



**Kimingich & another v Republic (Criminal Appeal
121 of 2022) [2023] KEHC 19646 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 121 OF 2022
JRA WANANDA, J
JULY 7, 2023**

BETWEEN

SAMUEL KIMINGICH 1ST APPLICANT

ERICK NYOGESA WANJALA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Arising from Eldoret Chief Magistrate's Court Criminal Case No 2474 of 2019.)

RULING

1. By the Judgment delivered on October 14, 2022 in Eldoret Chief Magistrate's Court Criminal Case No 2474 of 2019, the Appellants were convicted of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. They were then on 5/12/2022 each sentenced to serve 50 years imprisonment. Being dissatisfied with the conviction and sentence, the Appellants filed this Appeal on December 16, 2022.
2. It is therefore upon this background that by the Notice of Motion dated 2/2/2023 and filed through Messrs Ombima & Co. Advocates, the Appellants now seek the following orders:
 - i. [.....] Spent
 - ii. That the Appellants/Applicants be and are hereby released on bond and/or with the alternative of cash bail pending the hearing and determination of the appeal herein.
 - iii. That costs of this application be in the cause.
3. The Application is premised on the grounds that the appeal has an overwhelming chance of success, the Appellant are men of good character, they were declared by the prosecution as first-time offenders, they had been released on bond during the trial at the lower Court and never absconded or failed to



attend Court for the entire period the matter was before the said Court, the 1st Appellant is the sole breadwinner of his family, particularly to his elderly mother and an ailing brother, the 2nd Applicant has a young family that depends on him, he has a wife and two children who are minors, he has the responsibility to take care of the children, they Appellants stand to suffer irreparable loss and prejudice as their Appeal will be rendered nugatory if this Application is not heard expeditiously and the orders sought granted as prayed and the Appeal is subsequently allowed, the Appellants are constitutionally entitled to extension of the presumption of innocence until their Appeal is heard and determined, the Appellants are not a flight risk as they each have a residence at a known place, it is in the interest of justice that the Application be allowed, the Application is made in good faith and without undue delay, the Respondent will not suffer any prejudice if the Appellants are released on bail as they pledge to abide by all terms and conditions of this Court and lastly that the Appellants are ready and willing to abide by such terms as the Court may set for their release.

4. The Application is then supported by the respective Affidavits sworn by each of the Appellants. In the Affidavits, they reiterated the grounds already set out above and in a bid to demonstrate that the Appeal had a high chance of success, they added that there are glaring errors in the Judgment, namely, that their conviction was solely based on alleged identification by a prosecution witness, which was evidence was weak and unsatisfactory, the identification basically amounted to dock identification which is baseless in law, the trial Magistrate erred in not interrogating the circumstances surrounding the alleged identification and thus wrongly convicted the Appellant, the Court erred in admitting evidence which was neither supported nor corroborated, the trial Magistrate failed to take into account the weight of the defence evidence adduced by the Appellants, the Court failed to consider the possibility of the complainants having been robbed by strangers that they could not recognize but chose to implicate the Appellant for reasons best known to them. They then alleged that they were framed upon failure to recognize the real offenders, the Court improperly exercised its judicial function by shifting the burden to the Appellants to prove that they did not commit the offence instead of the prosecution proving that it is the Appellants who committed it hence resulting in a miscarriage of justice and that the sentence meted out against them was excessive in the circumstances despite the averment that they were first offenders.

Response by the State

5. By the Grounds of Opposition filed on 17/5/2023, State opposed the Application on the following grounds:
 - a. There are no circumstances indicating that the appeal is likely to succeed.
 - b. There are no exceptional or unusual circumstances to warrant the grant of bail pending appeal.
 - c. There is no danger that the Appellants/Applicants will have served a substantial part of their sentence before their sentence before their appeal is heard and determined.

Hearing of the Application

6. Pursuant to directions given, the Application was canvassed by way of written submissions. The Appellants, through their said Advocates, filed their Submissions on 17/5/2023 while the Respondent, through Senior Prosecution Counsel, Emma Okok also filed its Submissions on the same 17/5/2023.

