



REPUBLIC OF KENYA



**Kipkoech v Republic (Criminal Appeal E014 of 2023)
[2023] KEHC 18810 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E014 OF 2023**

**JK SERGON, J
JUNE 15, 2023**

BETWEEN

VINCENT KIPKOECH APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Vincent Kipkoech, the Appellant/Applicant herein filed the Application dated 18th April, 2023 whereof he sought for orders that he be admitted to bail pending the hearing and determination of the Appeal against his conviction and sentence delivered on 31st March 2023 in Kericho Resident Magistrate's Court Criminal case no. 1006 of 2022.
2. The Appellant/Applicant also sought for orders that he be released from prison custody on bond/bail on such terms that the court shall deem fit, appropriate and expedient in the circumstances pending the hearing and the determination of the Appeal preferred herein.
3. The Application is supported by the grounds laid out on its face and the Affidavit sworn by the Appellant/Applicant in support of the Application.
4. The applicant deponed in the Affidavit that on March 16, 2023, he was convicted of an offence of assault contrary to section 251 of the Penal Code and was later sentenced on March 31, 2023 to 3 years imprisonment, that the said conviction and sentence was oppressive and harsh and being aggrieved he preferred the instant appeal.
5. The Applicant further deponed that he was apprehensive that by the time the appeal is heard and determined, he will have served a substantial portion of the sentence and subsequent reversal of the decision of the trial court's decision will not undo the damage he would have suffered as a result of his incarceration.



6. The Applicant deponed that he was out on bond throughout the duration of his trial in the subordinate court and he fully complied with the bond terms until the matter was determined and that he believed that the trial court erroneously convicted him relying on contradictory pieces of evidence by the prosecution which created great doubt and ought to have been analyzed to his benefit.
7. He deponed further that the learned trial magistrate erred in law and in fact by placing undue weight on the Respondent's case and totally failed to take into account his case and that the appeal has overwhelming chance of success since the learned trial magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt when the evidence produced did not support the charge as itemized.
8. He deponed that he posed no threat to anyone if released on bond pending the determination of appeal, he is not a flight risk, he is ready and willing to abide by any terms that the court may impose as pre-condition for his release on bail pending appeal.
9. The Applicant further deponed that he undertakes to be present at all times when required to appear by the court and cooperate in all matters expected of him and that he stands to suffer irreparable loss for he would have served a substantial portion of the sentence which loss is irreversible.
10. Mr. Musyoki, Learned Senior Assistant Director of Public Prosecutions opposed the applicant's Application stating that once an accused has been convicted, he loses the right of presumption of innocence, that the applicant's Appeal has no overwhelming chances of success, there are no exceptional circumstances shown and that the appeal may be fast tracked.
11. I have considered the arguments put forward by the parties. The only issue arising for the determination of this Court is the question as to whether the Appellant/Applicant should be admitted to bail/bond pending determination of the instant appeal. Mr. Musyoki has already pointed out the reasons why the same should not be granted.
12. In *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR it was 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 *Jiv Raji Shah vs. 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.



13. 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 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)
14. I have considered the decisions above and the basic point is that it is at the discretion of the court to grant bail pending appeal, which discretion should be exercised judiciously. In such an application, the applicant has the burden of establishing that the appeal has high chances of success or has a high likelihood of serving a substantial part of the sentence before hearing the appeal.
15. In the instant application, only the judgment of the trial court was availed but not the proceedings. I was not in a position to peruse the record to establish whether an arguable appeal with high chances of success have been disclosed by the grounds of appeal. However, I took the liberty to peruse the Trial Court Judgement and the Grounds of appeal filed in the instant appeal.
16. The Applicant was sentenced on March 31, 2023 to 3 years imprisonment, therefore, there is no likelihood of him having served a substantial part of the sentence before the appeal is heard. The current policy of quick disposal of cases does not create the possibility of delay in hearing of the appeal. In any case, the onus was on the Applicant to lodge his Record of Appeal without any delay.
17. I also observe that the Applicant has not demonstrated the existence of exceptional or unusual circumstance to warrant grant of bail pending appeal. The fact that the Applicant did not breach bail conditions in the trial court, he faithfully and dutifully attended mentions and hearings at the trial court, he does not pose threat to any one if released, he is not a flight risk and cooperated with the court until the matter was determined are not exceptional circumstances to warrant admission to bail pending appeal.
18. In conclusion, I find no merit in the application and the same is therefore dismissed.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 15TH DAY OF JUNE, 2023.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

No Appearance for the Appellant

No Appearance for the Accused

