



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kagunya v Republic (Criminal Appeal E094 of 2021)  
[2023] KEHC 1976 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1976 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E094 OF 2021  
A MSHILA, J  
MARCH 10, 2023**

**BETWEEN**

**JAMES MBWIRE KAGUNYA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment of the trial magistrate in Gatundu Criminal Case No 16 of 2020.)*

**RULING**

1. James Mbwire Kagunya the applicant herein has filed two applications dated October 20, 2021 and September 29, 2021, brought under Section 357 (1) of the *Criminal Procedure Code*. Both applications seek to have the appeal admitted as well as have the applicant admitted to bail pending appeal.
2. The applications are supported by the annexed affidavit of the applicant James Mbwire Kagunya who deponed he is aggrieved with the judgment of the trial magistrate in Gatundu Criminal Case No 16 of 2020 and has preferred an appeal against the said Judgment, that the appeal has high chances of success and he is apprehensive if bail pending appeal is not granted the applicant will have served a substantial part of the sentence and the appeal will be rendered nugatory. He further deponds he is a family man with a young family that is dependent on him.
3. At the hearing of both applications Counsel Odiek urged the court to admit the appeal and grant the applicant bail pending appeal. The prosecution counsel Mr. Gacharia was not opposed to the accused being granted bail pending appeal but urged the court to call for security as a condition for granting bail pending appeal.

**Issues For Determination**

4. The only issue framed for determination is whether the appellant has satisfied the conditions to be admitted to bail pending the hearing and determination of the appeal.



## Analysis

5. The conditions upon which bail pending appeal may be granted are set out in the case of *Jivraj Shah vs Republic* (1986) KLR 605 where the court held

“If it appears prima facie from the totality the circumstances that the appeal is likely to be successful on account of some substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.”
6. The applicant was convicted by the Gatundu trial court in Criminal Case No 16 of 2020 for the offence of defilement and was sentenced to 15 years imprisonment. He has lodged the current appeal on both conviction and sentence which he seeks to be admitted and states that the appeal has high chances of success. The applicant states he is willing to abide by the conditions set by the court on bail pending appeal.
7. An application for bond pending appeal is not a constitutional right as compared to bail pending trial, it is a discretionary remedy.
8. Section 357 of the *Criminal Procedure Code* provides as follows:-

“(1) 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.”
9. The trial court convicted the applicant to serve 15 years imprisonment, for the offence of defilement, the applicant states the appeal has high chances of success. The appeal file does not have the trial court file and neither is the Record of Appeal ready only a copy of the memorandum of appeal, notice of appeal and the applications are in the court file. In the absence of the proceedings the court is not well informed on whether the instant appeal has overwhelming chances of success.
10. The applicant argues that he will have served a substantial part of the sentence by the time the appeal is determined. It is noted from the notice of appeal the sentence was made on August 12, 2021, the applicant having been sentenced for 15 years this court is satisfied that he will not have served a substantial term of the sentence at the conclusion of the appeal noting that the number of judges in the station have increased and near hearing dates are readily available.
11. On the issue whether the applicant has demonstrated exceptional circumstance, the applicant contends he is a family man of a young family that is dependent on him and that he obeyed the bail terms conditions in the trial court.
12. In the case of *Peter Hinga Ngotho v Republic* [2015] eKLR it was held that the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an Applicant to bail pending appeal.
13. Also, in the case of *Dominic Karanja v Republic* [1986] KLR 612 it was held that the previous good character of the Applicant and the hardships if any facing his family were not exceptional or unusual circumstances.
14. In this circumstance, the court finds the application for bail pending appeal are unmerited and declines to exercise its discretion to allow the application for bond pending appeal.



### **Findings And Determination**

15. This court finds the applications for bond pending appeal are devoid of merit and are hereby thus dismissed.

- i. Mention on 4/05/2023 before the Deputy Registrar for compliance on filing Record of Appeal.

Orders Accordingly.

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 10<sup>TH</sup> DAY OF MARCH, 2023.**

**HON. A. MSHILA**

**JUDGE**