Applicant's Submissions

7. Counsel for the Applicants submitted that entitlement to bail is provided for under Article 49(1) (h) of the [Constitution of Kenya, 2010](#) which gives an arrested person the 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, article 50 (2) of the same Constitution provides that every accused person has the right to be presumed innocent until proven guilty, the Appellants are entitled to extension of such presumption of innocence until the appeal is finalized. He then cited the provision of Section 357(i) of the Criminal Procedure Code and also the case of Jivraj Shah vs. Republic [1986]eKLR,

8. Counsel argued further that there are exceptional circumstances justifying grant of bail because the 1st Appellant is the sole breadwinner of his family, he has an elderly mother who fully depends on him for her livelihood, he has an ailing brother, the 2nd Appellant has a young family that fully depends on him, he has two minors under his care who are also school going, the mother to the minors is outside the country as she went to Saud Arabia to seek for employment.
9. Counsel also submitted that the Appeal has high chance of success since the Appellants were convicted purely on suspicion and circumstantial evidence, the prosecution failed to prove in whatsoever manner that the Appellants were involved in the robbery with violence as charged, it is an established principle of law that mere suspicion however strong does not form the basis of conviction as held in Joan Chebii Sawe v Republic - Criminal Appeal No 2 of 2002. He further argued that the prosecution called 5 witnesses, 2 of them were the complainants and also husband and wife, another was an eye witnesses and the other two were expert witnesses, the eye witnesses' evidence was not corroborated in any way. Counsel then recited and re-analyzed the evidence of the various witnesses and concluded that there were other relevant witnesses who were not called as prosecution witnesses, a witness to the police 4 names of people he saw attack them at night but only the 2 Appellants were charged, the Appellants contest the manner in which they were identified by the witnesses, the offence allegedly occurred at night but the Court failed to consider the intensity of light at the scene and no identification parade was conducted, the evidence of identification and recognition alone was not enough to prove that the Appellants were guilty of the offence. He cited the case of Hassan Abdalla Mohammed vs Republic eKLR and Wamunga vs Republic (1989) eKLR and added that there was evidence that a mobile phone and money were taken from the complainants but none of these items were traced by the police and/or brought as exhibits, there was also evidence that that the accused were armed with dangerous weapons but none were traced and/or as exhibits.
10. Counsel then cited the case of Yahya Ahmed v Republic [2021] eKLR and argued that in that case the Court allowed an Application for bail pending Appeal on grounds that the Appellant had an arguable case on appeal and that Appeal process was likely to take long.
11. Counsel further submitted that the Appellants have undertaken and committed that if granted bail they will diligently and religiously attend Court without failure, they will not interfere with the investigations or any of the witnesses, they will maintain their known place of aboard, they are not flight risks, they have no known history of absconding bail, they are willing to abide by any other terms that the Court may place, their continued stay in custody not only unfairly subjects them to further severe hardships and anxiety to them as individuals but also their families. He cited the case of Francis Macharia Nzeki v Republic [2021] and added that the Appellants are first time offenders with no other charges pending against them in any other Court of law, they were released on cash bail of Kshs 30,000/= each during trial at the lower Court and they religiously attended Court without fail.

Respondent's Submissions

12. On her part, Prosecution Counsel representing the State opposed the Application on the ground that it is not merited and that there are no sufficient grounds to support the same. She cited Section 357(1) of the Criminal Procedure Code and also the case of Jivraj Shah v R (*supra*) and submitted that that the Appellants have not demonstrated that there are exceptional or unusual circumstances where the



interests of justice would favour the grant of bail pending appeal, the fact that the Appellants adhered to bond terms in the trial Court is not a guarantee that they will attend Court during the hearing and determination of this Appeal, the offence that the Appellants have been convicted of is a serious one and the weight of the already pronounced sentence is so severe that it predisposes them to abscond, although the 1st Appellant states that he is the sole breadwinner of his family, that he has an elderly mother who fully depends on him and an ailing brother and although the 2nd Appellant also states that he has a young family and that he was left with two children who are minors under his care, these are not exceptional circumstances that would warrant grant of bail pending appeal.

