



**Sagaray & 3 others v Republic (Criminal Case 61 of 2012)  
[2023] KEHC 2352 (KLR) (Crim) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2352 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE 61 OF 2012  
RL KORIR, J  
MARCH 10, 2023**

**BETWEEN**

**DWIGHT SAGARAY & 3 OTHERS ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Judgment in this matter was delivered on January 25, 2023 where the court found the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons guilty of the charge of murder. Upon delivery of the Judgment, Defence Counsel Mr Katwa Kigen, Ms Kinyua, Ms. Waweru on behalf of Mr Okatch and Mr Wamwayi, for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused respectively made an oral application for extension of bond terms for the accused. The Prosecution opposed the applications stating that there was no basis for the extension of bond terms as the Accused persons' status had changed once the court pronounced itself.
2. I ruled that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons' bonds stood cancelled and that any applications could be made to the proper court. I further directed that the Accused persons be remanded at Industrial Area Remand Prison.
3. Subsequently, the 2<sup>nd</sup> Accused filed a Notice of Motion Application dated February 13, 2023 where he sought the following Orders:-
  - I. That this Honourable Court be pleased to admit the Applicant to bail, pending the hearing and determination of the appeal entered herein.
  - II. That the bail terms so granted be reasonable and consistent with the previous bail terms the applicant was released on.



4. The Application was based on the grounds on the face of the Application and the Supporting Affidavit sworn by Victor Olewe advocate on February 13, 2023.
5. The 2<sup>nd</sup> Accused's counsel stated that upon his client's conviction on January 25, 2021, the court deferred his sentencing hearing to 16<sup>th</sup>-17<sup>th</sup> of February 2023. He averred that he had mounted an appeal by filing a Notice of Appeal dated 6<sup>th</sup> February within the stipulated time.
6. Counsel stated that the 2<sup>nd</sup> Accused had been previously released on a cash bail of Kshs 1,000,000/= with one surety of a similar amount. That for the duration of the trial which was 10 years, he had abided by the bail terms and had never been cited for violating or defying them. That he was currently incarcerated at Industrial Area Remand prison awaiting sentencing. The Applicant further stated that he was confident that his appeal had an overwhelming chance of success.
7. It was the Applicant's case that he was a 46 year old man with a wife and two children who were all under 8 years old and that he was the sole bread winner and care giver of the family.
8. It was the Applicant's case that this court was not functus officio as Sections 356 and 357 of the [Criminal Procedure Code](#) empowered the court to entertain such applications.

### **Applicants' Submissions.**

9. Other than the 2<sup>nd</sup> accused's formal application, Counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons made oral applications and submissions for bail pending sentencing. Dr Khaminwa submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Accused. He stated that the 2010 [Constitution](#) placed a high premium on liberty and had removed the restrictions on offences previously considered not bailable including murder and robbery with violence. He cited the case of [R v Mgunya](#) (2010) eKLR which he informed the court he had the privilege of prosecuting the bail application as defence counsel and in which Ibrahim J (as he then was) granted the accused bail. He submitted that there was no report that the Accused persons failed to abide by the bond conditions. That the Accused persons will attend court and that the chances of absconding were zero.
10. It was Dr Khaminwa's submission that the 2<sup>nd</sup> Accused's mother was very depressed having lost her husband in the same period the 2<sup>nd</sup> Accused was arrested. That the mother had not recovered and the 2<sup>nd</sup> Accused had been comforting her. He submitted his submissions equally applied to the other Accused and urged the court to grant them bail.
11. Mr Olewe who appeared alongside Dr Khaminwa submitted that Sections 356 and 357 of the [Criminal Procedure Code](#) granted the court discretion and the power to determine this application. He submitted that the 2<sup>nd</sup> accused intended to appeal and had filed a Notice of Appeal. It was his further submission that the 2<sup>nd</sup> Accused had never failed to appear for any hearing or mention. He relied on the case of [John Koyi Waluke v Republic](#) (2020) eKLR, where the court granted the accused bail pending appeal.
12. Mr Swaka, counsel for the 3<sup>rd</sup> Accused associated himself with the sentiments of Dr Khaminwa and cited Section 356(1) of the [Criminal Procedure Code](#) which gave this court the jurisdiction to entertain the application. Mr Swaka further submitted that the 3<sup>rd</sup> Accused was a family man and prayed to be set at liberty so that he could organise his house. That he had never missed any session and had no intention to abscond as his bond terms were still intact.
13. Ms. Waweru who appeared on behalf of the 1<sup>st</sup> Accused submitted that the 1<sup>st</sup> Accused was not a flight risk as he had voluntarily submitted himself to the court and had never avoided any investigations and



