



**Leisuku & 2 others v Republic (Criminal Appeal E011 of 2023)
[2023] KEHC 18820 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E011 OF 2023
CM KARIUKI, J
JUNE 15, 2023**

BETWEEN

JAMES LEISUKU 1ST APPELLANT

LOLETU LONGITUNGU 2ND APPELLANT

RIARI LOOPROA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellants/Applicants seek to be released on bond pending Appeal.
2. The state opposes the same. Thus the parties were directed to canvass application via submissions.

3. Applicant's submissions

4. The principles for granting bond pending an appeal are already settled in the case of *Jivraj Shah v Republic* (Supra), which laid down the principles as follows:

- “(1) The principal consideration of 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 facie from m 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 circumstances that disclose substantial merit in the Appeal, which could result in the Appeal being allowed. The proper approach is the consideration of the particular circumstance and weight and relevance of the points to be argued”.

“ The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but the laws of today frankly recognize, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...”

5. The Applicants have demonstrated that there are exceptional or unusual circumstances the Court would consider in determining whether the Honourable can grant the bail pending Appeal.
6. A perusal of the Appeal record indicates that they are fathers of young children. It further indicates that the Applicant/Appellants were arrested on a market day when running activities of fending for their families.
7. Having minor children amounts to exceptional and unusual circumstances. As it was held in the case of *Pauline Ruguru Kithumbu v Republic [2019]* eKLR, having a minor and breast feeding amounted to exceptional circumstances. The Court observed as follows:

“ 21. The fact that the Applicant was a mother of young children who were too tender years ought to have been considered during sentencing to explore the possibility of a non-custodial sentence.

22. I believe that being a mother of young children who depend on the Applicant is an exceptional circumstance for the Court to consider this application.

23. it is my finding that the application has satisfied the basic requirements and is merited.”

8. While the Appellants herein are not breastfeeding, they are equally parents of children of tender age, just as in the preceding authority. Fathers are equally parents, and the same rules should apply to them just to mothers.
9. Guided by the foregoing case in considering whether there exists an exceptional circumstance that the Court should consider in whether Applicant/Appellants should be released on bail.
10. In *Mkirani v Republic (Criminal Appeal E010 of 2021 [2021] KEHC 300 [KLR]* (3 December 2021 (Ruling), the Court was guided by an Indian case *Krishnan versus the People*, where it was held that:

“The fact that the Appellant, due to delay in determining the Appeal may, have served a substantial part of his sentence by the time his Appeal is heard, is one such



exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances”.

11. The Applicants /Appellant was convicted of all three counts. They were sentenced to a fine of Kshs. 50,000/= in default to serve a prison term of six months for the 1st count. They were also fined to pay a fine of Kshs.100,000/= in default to serve one-year imprisonment.
12. It is not indicated whether the terms run concurrently or not. We implore the honourable Court to consider that as an exceptional circumstance.
13. A perusal of the same indicates that the Appeal has a chance of success for the following reasons;
 - a) The plaintiffs were accused of aiding a prisoner to escape. The respondent failed to show that, indeed, there was a prisoner or a prison where the Applicants aided the prisoner to escape.
 - b) The name of the prisoner or prison was not provided. The Appeal record shows evidence that the Applicants were arrested in an open-air market called Olmoran—no mention of any prison whatsoever.
 - c) David Githinji, who reported that his stolen cows were being sold by a suspect who allegedly ran away, was not called to testify. There is no evidence that the said David Githinji made any report of stolen cows. Their entire story seems to be a rehearsed composition.
 - d) The two prosecution witnesses, Mr. Fredrick Wambugu (PW 20 and Felix Nzomo (PW2), failed to give any evidence that they indeed went to pursue a reported police matter.
 - e) The prosecution and its witnesses did not correctly identify the appellants/applicants, as they failed to corroborate their statements.
14. The foregoing reasons basically prove that the respondent did not discharge the burden of proof beyond reasonable doubt as required by law.
15. The foregoing reasons and as provided in the Petition of Appeal and the record of Appeal, show that the Appeal has an overwhelming chance of success.
16. The Applicants/Appellants were sentenced as follows:
 - Count 1: Pay a fine of Kshs. 50,000/ in default to serve six months imprisonment.
 - Count 2: Each accused person of paying a fine of 100,000/= in default to serve one-year imprisonment.
 - Count 3. To pay a fine of 100,000/= in default to serve one-year imprisonment.
17. The trial court’s judgment does not indicate whether the sentences run concurrently; hence there is a dilemma.
18. The Applicants/Appellants have served their sentences since 12 April 2023. It is nearly two months in custody.



19. Assuming the sentences run concurrently, two months is a substantial part of one year sentence; hence the Applicants/Appellants would have served a substantial part of the sentence.
20. If the substantive Appeal takes two or three months to conclude, the Applicants/Appellant would have served nearly half of the one-year sentence.
21. Respondent Submissions
22. It should be noted that an Appellant under a sentence of imprisonment seeking bond lacks one of the elements normally available to an accused person seeking bail before trial, which is the presumption of innocence.

