



**Republic v Muriuki (Criminal Case E001 of 2023)  
[2023] KEHC 20705 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20705 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL CASE E001 OF 2023**

**LW GITARI, J**

**JULY 5, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JAMES KIFO MURIUKI ..... APPELLANT**

**RULING**

1. By application dated February, 2023, the Appellant herein seeks bail pending appeal under the provisions of Section 349 and 357 *Criminal Procedure Code* Cap 75 Laws of Kenya. The said application is based on the grounds on the face of the application and is supported by the affidavit of the Appellant sworn on the same February 1, 2023. Specifically, the Appellant sought for order that:
  - a. Spent.
  - b. Spent.
  - c. The Appellant/Applicant be released on bail/bond on reasonable terms pending the hearing and final determination of the appeal herein.
  - d. The Appellant's/Applicant's sentence in Chuka Chief Magistrate's Court Criminal Case No. 501 of 2020 be suspended pending hearing and final determination of the appeal.
2. The Appellant deposes that he lodged this appeal following his dissatisfaction with the judgment of the trial court in Chuka Chief Magistrate's Court Criminal Case No. 501 of 2020 where he was charged with 5 (five) counts to wit:
  - a. Count 1: Attempted murder contrary to Section 220(a) of the *Penal Code*.
  - b. Count 2: Grievous contrary to Section 234 of the *Penal Code*.



- c. Count 3: Sexual Assault contrary to Section 5(1)(a)(ii)(2) of the *Sexual Offences Act* No 3 of 2006. In the alternative to this count, he was charged with committing an indecent Act contrary to Section 11(A) of the *Sexual Offences Act* No 3 of 2006.
  - d. Count 4: Unnatural offence contrary to Section 162(a) of the *Sexual Offences Act* No 3 of 2006.
  - e. Count 5: Moving out of a restricted area contrary to Rule 4(1) as read with Rule No 11 of the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules 2020.
3. After a full trial, the Appellant was acquitted in Count 1 and convicted in Counts 2, 3, 4, and 5. He was consequently sentenced to serve fifteen (15) years, twenty (20) years, twenty (20) years and 6 months for Counts 2, 3, 4, and 5 respectively.
  4. The application for bail pending appeal was opposed by the an undated affidavit sworn by D Miriam Mbithe, an advocate of the High Court, practicing as such with the Office of the Director of Public Prosecutions. The said counsel deposed that the conviction and sentence meted out against the Appellant was proper and as such, the present appeal is not arguable and does not have any chances of success.

### Issues for Determination

5. From the above legal provision, it follows that the main issue for determination in this ruling is whether the Appellant's application has met the threshold for granting of bail pending appeal, and if so, what conditions should be set.

### Analysis

6. The principles for granting bond pending appeal are well set out in the case of *Jivraj Shah v Republic* [1986] eKLR which include;
  - a. The existence of exceptional or unusual circumstances upon which a court of appeal can fairly conclude that it is in the interest of justice to grant bail.
  - b. Whether the appeal has overwhelming chances of success.
7. The principles for granting bond pending an appeal were reiterated in the case of *Jivraj Shah v Republic* (*supra*) 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. Under Article 49 of the Constitution of Kenya, an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proved guilty. This is not like the present case where the Applicant has already been convicted.
9. 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. In Dominic Karanja v Republic (1986) KLR 612, the Court of Appeal stated in alia:
  - “(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) .....

11. From the above decisions, it is clear that bail pending appeal is at the discretion of the court guided by the above principles and that the discretion must be exercised judicially. Section 357(1) of the Criminal Procedure Code provides:-

“

“(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.”

In the case of *Anderuba v Republic* 1983 KLR 442 the court stated discretion is exercised where the appeal has high chances of success and the applicant is likely to serve a substantial part of the sentence before his appeal is heard.

The granting of bail pending appeal depends on the cogency of the grounds of appeal and exercise of court’s discretion.



12. In the *Bond and Bail Policy guidelines*, the burden in such an application lies with the Applicant to establish that the appeal has high chances of success or that he is likely to serve a substantial part of the sentence before the appeal is heard.
13. I have carefully examined the grounds of appeal raised by the Applicant. The applicant avers that appeal herein has a high probability of success. From the judgment and Petition of Appeal on record, it is my view that there are no glaring inconsistencies and contradictions that were characteristic of the trial in the lower court.
14. The Appellant was sentenced to serve 20 years hence there is no likelihood of him having served a substantial part of the sentence before the appeal is heard. Furthermore, the courts have currently adopted a policy of quick disposal of cases and the possibility of the appeal taking long to be heard does not arise. In addition, the Applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.
15. The upshot of the foregoing, in my view is that the application lacks merit. I therefore dismiss this application. The applicant should have the appeal fixed for hearing so that it can be heard on priority basis.

**Dated, signed and delivered at Chuka this 5<sup>th</sup> day of July 2023.**

**L.W. GITARI**

**JUDGE**

5/7/2023

The ruling has been read out in open court.

**L.W. GITARI**

**JUDGE**

5/7/2023

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