appointments in court. That he does not intend to leave the jurisdiction and that his bond terms were still intact.

14. Ms. Waweru further submitted that the 1<sup>st</sup> Accused had surrendered his travel documents to the court and that he would abide by any bond terms pending sentencing. She relied on Sections 356 and 357 of the [Criminal Procedure Code](#).
15. Mr Wamwayi for the 4<sup>th</sup> Accused wholly associated himself with the sentiments of the counsels for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons. He submitted that the Accused have been in court for 10 years and that they had never failed to attend court. It was his further submission that the 4<sup>th</sup> Accused had been released on a bond of Kshs 1,000,000/= and that the sureties were still intact and had not been discharged.

### **Prosecution's Submissions.**

16. The prosecution promptly opposed the applications for bail citing Articles 24 and 49 of the [Constitution of Kenya](#). Prosecution Counsel Mrs Ouya submitted that the right to liberty can be curtailed under Article 24 of the [Constitution](#) where a person has been convicted of an offence punishable by death. Counsel submitted that under Section 356 and 357 of the [Criminal Procedure Code](#) relied on by the Applicants, the court may grant stay of execution of sentence. That the court should consider the circumstances required to be fulfilled when granting bail pending appeal i.e. the parties should demonstrate an arguable appeal and that there ought to be exceptional circumstances. The prosecution further submitted that regular court attendance and being a bread winner were not exceptional circumstances.
17. It was the prosecution's submission that the matter was premature as it was slated for pre-sentence hearing and that one of the critical aspects was the probation report. That the Accused persons had been enjoying liberty but their circumstances changed when they were convicted. It was the prosecution's further submission that the probation report would have reviewed the circumstances.
18. The prosecution submitted that the application should have come under Section 379 of the [Criminal Procedure Code](#) on appeal upon being sentenced. That this court had already made a finding of guilty and that the superior court should be the one to entertain the application. She referred the court to Section 325 of the [Criminal Procedure Code](#) and submitted that the court should not be barred from proceeding to sentencing where there was no motion to arrest the judgment. She further submitted that the trial process should proceed to its logical conclusion and that the application be entertained upon the submission of a pre-sentence report.
19. In response to the prosecution's submissions, Dr Khaminwa submitted that the court should look at the new and compelling evidence like the question of Mohammed Ahmed Mohammed. He relied on Articles 31 and 50 (2) of the [Constitution](#). He further submitted that the 1<sup>st</sup> Accused enjoyed diplomatic status.
20. Mr Swaka, counsel for the 3<sup>rd</sup> Accused submitted that the Section 325 of the [Criminal Procedure Code](#) referred to by the prosecution had nothing to do with the matter at hand, it dealt with an arrest of Judgment. He reiterated that he relied on Sections 356 and 357 of the Criminal Procedure Code.
21. Mr Wamwayi, counsel for the 4<sup>th</sup> Accused submitted that after conviction there was also mitigation. He asked the court to grant bail so that they could proceed to mitigation and later on sentencing.
22. Ms. Waweru submitted that their application was predicated on Sections 356 and 357 of the [Criminal procedure Code](#) but the State invoked Section 379 of the [Criminal Procedure Code](#). That the section referred to by the prosecution was incorrect.



