



**Ndwiga v Republic (Criminal Appeal E014 of 2024)
[2024] KEHC 12825 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12825 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E014 OF 2024
LM NJUGUNA, J
OCTOBER 23, 2024**

BETWEEN

PETERSON NJIRI NDWIGA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellant/applicant was charged with the offence of Incest contrary to section 20(1) of the [Sexual Offences Act](#). He was convicted and sentenced to 5 years imprisonment and a fine of Kshs.10,000/= . Being dissatisfied with the decision of the trial court in Embu MCSO No. 16 of 2019, the appellant/ applicant herein has filed a petition of appeal alongside a notice of motion dated 15th February 2024 seeking orders that:
 - a. The applicant be admitted to bail/bond pending appeal; and
 - b. The said bail/bond, if granted be on reasonable conditions and terms as the honourable court may deem just to grant.
2. The applicant based his application on the argument that he is the sole breadwinner of his family of 5 who stand to suffer great financial constraints and hardships unless he is granted bail/bond. He is apprehensive that the appeal will take a long time thus he urged the court to grant him bail pending appeal.
3. The respondent filed grounds of opposition to the application, stating that the application fails to disclose any exceptional circumstances that would warrant granting of the orders sought. That the applicant has not highlighted any weakness in the prosecution’s case that would guarantee success of the appeal. It urged the court to dismiss the application.
4. The application was canvassed by way of written submissions.



5. The applicant submitted that his appeal has triable issues and it has high chances of success. He relied on the case of Charles Owanga Aluoch v. DPP (2015) eKLR and argued that the courts have previously guided on the parameters to be considered while granting bail pending appeal. That he has served part of his sentence and he is apprehensive that by the time the appeal is heard and determined, he will have served a substantial part of it, leading to injustice. He urged the court to grant the orders sought.
6. In its submissions, the respondent relied on the case of Jivraj Shah v. Republic (1986) eKLR and argued that court should grant bail pending appeal where the applicant has disclosed exceptional circumstances. That while *the constitution* guarantees an accused person the right to bail, there has to be sufficient grounds advanced for the same since in the case of the applicant, presumption of innocence does not apply after conviction. That the applicant has not satisfied the court that justice would be endangered if the orders sought are not granted.
7. The issue for determination is whether the application has merit.
8. To begin with, it must be well understood that an appellate court can only grant bail pending appeal on discretionary basis according to Article 49(1)(h) of *the Constitution* of Kenya which provides that:-

“An accused 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. On appeal, the appellant/applicant is no longer awaiting trial but rather, he has already been convicted and sentenced and is awaiting hearing of the appeal, thus invoking the application of Section 357 of the Criminal Procedure Rules which provides:

“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...”

This was the position in the case of Masrani v R [1060] EA 321, where it was held thus:-

“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.”
10. The principles guiding grant of bail pending appeal are set out in the case of Jivraj Shah v Republic [1986] KLR 605 as follows:-
 1. The principal contribution 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 exist.
 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.

11. On establishment of exceptional circumstances, I am guided by the case of *Dominic Karanja v Republic* (1986) KLR 612 where the court labored to explain what exception circumstances encompasses. The court stated:

- “(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)

12. The applicant herein stated that he is the sole breadwinner of his family of 5 and that if he is denied bail, they will suffer financial strain. Per the guiding principles informing exceptional circumstances, the applicant’s argument does not satisfy this requirement. As to the issue of a prima facie case, I have perused the petition of appeal and judgment of the trial court and, in my view, the success or otherwise of the appeal will be adjudged by the court after its hearing.

13. In the upshot, I do find that the appellant applicant has failed to demonstrate to the court that the orders ought to be granted and that the reasons given in support of the application are sufficient. Additionally, owing to the relationship between the appellant and the victim, I am inclined to deny bail pending appeal.

14. I therefore find no merit in the application and I do hereby dismiss it. I further direct that the appellant herein proceeds swiftly to have this appeal expedited urgently, in the interest of justice.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant /Applicant

.....for the Respondent

