



REPUBLIC OF KENYA



**Mutegi & another v Republic (Criminal Appeal E002 & E003 of 2023
(Consolidated)) [2023] KEHC 849 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E002 & E003 OF 2023 (CONSOLIDATED)**

**LW GITARI, J
FEBRUARY 2, 2023**

BETWEEN

NAHASHON MAUKI MUTEGI 1ST APPLICANT

MOSES MUTHARAKA IGUNA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The 1st Appellant herein is the Appellant in Chuka High Court Criminal Appeal No E002 of 2023 while the 2nd Appellant herein is the Appellant in Chuka High Court Criminal Appeal No E003 of 2023.
2. The two Appellants filed separate Notice of Motion applications both dated January 4, 2023. They both urge this Court to admit them to bail pending appeal on such terms as the Court deems fit and just in the interest of justice. The Applications are respectively supported by the affidavits of the Appellants.
3. Both applications were opposed by the Respondent vide the respective Replying Affidavits that were both sworn on January 12, 2023 by Jane K Maari, for the State.
4. This court consolidated the two appeals into one on January 17, 2023 noting that the two files were related and the parties, in their aforesaid applications, were seeking the same orders. Chuka High Court Criminal Appeal No E002 of 2023 became the lead file.
5. The Appellant relied on the provisions of Section 357 of the *Criminal Procedure Code* which empowers this Court to admit an appellant on bail with or without sureties pending the hearing of his appeal.



6. The appellant faced the charge of manslaughter contrary to Section 202 as read with Section 205 of the [Penal Code](#). After a full trial, they were both found guilty, convicted accordingly, and sentenced to serve 15 years' imprisonment each.
7. Counsel for the Applicants submitted that the appeal by the appellants has a high chance of success. It was the Applicants' contention that the trial court took lightly the fact that the deceased was involved in a fatal accident which they allege was the cause of the death of the deceased. It was their case that there was insufficient evidence to support the charge of manslaughter that the Appellant were facing. The Appellants urged this Court to release the Appellant on bail citing the case of [R V Lucy Wanja Kibugu & 4 Others \[2018\] eKLR](#) where the court found that the accused were respected members of the society and due to the nature of their work as chiefs, they were granted bail.
8. In opposition to the application, the Respondent submitted that the proceedings of the trial court show that the deceased was assaulted by the Appellants for allegedly being in possession of illicit brew. That the Appellants escorted the deceased to the police station but on the way, due to the injuries suffered, they took him to Marimanti Level 4 hospital. The Respondent submitted that the fact that the deceased was referred to Chuka Hospital for a head CT scan and the doctor's confirmation that the deceased succumbed to a head injury is clear evidence that the deceased suffered head injuries as a result of an assault by the Appellants. The Respondent further submitted that these events were considered by the trial court and that in any case, there were eye witnesses who saw the Appellants assault the deceased and occasion him head injury. Finally, the Respondent submitted that the cause of action arose in Marimanti but the matter was tried in Chuka because there was an uproar at Marimanti with threats to harm the Appellants. As such, the Respondent submitted that the application should be dismissed as the presumption of innocence is no longer available and the Appellants can be harmed if released.
9. In a brief rejoinder, Counsel for the Appellants submitted that the Respondent's contention that there was an uproar in Marimanti is not true. That the matter was heard in Chuka following an application by the State Counsel to that effect on the basis that the 1st Appellant, an area chief, could influence the witnesses.
10. I have considered the present application, the respective affidavits in support and opposition of the application, as well as the submissions of the parties. The only issue for determination is whether the appellants herein should be admitted to bail pending the hearing and determination of their appeal.
11. In considering this application, I am guided by the case *Mundia vs Republic [1986] KLR 623* where Tanui J pronounced the following as the principles that a Court should apply in considering an application for bail pending appeal as is the present case:-
 1. Admission to bail pending appeal is a discretionary power which the court must exercise judicially in accordance with laid down principles.
 2. Once a person has been convicted and sentenced, his application for bail pending appeal will be granted only in exceptional circumstances.
 3. There is a presumption that once a person is convicted he was properly convicted.
 4. The chances of the appeal succeeding is a factor for consideration in arriving at a decision in an application for bail pending appeal.



5. Bail pending appeal may be granted where there is a risk that the sentence will have been served by the time the appeal will be heard but there must exist the major issue of overwhelming chances of the appeal in the first instance.
12. In the case of *R V Lucy Wanja Kibugu & 4 Others* (supra) cited by the counsel for the Appellants, it is first and foremost notable that the application before the court was for bail pending trial. It is also notable the court's holding that:

' 12. As much as they are respected in their community it is important for this court to remind itself that Article 27(1) of the Constitution provides that all persons are equal before the law and have rights to equal protection and equal benefit of the law.'

What was considered under the case was the grant of bail pending trial. In such an application, bail is a Constitutional Right under Article 49 (1) (h) of the Constitution. It is granted to an accused person where there are no compelling reasons not to grant him bail. It is also granted on the Constitutional Right on fair trial under Article 50 where it is stated that an accused person has the right to be presumed innocent until proved guilty.

On the other hand in application for bail pending appeal, the main consideration is whether the appeal has overwhelming chances of success.

13. The Bail and Bond Police Guidelines at page 27 paragraph 4:30 it stated-

' The burden is on the convicted person to demonstrate that there is an overwhelming chance of success.'

In *Clumambai -v- Republic, 1971 EA 343* the court stated that-

' The case of an appellant under sentence of imprisonment seeking bond, lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, presumption of innocence.'

14. The Court of Appeal on the other hand in *Dominic Karanja -v- Republic 1986 KLR 612* stated as follows on the issue of bail pending appeal:

- ' (a) The most important issue was that of 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 hardship if any facing his family were not exceptional or unusual factors. Ill health perse would also not constitute an exceptional circumstance where there existed medial facilities for prisoners;
- (c) A solemn assumption 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;'



See the case of *Jivraj Shah -v- Republic (1986) eKLR* where the court enumerated the principles for granting bail to include,

- ' a) a) 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) Whether the appeal has overwhelming chances of success.'

Having considered the above authorities I am well guided that the granting of bail pending appeal is at the discretion of the court guided by the above cited principles. As stated in the Bail and Bond Policy Guidelines the burden is on the applicant to establish that the appeal has high chances of success which implies that by looking at the Judgment and the petition of appeal to see there were inconsistencies which exposes doubts in the case which was before the trial court. It is the consideration whether the applicant has an arguable appeal with overwhelming chances of success.

15. In the present case, I have considered the lower court's proceedings. There are eye witnesses who saw the Appellants assaulting the deceased by hitting him on his head using a walking stick. The deceased consequently sustained injuries and the Appellants took him to Marimanti Level 4 Hospital. He was then referred to Chuka Hospital. It is not in dispute that deceased got into a road traffic accident while being transferred from Marimanti Level 4 Hospital to Chuka Hospital. However, the reason behind the transfer to Chuka Hospital was for a head CT scan. This implies that the deceased had sustained head injuries at the hands of the applicant.
16. In my view, there are several arguable points of fact and law forming the basis of the Appellants' appeal. However, the appeal can go either way and can therefore not be said to have an overwhelming chance of success. At this stage, therefore, I opine that on a prima facie basis, there are no exceptional circumstances to warrant the granting of bail pending appeal.

In the circumstances I find that the application lacks merits. I also note that there is no likely-hood of the applicants serving substantial part of the sentence before the appeal is heard and determined. The application lacks merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 2ND DAY OF FEBRUARY 2023.

L.W. GITARI

JUDGE