23. Mr Olewe submitted that Section 379 (4) of the *Criminal Procedure Code* dealt with the grant of bail pending appeal.

**The Law.**

24. Article 49(1)(h) of the *Constitution* provides that:

An accused person has the 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.

25. Section 356 of the *Criminal Procedure Code* provides that:-

- (1) The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.
- (2) If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the person, otherwise orders.

26. Section 357 of the *Criminal Procedure Code* provides that:-

- (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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

- (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.
- (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.

27. The prosecution stated that the Application was premature and ought to be brought under Section 379 of the Criminal Procedure Code. Section 379 (4) of the Criminal Procedure Code provides that:-  
Save in a case where the appellant has been sentenced to death, a judge of the High Court, or of the Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.



## Analysis

28. My understanding of Section 379 of the CPC cited above is that it comes into effect only once an Accused person has been sentenced and has lodged an appeal to the superior court. As rightly contested by the defence this section does not apply in the present case as the Accused persons have not yet been sentenced. The Applicants have rightly come under the Constitution and Section 356 and 357 of the Criminal Procedure Code as the said sections apply to a situation where either a conviction has been entered without sentence or after conviction and sentence.
29. The starting point in a bail application is the Constitution. This is because denial of bail curtails the liberty of a person as correctly submitted by the defence. Article 49 however refers to a pre-trial period and even then, discretion is left for the trial court to determine the existence of compelling reason not to grant bail. DrKhaminwa in a rejoinder to the submissions by the Prosecution referred the court to Article 50(2) (q) of the Constitution and submitted that the court was empowered to look at new and compelling evidence and that in this case there was evidence relating to one Mohammed Ahmed.
30. Section 50(2) (q) of the Constitution provides:
- “Every accused person has the right to a fair trial, which includes the right if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”
31. This court needs no persuasion that bail is a constitutional right provided under Article 49 of the Constitution and also concretely defined by Article 29 of the Constitution which guarantees the right to liberty. However, in the application before me the Applicants have already been convicted by a competent court and although they were yet to be sentenced, their circumstances changed as submitted by the prosecution. While conviction did not extinguish their right to bail the same must now be considered under section 356 and 357 of the Criminal Procedure Code which the Applicants have correctly cited.
32. In the case of John Koyi Waluke & another v Republic (2020) eKLR, cited to me by the Applicants Onyiego J. Stated:-
- “For a court to grant bail pending appeal, it has to bear in mind that the applicant is no longer innocent. In other words, his/her benefits for release on bail terms under Article 49 (1) (h) of the Constitution are limited.”
- In that case, the Court went ahead to grant bail pending appeal after considering the circumstances of the case.
33. The principles to be considered in an application for bail pending appeal pursuant to the provisions of Section 356 and 357 of the Criminal Procedure Code were set out in the Court of Appeal case of Jivraj Shah v Republic (1986) eKLR which held as follows:-
- “There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in Somo v Republic (1972) EA 476 which was referred to by this court with approval in Criminal



Application 5 No. NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self defeating to attempt to define phrases or to establish formulae.”

34. I agree with the position of Mulwa J. in the case of *Charles Owanga Aluoch v Director of Public Prosecutions* (2015) eKLR where she 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 *Jivraj Shah v 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.”

35. Similarly, 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 3
- (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.....”

36. As stated earlier through case law, the conditions to be satisfied before a court can grant bail pending appeal can be summarised as follows:-

- i. Whether the appeal has overwhelming chances of success.
- ii. Whether there are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion.



