



REPUBLIC OF KENYA



**Muturi v Republic (Criminal Appeal E077 of 2024)
[2024] KEHC 11560 (KLR) (1 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E077 OF 2024
SM MOHOCHI, J
OCTOBER 1, 2024**

BETWEEN

MICHAEL KINYUA MUTURI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the decision of Honourable Resident Magistrate E. Soita in Nakuru CMCR Sexual Offences Case No. E006 of 2022 delivered on 29th July, 2024)

RULING

1. The Appellant/Applicant moved Court vide Notice of Motion Application dated 18th September, 2024 under Section 357 (1) of the Criminal Procedure Code seeking the following orders: -
 - a. That this Honourable Court be pleased to grant extension of time to file the Petition of Appeal out of time;
 - b. That this Honourable Court be pleased to release the applicant herein Micheal Kinyua Muturi on bail pending the hearing of the appeal;
 - c. That alternatively, this Honourable Court be pleased to suspend the execution of the sentence imposed on the appellant pending the hearing and determination of this Appeal
 - d. That the Petition herein be deemed as filed out of time.
2. The Application was premised on the grounds on the face of the Application, that;
 - i. the Appeal has an overwhelming chance of succeeding;
 - ii. the Applicant never violated the bail terms throughout trial;
 - iii. the Applicant has a young family and thus the bread winner;



- iv. the sentence was not proven beyond reasonable doubt;
 - v. the sentence was not founded in law; and
 - vi. the delay is not inordinate and it is the interest of justice that the accused be allowed to be heard and prove his innocence.
3. The Application was supported by the sworn Affidavit Mr. Okumu Ong'ang'o, Counsel for the Applicant. He averred that the Applicant was found guilty on 29th July, 2024 and is currently serving his sentence but has fallen ill in prison with his health deteriorating pending hearing of the appeal and extension of time to file the annexed Petition of Appeal.
 4. That the Applicant was out on bond throughout the trial process and never violated the bond terms and therefore in the interest of fairness and justice the prayers sought should be allowed.
 5. The Respondent opposed the Application vide the undated Replying Affidavit sworn by Ms. Monica Mburu, state counsel, wherein she deposed that bail pending hearing and determination of an appeal is a right that is not absolute.
 6. It was the Respondents case that, no exceptional or unusual circumstances have been demonstrated where the interests of justice would favour granting bail pending appeal. Further that there has been no demonstration that the appeal has high chances of succeeding by a draft Petition of Appeal or otherwise any substantial question of fact and or law that is arguable on appeal.
 7. It was her argument that, the appeal has no prospects of succeeding as the ingredients for proof of the offence of defilement were established hence the conviction meted. It was her argument further that the Applicant poses as a flight risk and the mere fact the bail terms were not breached is not enough to warrant bail pending appeal. Further, that falling sick was not reason enough since he is receiving treatment at Nakuru County Referral and Teaching Hospital facilitated by the government.
 8. The Application proceeded orally on 25th September, 2024

Applicant's Submissions

9. Through Mr. Okumu it was submitted that issues raised on appeal can only be argued substantively. That what is on consideration is bail pending appeal and the application is grounded on the deteriorating health of the Applicant whereby granting him bail will enable him seek medical attention.
10. That as much as the Applicant has access to medical attention, it is not adequate. That he has a problem with the prison diet as when he feeds, he vomits which counsel asserted to have witnessed, and it is draining his parents to provide alternative diet. That his incarceration risks his right to life thereby infringing his right to life under Article 26 of *the Constitution*.
11. Counsel relied on the decisions in *R vs Danson Mugunga & Another* and *R v Diana Suleiman Said* wherein the Courts emphasized on the Right to bail under Article 49 (1) (h). That the arguability of the appeal is an important element, it does not have to be meritorious. The Applicant is yet to be proved guilty on appeal.
12. At the Court seeking clarity as to the sentence imposed by the trial Court which was not disclosed in the pleadings, and the sentence ruling was neither attached to the motion the Applicant Counsel Stated that the sentence of 20 years' imprisonment imposed is harsh and maximum and, in the appeal, it is contended that it was not safe to hand him a maximum sentence when all the elements were to be proven.



13. That the sentence is not a reason for the Applicant not to appear in Court and that the Court has powers to enforce conditions to ensure attendance in Court or impose conditions for non-interference with the case. That in as much as it is 20-year sentence, the seriousness of the charge is not a ground unless the appeal is heard and determined.

