



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kipkorir v Republic (Criminal Appeal E018 of 2022)  
[2023] KEHC 4130 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4130 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KILGORIS  
CRIMINAL APPEAL E018 OF 2022**

**F GIKONYO, J  
MAY 10, 2023**

**BETWEEN**

**NELSON KIPKORIR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence of Hon. M.I.G. Moranga  
(SPM) in Kilgoris SPMCR No. 187 of 2021 on 9.12.2021)*

**RULING**

**Bail Pending Appeal**

1. Essentially, the application January 31, 2023 is seeking bail or suspension of sentence pending appeal.
2. The application is premised upon grounds set out in supporting affidavit sworn by the appellant on January 27, 2023.
3. The major grounds are; i) that the appeal herein has overwhelming chances of success; ii) that it is fair and just that this court be pleased to grant him bail pending appeal and that there be an order for stay of execution of the sentence imposed pending the determination of the appeal herein; and iii) that the respondent will not suffer any prejudice if the orders herein are granted.
4. The application is opposed by the DPP through written submissions filed on May 9, 2023 pursuant to the leave of the court.
5. The gist of the submissions by the prosecution is that; i) the appeal has no any chance of success, as no substantial point of law has been argued in the application; and that the 16 grounds of appeal cited by the appellant merely trivializes trial court's findings of fact on alleged non-existent contradictions, gaps and discrepancies in witnesses' testimonies; ii) that in light of the heavy sentence, the appellant is likely



to abscond; and iii) that the sentence imposed is lawful and therefore nothing justifies suspension of the sentence.

6. They relied on the case of Dominic Karanja (supra) and [Charles Owanga Aluoch v R](#) [2015] eKLR.

### **Analysis and determination**

7. The application dated January 31, 2023 is essentially for bail or suspension of sentence pending appeal under section 357(1) of the [Criminal Procedure Code](#). The section provides as follows:

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.

### **Burden of proof**

8. The appellant bears the burden of establishing reasons why he should be released on bail or sentence should be suspended pending appeal. The dominant view is that, upon conviction by a competent court, the guilt of the person has been established, thus, negating the presumption of innocence. See [Ragbbir Singh Lamba v R](#) [1958] 1 EA 337, [Chimambhai v Republic](#) (No 2) [1971] 1 EA 343 and [Masrani v R](#) [1060] EA 321 Potent grounds for bail pending appeal
9. The applicant should show;
  - i. The appeal has overwhelming chances of success ([Ademba v Republic](#) [1983] KLR 442, [Somo v R](#) [1972] EA 476, [Mutua v R](#) [1988] KLR 497); or
  - ii. There are exceptional or unusual circumstances to warrant the Court's exercise of its discretion ([Ragbbir Singh Lamba v R](#) [1958] EA 37; [Jivraj Shah v R](#) [1986] eKLR); or
  - iii. There is a high probability of the sentence or substantial thereof being served before the appeal is heard ([Chimambhai v R](#) [1971] EA 343).
10. See also the Bond and Bail Policy.

### **Overwhelming chance of success**

11. The major ground for applying set out by the applicant is; that the appeal has overwhelming chances of success. He also stated it is only fair and just that he should be released on bail pending appeal. And, concluded that the prosecution will not suffer any prejudice if he is released on bond. The latter seems to be a personal impression the applicant makes of his matter rather than a ground for grant of bail pending appeal.
12. On this ground on overwhelming chances of success, in [Dominic Karanja v Republic](#) (1986) KLR 612, the Court of Appeal stated *inter alia*:
  - (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
13. In evaluating the ground on overwhelming chances of success of an appeal, the court should be careful not to prejudice the appeal, but, at the same time ensuring '...if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty...'



14. I should also think it will profit the test of overwhelming chances of success; consists in prima facie impression 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 in the appeal (*Jiv Raji Shah v R* [1966] KLR 605)
15. Despite the 17 grounds of appeal- nine (9) in the memorandum of appeal and eight (8) in the supplementary grounds of appeal- and merely stating that his appeal has overwhelming chances of success, the appellant did not make any or further argument or amplification on the point.
16. I therefore agree with the prosecution that the appellant did not create any or necessary impression of the success of his appeal on account of a substantial point of law to be argued, for purposes of bail pending appeal. He fails on that front.

### **Exceptional circumstances**

17. The foregoing notwithstanding, are there exceptional circumstances to warrant release on bail or suspension of sentence pending appeal?
18. What constitute exceptional circumstances?
19. In *Dominic Karanja v Republic* (1986) KLR 612, the Court of Appeal stated inter alia:
  - (a) a) ...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 prisoners;
  - (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;
  - (d) .....
20. See also *R v Kanji* [1946] 22 KLR, where De Lestang, Ag J (as he then was) stated that:
 

“The appellant’s appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail.”
21. The applicant did not plead any exceptional circumstances. I do note that he is serving a 25 years’ jail term. The prosecution is apprehensive that the heavy sentence may be an incentive to abscond. That notwithstanding, of significance to this ruling is that, there is no possibility of serving the sentence or substantial portion of it before the appeal is heard especially in light of court’s statutory obligation under the overriding objective to inter alia dispose of cases expeditiously. Apt, directions certainly should expedite disposal of the appeal.
22. I do not find any exceptional or unusual circumstances which may warrant release on bond or bail or suspension of sentence pending appeal



23. In light of the foregoing, I find no merit in the application for bail or suspension of sentence pending appeal. I dismiss it.
24. Nevertheless, I direct the DR to submit within 14 days, the original trial court's record together with typed proceedings, for purposes of admission or otherwise of the appeal (section 352, 352A & 353 of the [CPC](#)) and attendant directions thereto.
25. Orders accordingly

**DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS  
ONLINE APPLICATION THIS 10<sup>TH</sup> DAY OF MAY, 2023**

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**F. Gikonyo M.**

**JUDGE**

**IN THE PRESENCE OF:**

**CA - Leken**

Koskei for Appellant

Okeyo for DPP