23. Does the Appeal have an overwhelming chance of success?

24. The Bail and Bond Policy Guidelines, page 27, paragraph 4.30, provides that the burden is on the convicted person to demonstrate that there are overwhelming chances of success. In this particular instance, I have perused the record, which is duly filed herein, and it's demonstrated that the trial Magistrate duly considered the evidence and the law in concluding convicting the Appellants. Hence the appeal perse has no chance of success whatsoever.
25. Is there a possibility of delay in the hearing and determination of the Appeal
26. The appellants were convicted and were on 12 April 2023 sentenced as follows:
 - i) Count 1 – Each is to pay a fine of Kshs—fifty thousand in default to serve six (6) months imprisonment each.
 - ii) Count II- Each is to pay a fine of Kshs. 100,000 in default to serve one (1) year.
 - iii) Count III – Each is to pay a fine of Kshs. 100,000 in default to serve one (1) year imprisonment.
27. Before the filing of this application, the proceedings had been typed and a record prepared and served; hence there is no likelihood of them having served a substantial part of the sentence. Furthermore, your lordship, courts have currently upscaled work, and the possibility of the Appeal taking long to be heard should not arise.

28. Demonstration of exceptional or unusual circumstances.

29. The Appellants have not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending Appeal in *Dominic Karanja v Republic [1986]* KLR 612 held that the previous good character of the Applicant and the hardships, if any, facing his family were not exceptional or unusual circumstances.
30. Further, the fact that the Applicant did not breach the bail conditions in the Court below is not an exceptional circumstance that can warrant a decision to admit an Applicant to bail as it was held in *Peter Hinga Ngotoho v Republic [2015]* eKLR.
31. In this case, whether the Appellants are first offenders and whether they 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 circumstances.



32. The Appellants have further sought reliance on Article 49 of *the Constitution* of Kenya which indicates that an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proven guilty, unlike a case where one is already convicted, as in this case. Thus the Court is urged to note that the Appellants have lost the presumption of innocence and are convicts.

33. **Determination**

34. The issue arising from the material before the Court is whether the application meets the threshold for granting bond pending Appeal.

35. Over the years, the courts have formulated several principles and guidelines upon which bail pending Appeal is anchored. In the case of *Jiv Raji Shab 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 that 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 weight and relevance of the points to be argued.”

24. 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 sureties support it, is not sufficient ground for releasing a convicted person on bail pending Appeal;

(d)

36. This Court has considered the decisions above on whose basis point that it is 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 a high chance of success or is likely to serve a substantial part of the sentence before hearing the Appeal.

37. It should be noted that an Appellant under a sentence of imprisonment seeking bond lacks one of the elements normally available to an accused person seeking bail before trial, which is the presumption of innocence.
38. Does the Appeal have an overwhelming chance of success? The Bail and Bond Policy Guidelines, page 27, paragraph 4.30, provides that the burden is on the convicted person to demonstrate that there are overwhelming chances of success. In this particular instance, I have perused the record, which is duly filed herein, and it's demonstrated that the trial Magistrate duly considered the evidence and the law in concluding convicting the Appellants. At this stage, the Court cannot conclude same has overwhelming chances of success.
39. Is there a possibility of delay in the hearing and determination of the Appeal? The appellants were convicted and sentenced on 12 April 2023 as follows: Count 1 – Each is to pay a fine of Kshs—fifty thousand in default to serve six (6) months imprisonment each. Count II- Each is to pay a fine of Kshs. 100,000 in default to serve one (1) year. Count III – Each is to pay a fine of Kshs. 100,000 in default to serve one (1) year imprisonment.
40. The finds from the court file that, before the filing of this application, the proceedings had been typed and a record prepared and served; hence there is no likelihood of them having served a substantial part of the sentence. Furthermore, the courts have currently upscaled work, and the possibility of the Appeal taking long to be heard should not arise.
41. This Court is to ready to hear the Appeal within the nearest date possible, subject to the parties' advocate dates availability.
42. Demonstration of exceptional or unusual circumstances. The Appellants have not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending Appeal in *Dominic Karanja v Republic* [1986] KLR 612 held that the previous good character of the Applicant and the hardships, if any, facing his family were not exceptional or unusual circumstances.
43. Further, the fact that the Applicant did not breach the bail conditions in the Court below is not an exceptional circumstance that can warrant a decision to admit an Applicant to bail as it was held in *Peter Hinga Ng'otho – vs. Republic* [2015] eKLR.
44. In this case, whether the Appellants are first offenders and whether they 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 circumstances.
45. The Appellants have further sought reliance on Article 49 of *the Constitution* of Kenya which indicates that an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proven guilty, unlike a case where one is already convicted, as in this case. Thus the Court notes that the Appellants have lost the presumption of innocence and are now convicts.
 - i. The Court finds no merit in the application and dismisses the same, and orders the Appeal to be heard on a priority basis.

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



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CHARLES KARIUKI
JUDGE

