



**Macharia v Director of Public Prosecution (Criminal Appeal
E011 of 2023) [2023] KEHC 3806 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E011 OF 2023
SC CHIRCHIR, J
APRIL 20, 2023**

BETWEEN

JOSEPH WAMBUGU MACHARIA APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. By way of a chamber summons dated 13th March 2023, the Applicants seek to be admitted to bail pending appeal, being this Appeal.
2. He further seeks leave to file a supplementary grounds of appeal and that a draft which he has attached to the Application be deemed as filed.
3. The Application is supported by the Affidavit of Manyoni Philip Isaya, the Applicant's counsel. It is deponed that the Applicant was on bond during trial and was faithful to the bond terms throughout the period of trial; that there were glaring contradictions and inconsistencies in the prosecution's case and therefore the Appeal has high chances of success. It is further contended that the Appellant is a public servant a police officer, of humble abode, and hence not a flight risk.
4. The Appellant further depones that he is likely to end up serving the sentence before the Appeal is heard; That he is likely to lose his job, if the incarceration continues; That the applicant has many dependants looking up to him, including his six siblings and an ailing mother.
5. The Applicant further pleads that he has a medical condition that requires the attention of specialist doctor, and special diet both of which are not available in prison.

Appellant's submissions

6. The Applicant's submission was a complete replica of his replying Affidavit and I don't find it necessary to repeat .He has relied on the following past decisions to buttress his submissions:



- a). *Maurice Shokovolo Amita v Republic*[2018] eKLR
- b). *George Wambugu Thumbi v Republic*[2018] eKLR
- c). *Nathan Brown Birundu v Republic* [1986] e KLR
- d). *Alfayo Musungu v Republic*(Kakamega HCCRA NO.119of 2019
- e). *Peter Hinga Ngatho v Republic*[2015]eKLR

Respondent's Submissions.

7. It was the respondent's submission that the Applicant is a convicted person and hence bail is not a matter of right; that the Appellant's submission that he is a civil servant or that he complied with bond terms during trial are non-issues in this court.
8. It is further submitted that the fact that the Appellant is the sole breadwinner is not a factor to be considered in an Application for bail pending Appeal. In any event, the respondent submits, the Appellant has been in interdiction during trial; that there is no evidence to support the allegation of a chronic illness and whatever medical documents he presented shows that he suffered from a treatable ailment. It is further submitted that medical services are available in prison.
9. The respondent further submits that the applicant has not demonstrated that his appeal has any high chance of success. The respondent has relied on Kakamega HCCA No. 7 of 2018, where it was held that bail pending Appeal should only be granted under special circumstances. It is submitted that no such special circumstances have been shown to warrant bail.

Determination

10. The Applicant was charged with the offence of attempted defilement at the chief magistrate's court at Mumias. He faced a 2nd charge of committing an indecent act with a child. He was convicted of the first charge and sentenced to 10 years in prison. He has since filed an Appeal against the conviction and sentence. I have considered the Application and parties submissions plus the Authorities relied on.
11. The right to bail is enshrined under Article 49(1)h of the *Constitution* .It 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.
12. However, in the case of *Charles Owango Oluoch v DPP* [2015] eKLR. The court held

“ 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”
13. The court have developed certain guidelines in the exercise of the aforesaid discretion .The guidelines were set out in the case of *Jivraj Shah v Republic* [1986] KLR 605 cited with approval in the case of *Ibrahim samon Ali v Republic* [2021]eKLR, where the court set out the principles as follows:
 1. “The principal contribution in an Application for bond pending Appeal is the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly say 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 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 point to be argued”.
14. It is important to point out that the burden is on the Applicant to prove that all the aforesaid circumstances are present. What circumstances has the Applicant presented to court?
- He has told the court that he is a sole provider for his family of six siblings and an ailing mother ; his conduct during trial was good and that he was faithful to the bond terms plus the fear of losing his job due to the continued incarceration.
15. The circumstances in my view are not exceptional , they are common to all men and women. In the case of *Dominic Karanja v Republic* [1986] KLR it was held “ previous good conduct and character of the Applicant and hardships if any facing his family were not exceptional or unusual circumstances. And in *Peter Hinga Ngotbo v Republic* it was held: “the fact that the Applicant did not breach the bail conditions of court below is not an exceptional circumstances which warrant a decision to admit an Appellant to bail pending Appeal.”
16. On the ill health, the Applicant has submitted that he suffers from undisclosed illness which require him to see a specialist and be on a special diet. It is not indicated whether the illness is chronic. However the discharge summary from Kakamega central Maternity and nursing home (JWN5) shows that in July, 2021, the Appellant was diagnosed with Malaria. Malaria is a treatable disease, it is not a chronic . There are therefore no unusual circumstances to entitle the Applicant to bail pending Appeal.
17. On the Appeal succeeding, I have perused the lower court proceedings and the judgment. Whereas I do not want to venture into the merits and demerits of the Appeal, the evidence tendered was overwhelming in favour of conviction. The sentence of 10 years meted out is the minimum prescribed by the section 8(3) of the *sexual Offences Act* No. 3 of 2006. In a nutshell I have my reservations on the Appeal succeeding
18. Finally, the applicant was sentenced on 17.2.2023 to a prison term of 10 years. The chances of his trial lasting that long or even half of the term are minimal. The Applicant’s submission in this regard is lacking in sincerity in my view.
19. In the case of *Douglas Mutunga Muthaya vs. Republic* (1988) KLR 497 it was held “It must be remembered that an Applicant for bail 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. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so”

The Applicant in my view has failed to convince this court that bail is deserved. Applicant’s application is unmerited. The same is declined.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF APRIL 2023.

S. CHIRCHIR

JUDGE

In the presence of:

Court Assistant- Eric

Ms Odumba for the Respondent



No appearance by the Applicant**

