, 2024. The Learned Prosecutor maintained that ill health is not considered as an exceptional circumstance. The Learned Prosecutor reiterated that the applicant had not demonstrated any unusual or exceptional circumstances warranting grant of bail pending appeal and cited the case of *Dominic Karanja v Republic* (1986) KLR 612 in which the court stated that the previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors warranting bail pending appeal.



13. I have considered the pleadings and the oral submissions made on behalf of the parties and the sole issues for this Court's determination is whether the appellant has made out a good case for bail pending appeal.
14. Article 49(1) (h) of the Constitution provides that:- "An accused person has the right - to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released." Whereas section 357 of the Criminal Procedure Code provides for bail pending appeal and states as follows; "After the entering of an appeal by the 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 the appeal."
16. However, it is imperative to note that different principles apply post-conviction, this principle was set out in the case of *Masrani v R* [1060] EA 321, it was held that:- "Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction."
17. . In the case of Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR in which the Learned Judge cited the renowned case of Jiv Raji Shah vs. R [1966] KLR 605 on bail pending appeal it was held that;

"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 considering 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 Jiv Raji Shah vs. R [1966] KLR 605, the principle considerations for granting bail pending appeal were stated 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 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."
18. This court has considered the aforementioned decision and the finding therein that it is the discretion of the court to grant bail pending appeal, which discretion should be exercised judiciously not whimsically.
19. In an application for bail pending appeal, the applicant has the burden of establishing that the appeal has high chances of success or has a high likelihood of serving a substantial part of the sentence before hearing the appeal.



20. In the application herein, the applicant has not aptly demonstrated to this Court that the intended appeal has high chances of success. The applicant was convicted and consequently sentenced to serve 8 years imprisonment for the offence of defilement contrary to the *Sexual Offences Act* No. 3 of 2006 on 30th January, 2024. Therefore, there is no likelihood of him having served a substantial part of the sentence before the appeal is heard.
22. Furthermore, this court finds that the applicant has not demonstrated the existence of exceptional or unusual circumstances to warrant grant of bail pending appeal. The fact that the applicant is of ill health, ready and willing to abide by the terms and conditions imposed by this Court are not exceptional circumstances to warrant admission to bail pending appeal.
23. In conclusion, this court finds no merit in the application for bail pending appeal and therefore the notice of motion dated 13th May, 2024 is hereby dismissed. Hearing of the appeal be fixed on a priority basis. It is so ordered.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 25TH DAY OF JULY, 2024.

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J.K. SERGON

JUDGE

In the Presence of:

C/Assistant – Rutoh

Prosecutor – Mr. Musyoki

Applicant – Present in Person

O. Lang'at holding brief for Kiplangat for Applicant

