



REPUBLIC OF KENYA



**Wambia v Republic (Criminal Appeal E095 of 2022)
[2023] KEHC 829 (KLR) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E095 OF 2022
PJO OTIENO, J
FEBRUARY 7, 2023**

BETWEEN

JUSTUS OBONYO WAMBIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of Hon. D. Alego (SPM) in Kakamega
CM's Court Sexual Offence No. 129 of 2018 delivered on 13th December 2022)*

RULING

1. The appellant seeks to be admitted on bail pending appeal and puts forth the fact of sickness as the outstanding ground for such prayer. The nature of sickness is disclosed to be diabetes mellitus and episodes of frequent asthmatic attacks. Away from sickness, the Appellant says his appeal raises arguable grounds with high chances of success hence he risks serving a substantial part of the sentence of twenty years by the time the appeal is heard and determined.
2. Indeed the length of the sentence and strength of the appeal are the pillars upon which a decision for bail pending appeal must be rested. There could be other considerations including the health of the Appellant but those are ancillary and corollary considerations.
3. The primary consideration by the Court as disclosed in precedents and Bail and Bond policy are the demonstration of an appeal with overwhelming chances of success and the prospects of the Appellant serving a substantial portion of the sentence before the appeal is heard. It was held in *Jivraj Shah v Republic* [1986] eKLR, which laid down the principles, that:-

“(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 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 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.”

4. Earlier, in the case of *Chimambhai v Republic* 1971 EA 343 J. Harris foreran same principles in such an application when he said:-

“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, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....”

5. In this appeal, the record has not been availed hence it is difficult for the court to appreciate the overwhelming strength of the appeal pointing towards overwhelming chances of success. In addition, the term he was convicted and sentenced to serve is fairly long and to this court it is just and only fair that the appeal itself be progressed to be heard on the merits and can be so heard and determined within ten (10) months from today.
6. For that reason, let the Record of Appeal be compiled and availed within thirty (30) days from today to enable parties file and exchange submissions within 30 days thereafter.
7. Mention on April 24, 2023 to confirm compliance and to take directions on a Judgment date.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Otsyeno for the Appellant

Mr. Chala for the Respondent

Court Assistant: Polycap

