



**Bulinda v Republic (Criminal Appeal E004 of 2024)
[2024] KEHC 12919 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E004 OF 2024
SC CHIRCHIR, J
OCTOBER 17, 2024**

BETWEEN

JULIOUS BULINDA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant has brought the present Notice of Motion, dated 5th February 2024, seeking bail pending appeal. The Application is premised on section 356 and 357 of the Criminal Procedure Code and section 49 (4) of the Constitution of Kenya. It is supported by the grounds appearing on the face of the application and by applicant’s affidavit sworn on 5th February 2024.

The Applicant’s case

2. The Applicant’s case is that dissatisfied with the conviction and the sentence handed down by the chief Magistrate’s court in Kakamega, in sexual offences case No E122 of 2021; that consequently, he has filed an Appeal against both the conviction and sentence.
3. He now seeks to be granted bail pending Appeal. He states that he suffers from a terminal illness, and the prison conditions are not conducive on account of the said illness. He states that he is epileptic and the treatment for the conditions is not available in prison.
4. He submits that he is willing to comply with any prerequisite conditions that this court ay set.
5. The bail hearing proceeded by way of oral submissions.
6. The applicant reiterated the statements set out in the supporting Affidavit . He further submits that he had been admitted on bail pending appeal at the lower court for which he had complied with all the terms.



7. In response state, the Respondent states that the applicant has not submitted any proof of the alleged illness.

Determination

8. The application has been brought under Sections 356 and 357 of the *Criminal Procedure Code* which grants this court the power to release a convicted person on bond/bail pending the hearing and determination of an appeal.
9. The right to bail is anchored on Article 49(h) of the *Constitution*. It is an entitlement to the accused person, who is awaiting trial, unless there are compelling reasons to deny.
10. However the situation is different where an accused person has been convicted. In *Chimambhai v Republic* (1971) EA 343, it was held: “the case of an Appellant under sentence of imprisonment seeking bond lacks the strongest elements normally available to an accused person seeking bail before trial, namely the presumption of innocence, but nevertheless the law of today recognizes, to an extent, the possibility of conviction being erroneous or the punishment being excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.”
11. Also in the case of In *Mutua v Republic* (1988) KLR 497 cited with approval in *Douglas Mutunga Mathenya v Republic* (2017) eKLR it was held “It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction, which stands until it is set aside on appeal. It is not wise to set the Applicant at liberty, either from the point of view of his welfare or of the state, unless there is a real reason why the court should do so”
12. Thus the right to bail pending Appeal not being an automatic one, the courts have come up with certain principles which guide the courts when making a determination on an Application for bail pending Appeal. In *Jivraj Shah v Republic* (1980) eKLR the court of Appeal stated as follows:
 - “(a) The principal consideration in an application for bail 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.
 - (b) If it appears prima facie from the totality of the circumstance 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 exist.
 - (c) 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.”
13. The applicant has submitted that he is suffering from a terminal illness and the medical attention he needs is not available in prison. On the terminal illness, the courts have in some instances held that chronic illness for instance, constitute exceptional and unusual circumstances and therefore entitles an Applicant to bail pending Appeal. However, in the present case, there is no evidence at all that has been presented to this court to show that the appellant is ill.



14. On the Applicant's submission that he complied with the bail terms granted to him during trial, this has no bearing to the present Application. In the case of *Peter Hinga Ngoto v Republic* (2015) eKLR the court held that, the fact that the applicant did not breach the bail conditions of the court below, is not an exceptional circumstance, which warrant a decision to admit an appellant to bail pending appeal.
15. In the case of *David Kimani Kuria v Republic* {2021} eKLR it was held that it is necessary for an applicant to demonstrate the existence of exceptional circumstances upon which the court can fairly conclude that it is in the interests of justice to grant bail and also demonstrate the existence of an arguable appeal with high chances of success.
16. On whether his Appeal is arguable, although I have perused the memorandum of Appeal, I have not had the benefit of seeing the proceedings. Am not therefore in a position to gauge the Applicant's chances on Appeal.
17. In conclusion, the Applicant has failed to demonstrate that there are special and unusual circumstances to warrant him being released on bail pending his Appeal.
18. The Application is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF OCTOBER 2024.

S. CHIRCHIR

In the presence of :

Godwin Luyundi- Court Assistant

Ms. Osoro for the Respondent

Mr. Obute for Mr. Manyoni for the Applicant.