13. Counsel submitted further that the issues raised by the Applicants in the Application and Appeal are issues of fact, and not weighty legal questions that would prima facie suggest an overwhelming chance of success, there is no substantial point of law that is likely to be successfully argued, the main issue that the Appellants have raised is on the issue of identification, without going into the merits of the Appeal, the Appellants were properly identified by the prosecution witnesses as they were people well known to them, identification was by way of recognition which is the best form of identification, the fact that an Appeal is arguable does not mean it will automatically be allowed, the prosecution proved its case beyond reasonable doubt as the evidence on identification was solid and the Appellants were all placed at the scene of the crime.
14. Finally, Counsel submitted that the Applicants were sentenced to serve 50 years imprisonment on 5/12/2022, they have thus just started serving their sentence, Appeals are being quickly admitted, dates are soon available, the Appeal will be heard expeditiously, there is therefore no danger of the Appellants serving a substantial portion of the sentence.

Analysis and Determination

15. I have considered the Application, the Affidavit in support thereof, Grounds of Opposition and the Submissions filed by the parties. In my view, the issue that arises for determination is “whether the Appellants have made out a case for their release on bond and/or bail pending the hearing and determination of this Appeal”.
16. I begin by quoting Article 49(1)(h) of the [Constitution](#) which provides as follows:
An accused person has the right ...
(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.
17. On its part, Section 357(1) of the [Criminal Procedure Code](#) 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.”
18. In the case of [Masrani v R](#) [1060] EA 321, it was held that: -
“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”



19. In *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR, Hon. Lady Justice Janet Mulwa 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.”

20. Further, 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)

21. From the above guidelines, it is clear that a different test from that applied in Applications for bail pending trial is applied when dealing with Applications for bail pending Appeal. When considering an application for bail pending Appeal, the Court has discretion in the matter and which must be exercised judicially taking into consideration the various factors set out in the authorities. The Court must also appreciate that the accused person has then become a convicted person and more caution has to therefore be exercised before deciding whether or not to grant him/her bail.



22. What constitutes “exceptional circumstances” was dealt with in *R vs. Kanji* [1946] 22 KLR, where De Lestang, Ag.J (as he then was) held as follows:

“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.”

23. The rationale for considering the chances of success of the appeal were set out in *Somo v R* [1972] EA 480, in which the Court observed as follows:

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be a good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed.”

24. In the present case, I have taken into consideration the fact that the Appellants have already been convicted by the trial Court and are serving a lawful sentence. I have also taken into consideration the grounds of appeal preferred. Whereas the Appellants have set out various grounds that may be valid and may well succeed at the hearing of the Appeal, there is nothing extraordinary in the grounds raised. The same are the usual grounds normally raised in these kinds of cases. While the Appeal may well succeed, the grounds cannot be said to amount to “overwhelming chances of success” within the meaning contemplated in the above-cited authorities.
25. As regards the “exceptional circumstances”, I cannot find any. The mere fact that the Appellants have dependents back at home cannot amount to “exceptional circumstances”.
26. More important however, this Appeal has been ready for hearing. I had already admitted the Appeal before my attention was drawn to the existence of this Application. The lower Court file, inclusive of the typed proceedings, has already been supplied and the Petition of Appeal, too, has been prepared. It is simply the present Application that has delayed and frustrated the hearing and determination of this Appeal.
27. In view of the foregoing, I am disinclined to grant the Appellants bail pending Appeal since I find no basis to conclude that the Appeal will be rendered nugatory. I therefore find no merit in the Application.



Final Orders

28. In the end, I order as follows:

- i. The Application dated 2/02/2023 seeking release on bond and/or bail is dismissed.
- ii. Since the lower Court file, inclusive of typed proceedings, has already been forwarded to this Court, the Petition is also on record, and the Appeal already admitted for hearing, I direct as follows:
 - a. The Appeal shall be canvassed by way of written Submissions.
 - b. The Appellants shall, within 14 days, file and serve their written Submissions in respect of the Appeal.
 - c. Upon being served, the Respondent shall, within 14 days, also file and serve its written Submissions in response to (b) above.
 - d. The Appeal shall then be mentioned before this Court on a date to be fixed, for purposes of confirming compliance and fixing of a date for delivery of Judgment.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JULY 2023

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WANANDA J. R. ANURO

JUDGE

