



**Odallo v Republic (Criminal Appeal E035 of 2023)
[2023] KEHC 19854 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E035 OF 2023
PJO OTIENO, J
JULY 11, 2023**

BETWEEN

SAMSON ONYANGO ODALLO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellant herein was tried and convicted of offences of conspiracy to commit felony contrary to section 393 of the *Penal Code*, obtaining by false pretense contrary to section 313 of the *penal code* and the offences of forgery contrary to section 350 of the *penal code*. At the trial court, it was held that the prosecution had proved substances of all the charges beyond reasonable doubt and as a result the appellant was convicted and sentenced to a total concurrent maximum term of 10 years' imprisonment.
2. The appellant was dissatisfied with the said judgement and has lodged the appeal against the conviction and sentence and simultaneously filed the application by a notice of motion under sections 357(1) of the *Criminal Procedure Code*, in line with articles 49(h) & 50(1)(q) of the *Constitution*, dated 26th June 2023, seeking an order of bail pending appeal be granted by this court. The application has also been supported by an affidavit sworn on 26th June 2023.
3. It is averred that the appellant suffers from diabetes type 2 and chronic tuberculosis and therefore depends on the daily injection of insulin (rifampicin) which needs special storage as well as application and use of tuberculosis drugs for survival and since he was incarcerated his health has deteriorated significantly owing to the lack of conducive medical environment at the prison facility.
4. The appellant further depones that being an employee of Klaseeq Enterprise where he works as sale representative in charge of western region, denial of the application will probably lead to termination of his job. The appellant also has a family with school going children of which he is the sole bread



winner which to mean if the bail is denied, the family is likely to be predisposed to severe hardship with the children likely to drop out of school.

5. The Appellant is apprehensive that if not granted bail, he will to no doubt serve a substantial part of the sentence in jail which would occasion him profound injustice in the event that the appeal is allowed and sentence is already served, even if in part thereby rendering the success of the appeal of only an academic purpose but of no real genuine benefit, which would in effect rob the appellant of the benefit of his real and tangible right of appeal granted both by the Constitution at Article 50 (1)(q), and the right thereon of release on bond while pending appeal as set out under Article 49 (1) (h), as read with section 357 (1) of the Criminal Procedure Code.
6. The appellant avers that his appeal discloses high chances of success and it may be rendered nugatory in the event he is not granted bond and the sentence is suspended while awaiting the outcome of the appeal, because in the absence of the said reliefs.
7. The appellant further contends that having faithfully attended court whenever required to do so on the same bond terms while pending the trial in the subordinate court, and having now undertaken to continue attending court, and to comply with any other directions of this court, there would not be any compelling reasons for the appellant to be denied bond within the meaning of Article 49(1)(h) of the constitution.

Analysis and Determination

8. After going through the pleadings judgement and submissions on record, I find the issues are whether the appellant application has met the threshold for granting of bail pending appeal and if the above be answered in affirmative, what are the conditions or terms of such grant.
9. In every application for a bail pending appeal, the presumption of innocence does not apply as the appellant is presumed to have been properly convicted and sentenced until the appellate court determines otherwise. The court in *Somo vs Republic* (1972) eKLR affirmed that what ought to be majorly considered is whether the appeal in question has overwhelming chances of success as well as the existence of exceptional circumstances warranting the release of the appellant on bail pending the appeal.
10. Consequently, the principles for consideration by the court for grant of bond pending an appeal are now well settled to the existence of exceptional or unusual circumstances upon which the appellate can fairly conclude that it is in the interest of justice to grant bail. in the case of Jivraj Shah vs Republic (1986) eKLR it was held: -

“ ... (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.”



11. In *Dominic Karanja vs Republic* (1986) eKLR, the Court of Appeal clarified the overriding applicable consideration to be 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; ...”
12. In the circumstances of this case, it is undisputed that the appellant suffers from diabetes type 2 and chronic tuberculosis as revealed in paragraph 1(e) of the notice of motion filed on 26th June 2023, a condition that has made him depend on the daily injection of insulin (rifampicin) which needs special storage as well as application and use of tuberculosis drugs for survival. The appellant since incarceration is experiencing significant health deterioration owing to lack of conducive medical environment at the prison facility. The same tuberculosis is not only life threatening to the appellant but also to the other inmates being it is highly infectious. This has been exhibited by letter from Kisumu County Hospital, annexed and marked as 'S02' dated 26th June 2023 as well as the medical report from Kakamega County General Hospital prepared and signed by senior medical officer, one Dr. Amunga Jairus which reveals the appellant to have been put on insulin injection on a daily basis and ventolin inhaler when necessary. His blood sugar is also to be measured on a daily basis, he is to eat sugar free foods, have a regular check-up and also avoid allergens.
13. Having considered all the surrounding circumstances of this matter, and the fact that the prosecution or state does not oppose the application being there is no reply to the application, I am convinced that the appellant being granted the bail will be the most appropriate and convenient decision. The appellants decease being highly infectious is not only life threatening to the appellant but also to the other inmates as they are likely to contract the same. It is therefore not only in the interests of the appellant that he be out of prison but equally in the interests of public health and overall good.
14. On the other limb, being the overwhelming chances of success for the appeal, it is argued that the appeal discloses high chances of success and that it may be rendered nugatory in the event he is not granted bond and the sentence is suspended while awaiting the outcome of the appeal, because in the absence of the said reliefs, he will no doubt serve part of the sentence in jail which would occasion him profound injustice in the event that the appeal is allowed and sentence is already served.
15. A reading of the judgment of the trial court which show that the appellant was convicted for conspiracy when his co-accused was acquitted, that there was evidence that the accused had lost his national identity card long before the transactions in which the lost identity card was used, this court still holds that the appeal has high chances of success and that appellant stands likelihood of having served a substantial part of the sentence before the proceedings are typed and the appeal heard being the sentence is only of 10 years imprisonment.



16. It is also undisputed that the appellant has a family with school going children of which he is the sole bread winner, his wife being not employed, which to imply the entire family is likely to be predisposed to severe hardship with the children lacking basic requirements for survival thus violating their rights envisaged under article 53 of the constitution. Accordingly, this court is of considerable view that this amounts to an exceptional or unusual circumstances that is justifiable in warranting the grant of bond pending appeal.
17. In addition, it is evident that the appellant dutifully attended the trial court whenever required, establishes that has fidelity to observe the bond terms and will continue to do so if released on bail pending appeal. More so the appellant confirms the ability to provide a suitable surety in the person who was his surety at trial and who has not been discharged. The court has the satisfaction that the application meets the required threshold for grant of bond pending appeal.
18. In upshot, I allow the application for bail pending appeal. The appellant be released on a bond of Kshs. 200,000/= with one surety of similar amount in terms of the terms he enjoyed before the trial court. Let the preparation of the proceedings be fast tracked for a Record of Appeal to be filed within 90 days from today.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11TH DAY OF JULY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

Mr. Nyaberi for Appellant

Ms. Chala for the State