Respondent's Case

14. On behalf of the state, Ms. Mburu submitted that the Applicant is convict for the offence of defilement and as such does not enjoy the right to bail under Article 49 (1) (h) of *the Constitution* which right is available to arrested persons. He does not enjoy the right of presumption of innocence nor does the intention to appeal or has an appeal afford him the presumption. That as a convict, the Appellate Court is to confirm or otherwise.
15. That considering the severity of the sentence, the Applicant poses as a flight risk and the Court has no guarantee that is he is released he shall avail himself.
16. That Section 351 of the Criminal Procedure Code provides for bail pending appeal and it provided that the Court may release one on bail. The wording "may" is not mandatory and the right is not absolute and can only be granted in exercise of discretion. That the discretion will be informed by the circumstances of the case on a case-to-case basis.
17. Reliance was placed in Court of Appeal case of Jivaj Shah vs Republic (1986)] KLR where the Court stated that:

there must be exceptional or unusual circumstances upon which the Court can conclude that it is in the interests of justice to grant bail if it appears prima facie from the totality of the circumstance that the appeal is likely to be successful on account of substantial point of law to be argued or that the sentence or substantially part of it may have served before the appeal is heard.
18. Ms. Mburu submitted on three points in reference to the above cited authority. Firstly, it was submitted that a substantial part of the sentence has also not been served and if the Court deems it fit can prioritize the appeal.
19. Secondly on whether the appeal is likely to be successful on account of substantial point of law to be argued, it was submitted that a draft Petition for Appeal has not been filed and that the judgment has no substantial point of law arguable since the entire evidence was considered and the Court was satisfied that the prosecution has proved its case beyond reasonable doubt. To this end it was submitted that the appeal has no chance of success.
20. Thirdly on exceptional or unusual circumstances, it was submitted that, there was none, since a health ground is not one warranting release on bail pending appeal. The annexures portray that the Applicant has received treatment in a hospital well equipped with trained personnel and equipment and the medical notes reveal the exhaustive services he has received therefore there is no other better facility. He has a right to continue accessing treatment while serving his sentence. There is no evidence regarding the diet issue.

Rebuttal

21. On the issue of the Applicant being a flight risk Mr. Okumu submitted that, the Applicant religiously attended Court and never absconded. That there was no interference with prosecution witnesses and going by that record he seeks to be released on medical reasons.



22. On the issue of appeal lacking points of law, it was submitted that Ground No. 1 has a point of law. That any period served shall occasion injustice should the appeal be successful.
23. On the issue of diet Mr. Okumu argued that the Court has discretion to interrogate and hear from the Applicant on the difficulty he is facing with the diet provided for in prison.
24. Mr Okumu Advocate was granted leave by the Court to file a supplementary Affidavit strictly deponing and evidencing the actual medical condition of the Applicant that would necessitate being released on bail pending Appeal as an exceptional circumstance.
25. It is noteworthy that, by the time of writing this ruling, the Applicant was yet to seize the moment to further demonstrate his unique health condition as an exceptional factor.

Analysis and Determination

26. Whereas the Applicant has postured that, the Right to Bail is unfettered even after conviction, this Court respectfully declines such an argument noting that the legal inference as to the Judgment made or sentence imposed, being contested on Appeal is that, of “legality of sentence” and judgment” until reversed or confirmed by the appellate Court.
27. The Applicant is a convict and by dint of the case of Masrani v R [1060] EA 321, he is subject to different principles as 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.”

28. This Court concurs with the position in the case of Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR where 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 face 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.”



29. This Court is further bound by the case of *Dominic Karanja v Republic* (1986) KLR 612 where the Court of Appeal stated 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 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)

30. This Court has considered the decisions above on whose basis point that, it is the discretion of the Court to grant bail pending appeal, which discretion should be exercised judiciously. In such an application, 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.

31. While the Applicant contends that the issues raised on appeal can only be argued substantively and that in the application, only judgment of the trial Court was availed but not the proceedings nor sentence. This Court was not in a position to peruse the record to establish whether an arguable appeal with high chances of success have been disclosed by the grounds of appeal.

32. The Burden of showcasing that the Appeal stands overwhelming chances of success was upon the Applicant which burden has not been discharged.

33. The Applicant was duty bound to further expound and evidence the unique circumstance in this case the health situation a condition that this Court is unable to state or identify, as the Applicant never filed and medical examination report to detail whatever condition it was and that the attached exhibits were various receipts for health services and treatment notes all from the Nakuru PG Hospital. The Applicant had two failed opportunities to further showcase this factor.

34. I am of the considered view that the Applicant has been accessing treatment at the government Nakuru P G H where the prison services refer their cases to and where the Applicant shall continue accessing treatment even whilst serving his sentence

35. The Applicant was sentenced on 29th July 2014 to a twenty (20) years imprisonment. Therefore, there is no likelihood of him having served a substantial part of the sentence before the appeal is heard. The current policy of quick disposal of cases does not create the possibility of delay in hearing of the appeal.

36. The Applicant has not demonstrated the existence of exceptional or unusual circumstance to warrant grant of bail pending appeal. The fact that the Applicant did not breach bail conditions in the Trial Court, has a young family and thus the bread winner are not exceptional circumstances to warrant admission to bail pending appeal.

37. In conclusion, this Court finds no merit in the application dated 18th September 2024 and is therefore dismissed. Hearing of the appeal be fixed on a priority basis upon preparation of a record of Appeal.



It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 1ST DAY OF OCTOBER 2024.

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MOHOCHI S.M

JUDGE

