



REPUBLIC OF KENYA



**Mungoma v Republic (Criminal Appeal E069 of 2023)
[2023] KEHC 20139 (KLR) (Crim) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E069 OF 2023

DR KAVEDZA, J

JULY 12, 2023

BETWEEN

VINCENT WERE MUNGOMA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for bail pending appeal from the conviction and sentence of 20 years imprisonment delivered by Hon. H. Okwani PM at Makadara Chief Magistrate's Court Sexual Offences case no. 3125 of 2015 Republic vs Vincent Were Mungoma)

RULING

1. The applicant was charged and after a full trial convicted for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*, No 3 of 2006. He was sentenced to serve twenty (20) years imprisonment. Being dissatisfied with the decision, he filed a petition of appeal dated March 9, 2023.
2. Simultaneously, he filed a notice of motion dated March 11, 2023, seeking his release on reasonable bail and/or bond pending the hearing and determination of his appeal. The application is premised on the grounds on the face thereof which are reiterated in the supporting affidavit sworn by the applicant of similar date. They are that the appeal has overwhelming chances of success. The appellant will have served a substantial part of the sentence.

Applicant's written submissions.

3. The appellant submitted that there exist exceptional circumstances upon which bail should be granted pending appeal. He argued that the copy of typed proceedings supplied was erroneous. This is because some aspects of the proceedings were missing. He contended that the trial court used the said



proceedings to write judgement as such failed to consider the entire record during trial. He maintained that this was an error and cited the case of *Joseph Kimwea Maina vs Republic* [2022] eKLR in support of his position.

Respondent's Written Submissions.

4. The respondent submitted that the court ought to consider whether the issue raised constitutes an exceptional circumstance to warrant the grant of bail pending appeal. It was further submitted that the evidence against which the applicant was convicted was cogent and proved the prosecution's case beyond reasonable doubt. On the argument that the applicant will have served a substantial part of his sentence, it was submitted that the appeal can be heard on a priority basis.

Issues for determination.

5. Having considered the application, the written submissions and the applicable law, the issue for Determination is whether the appellant has met the threshold for the grant of bail for pending appeal.

Analysis and determination.

6. I have considered the pleadings and submissions by the appellant and the respondent. The provision of law that applies to bond/bail pending appeal is section 357 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides as follows:

- (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.

7. The principles for granting bond pending an appeal were reiterated in the case of *Jivraj Shah v Republic* [1986] KLR 605 which laid down the principles 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 facie* 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.”

8. In the case of *Chimambhai vs Republic* 1971 EA 343 J. Harris made another observation in such an application when he said;

- “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 nevertheless the law of today frankly recognizes, 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.....”

9. Under Article 49 of the *Constitution* of Kenya, 2010 an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proved guilty, unlike a case where one is already convicted. In the above cases, the courts also held that anticipated delay in the hearing of the appeal, together with other factors may be grounds for grant of bail pending appeal.
10. I have carefully examined the grounds of appeal raised by the applicant. The applicant states that appeal herein has a high chance of success and one need only look at the judgment and petition of appeal to see the trial court failed to rely on the full record of proceedings in writing the judgement.
11. The rationale for considering the chances of success of the appeal was given in *Somo vs Republic* [1972] EA 472 at page 480 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 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 overwhelming probability that it will succeed.”
12. In this case, I have considered the seven grounds of appeal raised in the petition of appeal. However, I am not satisfied that the said grounds disclose the existence of an appeal with overwhelming chances of success. Whereas the appellant may succeed in arguing the said grounds at the hearing of the appeal, I am not satisfied that the chances of the appeal succeeding are overwhelming.
13. As regards the exceptional circumstances, it is argued that the appellant’s appeal is likely to be determined after the sentence is served. The appellant was sentenced to serve twenty (20) years imprisonment. The appellant’s apprehension, as I understood it is that the appeal will take long to be heard. However, it is my view that it is possible to have this appeal heard and determined in expeditiously and without delay before the completion of sentence.
14. The upshot of the above analysis is that the applicant has not demonstrated the existence of exceptional or unusual circumstances to warrant the grant of bail pending appeal. The application for bail pending appeal is dismissed.

It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JULY 2023

D. KAVEDZA

JUDGE

In the presence of:



C/A Habiba

Ms. Akunja for the respondent

Applicant present in person (virtually)

