



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Republic (Criminal Appeal E022 of 2021)
[2023] KEHC 21055 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E022 OF 2021
DO CHEPKWONY, J
JULY 4, 2023**

BETWEEN

FRANCIS GATU KARIUKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court for ruling is Notice of Motion application dated June 7, 2023 filed pursuant to article 159(2) (d), 50 (2) (q) and Article 165 (3) both of the Constitution of Kenya 2010, section 347 and 357 (1) both of the Criminal Procedure Code cap 75 Laws of Kenya.
2. The application seeks the following orders:
 - a. Spent;
 - b. That this Honourable Court be pleased to admit the Appellant/Applicant on reasonable bail/bond terms pending hearing and determination of the appeal.
3. The Application is based on the grounds set out on the face of the application and the supporting affidavit of Francis Gatu Kariuki, the appellant herein sworn on June 7, 2023.
4. According to the appellant he is aggrieved of the Judgment wherein he was convicted and sentenced to serve 20 years imprisonment when he had a good defence and has raised a meritorious appeal with high chances of success as will be seen in the grounds of his appeal.
5. The appellant states that if he is left to serve the sentence pending appeal, he stands to be prejudiced as he is likely to lose his job at the Kiambu County Government where he works as a Plant Operator and he believes the sentence will be overturned on appeal. He also contends that his job is the only



source of income for himself and his family (wife and children) and their lives and schooling would be shuttered with his continued incarceration.

6. The appellant contends that due to the backlog and prosecutorial delays in court, he is likely to serve a considerable length of the sentence before this appeal can be determined which will cause him grave injustice and render the appeal an academic exercise.
7. He prays that he be admitted to bail pending appeal and commits to comply with any conditions that the court may order or impose, as he did during the trial period.
8. The respondent opposed the application for bail and bond terms vide a
Replying affidavit sworn by Hellen Ngesa, a Senior Prosecution Counsel wherein she has stated that the application is frivolous, contemptuous and an abuse of court process as it does not demonstrate and outline the proper grounds or grant of bail pending appeal. She states that although bail and bond is a Constitutional right it is not an absolute right, and moreso for the applicant herein who has already been convicted and is serving sentence be heard to be legal. The Respondent holds that the appellant is no longer presumed innocent as he has already been convicted of the offence and the sentence started to run from the date of sentencing. The respondent also holds that the appellant has not given any evidence that the appeal has a high chance of success and that it is not sufficient to merely state it.
9. The respondent contends that the appellant was charged with the offence of defilement of a 15 years old girl which is a serious offence. According to the Respondent, from the evidence before the trial court, the appellant incapacitated the 15-year-old with a drug which he laced her yoghurt with and then he took her to a lodging where he defiled her. He also gave her an unknown tablet to take afterwards. It is the respondent's contention that owing to the gravity of the offence the appellant should not be given bail and bond terms.
10. The parties also canvassed the application by filing written submissions in support of their respective positions on the issue. The appellant's submissions are dated July 12, 2023 while the respondent's are dated June 25, 2023. The same will be considered in the determination of the application.

Analysis and Determination

11. Having read through the respective affidavits in support and in rebuttal of the applicant's application dated June 7, 2023 alongside the respective submissions by the parties, the issue for determination is whether the appellant has met the threshold for release on bond pending appeal.
12. The Law on bail pending appeal is enshrined under Section 357 of the [Criminal Procedure Code](#) which states that: -

357. Admission to bail or suspension of sentence pending appeal

“

“(1) 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:

Provided that, where an application for bail is made to the

subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to



the High Court and, notwithstanding anything to the contrary in Sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one Judge of the High Court sitting in Chambers.”

13. It is trite that article 49(1)(h) of the Constitution gives an accused person right to bail or bond. It provides that: -

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.

14. Although an accused person has a right to bail and bond, which right is absolute, unless there exist compelling reasons not to accord the same. However, upon conviction, the right is subject to the court’s discretion upon considering circumstances of the case in line with set out principles and guidelines on bail pending appeal. This is because it is believed that once one is convicted and sentenced, they begin to serve a sentence presumed to be legal. This court is guided by the position in the case of Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR, where 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 v 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.”

15. In summary, the conditions outlined in the Jiv Raji case is that bail and bond pending appeal can only be granted where it is in interest of justice to grant the same, where the appeal has a high chance of succeeding on account of substantial point of law and where there exist exceptional or unusual circumstances.

16. The guidelines on the Bail and Bond Policy Guidelines Page 27 Paragraph 4.30 “provides that the burden is on the convicted person to demonstrate that there is an overwhelming chance of success.”

17. In this case, in the submissions dated July 12, 2023, the appellant argues that his appeal has a high chance of success since the trial court disregarded critical documentary evidence such as the post rape care form whose findings showed that there was no penetration or that there were no spermatozoa which undermine the prosecution’s case. The appellant also argues that the Trial court did not consider



the evidence of the defence with regard to the age of the minor which he holds resulted into wrongful conviction. It is the appellant's contention that he abided by the conditions of bail and bond granted by the trial court and should he be granted bail/bond terms pending the appeal, he will similarly comply with any terms that this court will order.

18. It is trite that the court cannot address the merits of the appeal at this point as the court is alive to the fact that granting of bail and bond terms pending appeal is not based on whether the appeal will be successful or not but on whether the appeal is arguable to warrant the appellate court's interference. Also, that an appellant complied with the terms and condition set out by the trial court is not a great issue at its stage.
19. However, a glean through the grounds raised in the Memorandum of Appeal, without going into their merit, this court finds that the same touch on substantial points of law and evidence which are arguable before court.
20. In the circumstances, the Notice of Motion application dated June 7, 2023 be and is hereby allowed in the following terms:-
 - a. The Appellant may be released on a bond of Kshs.500,000/- with one surety of a similar amount.*
 - b. In the alternative, the Appellant to be released on cash bail of similar amount of Kshs.500,000/=.*
 - c. The Appellant to provide full particulars of contact person and to attend court whenever he is required until determination of the appeal.*
 - d. In the event of default of any of the terms, the bail/bond shall stand cancelled.*
 - e. The Deputy Registrar to compile and serve parties with the Record of Appeal.*
 - f. Mention on 2nd October, 2023 for parties to take directions on hearing of appeal.*

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 2ND DAY OF ...JULY....., 2023.

D. O. CHEPKWONY

JUDGE

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF JULY , 2023.

ABIGAIL MSHILLA

JUDGE

In the presence of:

For the Applicant - Mr. Kinyangi advocate.

Applicant - present

For the Respondent - No appearance

Court Assistant - Mourice

