



REPUBLIC OF KENYA



**Koech v Republic (Miscellaneous Criminal Application E088 of 2022)
[2023] KEHC 1140 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E088 OF 2022
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

CAROLYNE JEPCHIRCHIR KOECH APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. By Notice of Motion dated 21st December, 2022, the Application seeks for orders That:
 - 1) Spent.
 - 2) The Accused person/prisoner be admitted to bail/bond pending hearing and determination of this Criminal Appeal.
 - 3) The Appellant's appeal herein be deemed as duly filed and served.
2. The application is premised on the grounds adduced therein and it is further supported by the affidavit sworn Carolyne Jepchirchir Koech, dated 21st December, 2022.
3. The gist of the Applicant's case is that she was charged with three counts. The first was the offence of assault contrary to Section 251 of the *Penal Code*, malicious damage to property contrary to Section 339 (1) of the Penal Code and injury of an animal contrary to Section 33 of the Penal Code. She was convicted on all the three counts and fined Kshs.30,000/= or in default 6 months imprisonment on count I. In count II she was fined Kshs.10,000/= or in default 3 months imprisonment and lastly in count III she was condemned to pay Kshs.20,000/= or in default 6 months imprisonment.
4. The Applicant dissatisfied with said judgment has since preferred the appeal herein. The Applicant maintains that it is her constitutional right to be released on bail/bond pending appeal. That the offence which she charged with is aailable offence.



5. The Applicant is willing and ready to comply with the terms and conditions that this Court may impose and is ready to turn up for trial at any time when the Court requires her to do so.
6. The Applicant maintains that the proceedings and the judgment in respect of her appeal were ready on 15th December, 2022, and that she filed her appeal on 21st December, 2022. The Applicant maintains that the delay in filing the appeal was occasioned by the delay in obtaining the proceeding and judgment. The Applicant urged the Court to allow the appeal to be admitted out of time and also to be released on a cash bail of Kshs.15,000/=
7. The Applicant maintains that the appeal is arguable and has very high chances of success.
8. The Respondent is opposed to the application for bail pending appeal but is not opposed to the application seeking to have the appeal deemed to be duly filed and served.
9. The Respondent deposed that owing to the fact the Applicant lost her presumption of innocence, the Appellant is not entitled to automatic bail pending appeal. The Respondent maintained that the onus rests upon the Applicant to justify her release on bail pending appeal.
10. The rights of an accused person are firmly entrenched in *the Constitution* of Kenya, 2010. Article 50(2) (a) protects the right of any accused person of any offence to be presumed innocent until the contrary is proved. Article 49 (1)(h), of *the Constitution* of Kenya, 2010, provides that, an accused person has a 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.” Similarly, section 123 (1) and (2) of the *Criminal Procedure Code*, empowers the trial court to admit an accused person to bail or release him or her upon executing a bond with sureties for his or her appearance and states that in fixing the amount, the court shall take into account the circumstances of the case and it shall not be excessive.
11. This court agrees 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.”



12. The Court of Appeal in the case of *Dominic Karanja v Republic* [1986] KLR 612 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)
13. Going by the above decisions, I must point out that the grant of bail is at the discretion of the Court and that the said discretion ought to be exercised judiciously.
14. The issues for determination are whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal. Thus, the burden is on the Applicant to prove that she should be granted bail pending the hearing of her appeal. She should also demonstrate that the appeal has overwhelming chances of success.
15. I have considered the judgment and the grounds of appeal raised by the Appellant/Applicant and am satisfied that the said grounds touch on issues such as the severity of the sentence and the withdrawal of some of the charges that the Applicant was yet still convicted of by the learned trial Magistrate. The Applicant maintains that the charge in the circumstances should have been affray rather than assault. In my view these are arguable grounds.
16. In the end, I find merit in the Appellant’s application dated 21st December, 2022. The same is allowed in the following terms:
- a) The Appellant is released on bond pending appeal in the sum of Kshs.100,000/ plus a surety of identical amount.
 - b) Upon release the Appellant shall attend court as and when scheduled without fail until the final determination of the appeal or until further orders.
 - c) In default to observe the terms of bond, the same will be cancelled and she together with her surety called to account
 - d) The Appellant is directed to ensure that she sets the appeal down for hearing on priority basis.
- It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY , 2023.

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R. NYAKUNDI
JUDGE

