



**Chisutia v Director of Public Prosecution (Criminal Appeal
E089 of 2022) [2023] KEHC 17847 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E089 OF 2022
SC CHIRCHIR, J
MAY 18, 2023**

BETWEEN

PETER CHISUTIA APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(Being an Appeal from the Original Conviction and Sentence from Butali
Principal Magistrate's Court in Criminal Case No. 305 of 2020 delivered
on 23rd November 2022 by Hon. C.N. Njalale Senior Resident Magistrate)*

RULING

1. The Appellant's notice of motion dated December 7, 2022 seeks for bail pending appeal. It is brought under section 356 and 357 of the Criminal Procedure Code and Article 49(4) of the constitution.
2. It is supported by the grounds appearing on the face of the application and by appellant's affidavit sworn on December 7, 2022.

Background

3. The applicant was charged with the offence of stealing a motorcycle contrary to Section 278A of the penal code at the Principal Magistrate's Court in Butali in Criminal Case no 305 of 2020. He was convicted and sentenced to 5 years in prison. Aggrieved by the judgment, he has petitioned this court by way of a petition of appeal dated December 2, 2022.
4. He has brought the present application seeking for bail pending the hearing and determination of the said appeal.
5. The bail hearing proceeded by way of oral submissions.



Appellant's Submission

6. It is the appellant's submissions that he is not a flight risk; that he complied with bond terms during trial; that the appellant is willing to provide security equivalent to the value of the stolen motorbike, which was kshs 94,000/-. It is further submitted that the applicant requires special medical attention due to his medical condition. That the judgment which has been attached has sufficient information upon which this court can make a decision on bail

Respondent's Submissions

7. It is the Respondent's submission that bail pending appeal is discretionary and the discretion must be exercised judicially. It is further submitted that since the proceedings at the trial court have not been availed, the question of whether the appellant is a flight risk cannot be determined. It is further contended that the sentence of 5 years cannot be said to be excessive considering that the offence carries a maximum of 7 years.

Determination

8. I have considered the Applicant's Application and both parties submissions. Article 49(1) sets out the right to bail by an accused person. It gives an accused person the right to be released on such terms as may be reasonable, unless there are compelling reasons to deny the accused the right.
9. However, in *Chimambhai vs Republic* (1971) EA 343 the court held: " the case of an Appellant under sentence of imprisonment seeking bond lacks the strongest elements normally available to an accused person seeking bail before trial, namely the presumption of innocence, but nevertheless the law of today recognizes, to an extent, the possibility of conviction being erroneous or the punishment being excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases."
10. The same principle was stated in the case of *Charels Owango Oluoch vs DPP* (2015) eKLR it was held "..... Bail is a constitutional right where one is awaiting trial. After conviction, that right is in court's discretion and upon considering the circumstances of the application".
11. The courts have developed certain guidelines to guide the exercise of the said discretion after conviction. In the case of *Jirray Shal vs Republic* (1986) KLR 605 cited with approval in the case of *Ibrahim Samon Ali vs Republic* (2021)e KLR set out the following guiding principles:
 - a). "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 conclude that it is in the interest of justice to grant bail.
 - b). If it appears, prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantive 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
 - c). 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 the weight and the relevance of the points argued."
12. The Right to bail pending Appeal unlike one pending trial in the first instance is therefore not automatic. It is based on the discretion of the court and the onus is on the Applicant to prove that his circumstances warrant the granting of bail as he waits for the determination of his Appeal.



13. The applicant has submitted that he is not a flight risk, that he fully complied with bond terms during trial, that the appeal has high chances of success and that he suffers from a terminal illness which requires close monitoring by his Doctor.
14. On his faithful adherence to the bond terms during his trial at the lower court, the court in the case of *Peter Hinga Ngotho vs Republic* (2015) e KLR Stated that, the fact that the applicant did not breach the bail conditions of the court below is not an exceptional circumstance which warrant a decision to admit an appellant to bail pending appeal.
15. On the Appeal having high chances of success, I have had the chance to look at the judgment and summary of the evidence as contained in the copy of the judgment annexed to the Application and I am not fully convinced about the said chance. The Applicant admitted that he had the motorbike, and the circumstances under which it went missing do not rule out, prima facie, the culpability of the Appellant.
16. On the terminal illness, the courts have in some instances held that chronic illness for instance, constitute exceptional and unusual circumstances and therefore entitles an Applicant to bail pending Appeal. However in the present case, there is no evidence at all that has been presented to this court to show that the appellant is ill, let alone from a terminal illness.
17. The Appellant has not demonstrated to this court that he is deserving of the prayers sought. In *Mutua vs Republic*(1988) KLR 497 cited with approval in *Douglas Mutunga Mathenya vs Republic*(2017)e KLR 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”
18. In conclusion, the Applicant has failed to demonstrate that there are special and unusual circumstances to warrant him being released on bail pending his Appeal.
19. The Application is unmerited. It is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 18TH DAY OF MAY 2023

S. Chirchir

Judge

In the presence of:-

Erick- Court Assisstant

Mr. Manyoni for the Applicant

No appearance by the Respondent.