### **Whether the appeal has overwhelming chances of success.**

37. I am persuaded by the case of *Joshua Kiarie Nguguna vs Republic* (2021) eKLR, Odunga J. (as he then was) where he stated:-

“The rationale for considering the chances of success of the appeal was given in *Somo v R* (supra) at page 480 as follows:

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”

38. The onus fell on the Applicants to persuade this court that they had an arguable appeal. This is done by attaching a Memorandum of Appeal listing the grounds he intends to rely on in his appeal. The 2<sup>nd</sup> Accused/Applicant has attached a Notice of Appeal. The Notice is simply an intent to file an Appeal but it is neither the actual Appeal nor does it contain the grounds thereof.

39. Counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused made oral submissions in support of their respective applications. The submissions were not in respect of the grounds that they intended to rely on in their appeals. Therefore there were no discernible grounds of appeal.

40. It is my finding that the Applicants have failed to show that their Appeals had an overwhelming chance of success in the superior court. This is not surprising because the Applicants had not had a chance to appeal as their trial was yet to be concluded at sentencing.

### **Whether there are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion**

41. For the court to exercise its discretion in this Application, the Applicants ought to demonstrate that there are exceptional circumstances to warrant the court’s consideration. In summary, the counsels for the Accused submitted that their clients had been in court for 10 years and that they had dutifully attended mention and hearing dates and that the Accused persons would not abscond. That their sureties were also intact. The Supreme Court of India in the case of *Krishnan v The People* (SCZ 19 of 2011), (2011) ZMSC 17 stated:-

“.....The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an application to bail; pending appeal.”



42. In *Dominic Karanja v Republic* (*supra*), the Court of Appeal held that:-
- “.....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.....”
43. Similarly, I am persuaded by Kariuki J. in *David Kimani Kuria v Republic* (2021) eKLR where he stated:-
- “Further 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. (See Peter Hinga Ngotho v Republic) (*supra*).
- In this case the issue of whether the Appellant is a first offender and whether the Appellant complied with the bail conditions granted before conviction, is not a condition for granting bond pending appeal as it does not constitute exceptional or unusual circumstance.”
44. The 2<sup>nd</sup> Accused stated that he was a 46 year old man with a wife and two children who were under the age of 8 years. That he was the sole breadwinner of the family. Various authorities have held the position that being a sole bread winner is not an exceptional circumstance. In this regard, I associate myself with the sentiments of Ibrahim J. (as he then was) in *John Njuguna Kinyanjui v Republic* (2008) eKLR, where he held:-
- “.....The fact that he is employed and is likely to loose his employment or that he is the sole bread-winner for his family do not amount to exceptional circumstances.”
45. Similarly in *John Njiru Njue v Republic* (2017) eKLR, Muchemi J. held that:-
- “The fact that the applicant is the sole bread winner of his family and his purported medical condition do not amount to exceptional or unusual circumstances.”
46. As the authorities have shown, the conditions to be satisfied before a court grants bail pending either appeal are quite stringent compared to bail pending trial. The court must always remind itself of the fact that the Accused persons have been lawfully convicted and ought to be sentenced. The Court of Appeal in *Mutua v Republic* (1988) KLR 497 stated:-
- “It must be remembered that an applicant for bail pending appeal (emphasis mine) has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.
47. In the end, having considered the Applicants for bail pending sentencing and bail pending appeal and the respective submissions of Counsel, it is my finding that the Applicants failed to show that their appeals had overwhelming chances of success. Further, they have not demonstrated any exceptional circumstances to warrant the exercise of the court’s discretion in their favour to grant them bail pending either sentence or appeal.
48. I am disinclined to grant the applicants bail pending either sentencing or appeal.
49. Orders accordingly.

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





.....

**R. LAGAT-KORIR**

**JUDGE**

Ruling delivered in the presence of Mr Okeyo holding brief for Mrs Ouya for the State, Mr Katwa for the 1st Accused, Dr Khaminwa and Mr Olewe for the 2nd Accused, Mr Swaka for the 3rd Accused, Mr Wamwayi for the 4th Accused, and Yussuf (Court Assistant).

