



**Wechuli v Republic (Criminal Appeal E016 of 2023)
[2023] KEHC 20360 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E016 OF 2023
SC CHIRCHIR, J
JULY 20, 2023**

BETWEEN

JOSEPHAT KWEYU WECHULI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant’s Notice of motion dated May 11, 2023 seeks for bail pending Appeal. The motion is supported by the affidavit of the Applicant and the grounds appearing on the face of the Application

The Applicant’s Case

2. It is the Applicant’s case that he suffers from asthma and type 1 diabetes and therefore depends on injection of insulin which needs specialized storage facilities.
3. The Applicant further asserts that the is likely to serve the full term before the appeal is heard and determined. It is also stated that the applicant attended court faithfully during trial

Respondent’s Case

4. The Application is opposed. It is the respondent’s case that the application has failed to meet the requisite legal threshold for granting the orders sought; that the case in the lower court was overwhelmingly, and the intended appeal stands no chances of succeeding.
5. It is further stated that due to the nature of the offence, the conviction and the sentence that has been imposed, the chances of the applicant absconding is quite high.
6. That bail pending appeal is discretionary and that the Applicant has not demonstrated any exceptional or peculiar circumstances to warrant bail



7. The Application was heard by way of oral submissions

Applicant's Submissions

8. The Applicant's counsel, while relying on the case of *Hisbem Shaling v R* (2022) eKLR, reiterated the principles that the court should consider when determining an application of this kind.
9. It is submitted that the Applicant has submitted documentary evidence showing that he is sick. It is further submitted that, the appeal has high chances of success. The Applicant singles out the age of the victim and the identity of the perpetrator and argues that the same were not proved.
10. The Applicant further submits that the presumption of innocence subsists until the Applicant exhausts all avenues of appeal. It is argued that the prison facilities do not guarantee the required medical care.
11. Regarding his asthmatic condition, the applicant urges the court to take judicial notice of the fact that the prison conditions are not conducive to an asthmatic person.
12. The counsel then reiterates the issue of compliance with bond terms in the lower court, the fact that he is first offender and that he has family back home who entirely depend on him.

Respondent's Submissions

13. It is the Respondent's submission that the right to liberty is not absolute. That indeed his right to liberty has already been limited as he has been convicted.
14. The Respondent also submits that the conviction, by a court of competent jurisdiction has taken away the presumption of innocence.
15. The Respondent further argues that the Applicant's conduct during trial has no bearing on the present Application. It is further contended that his medical conditions is not infectious, and is already receiving treatment. That there are no special reasons given to warrant bail.
16. The respondent submits that the appeal has no chance of succeeding on the questions of age. It is submitted that the use of a baptismal card, which was the document used during trial, is an acceptable mode of proving age.
17. It is finally submitted that due to the seriousness of the offence, and the sentence of 20 years, the applicant is likely to abscond if given bail.

Determination

18. I have considered the Application, the response as well as the respective submissions of the parties. The right to bail is enshrined under Article 49(1) of the *Constitution*. It is a right which can only be limited where they are compelling reasons.
19. However, in the case of *Charles Owango Oluoch v DPP* (2015) eKLR the court held

‘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’

Being a discretionary power the courts have developed guidelines on the exercise of the aforesaid discretion. In the case of *Jivraj Shah v Republic* (1986) KLR 605, cited with approval in the case of *Ibrahim samon Ali vs Republic* (2021)eKLR, the court set out the principles as follows:



1. “The principal contribution in an Application for bond pending Appeal is the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly say 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 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 point to be argued.”
20. The Appellant has submitted that his appeal has high chances of success; that he suffers from two chronic illnesses which require specialized treatment and a clean environment respectively. He has also submitted that he has a family back home who entirely depend on him; that he complied with bond terms during trial and his presumption of innocence subsist until all avenues of Appeal have been exhausted.
21. Firstly, the conduct of the applicant during trial and his responsibilities to his family are not factors for consideration as was sated by the court the case of *Dominic Karanja vs Republic* (1986) KLR where it was held
- “previous good conduct and character of the Applicant and hardships if any facing his family were not exceptional or unusual circumstances.”
22. Further the conduct of the Appellant during trial is not also a factor.(see *Peter Hinga Ngotho vs Republic* (2015) e KLR.
23. On the chances of appeal succeeding the appellant has argued that the issue of the Victim’s age and the identity of the perpetrator are contestable. Without delving into the merits and demerits of the Appeal, from the judgement of the trial court, a copy of which is attached to the Application, a baptismal card was used to prove the age of the victim. When it comes to the identity of the perpetrator, differences in names is a non-issue especially where identification is by recognition.
24. Finally, on the issue of the Applicant’s illness. I have anxiously considered this ground. Whereas the Applicant has submitted documents showing that he suffers from two chronic illnesses, I have made he made the following observations:
- a. While sentencing the applicant, the trial magistrate recorded that the applicant did not say anything in mitigation. Type 1 diabetes is a disease that begins in childhood, meaning that the applicant must have been aware of his condition during his sentencing. Indeed, the report from the Kakamega County referral hospital shows that he has had the condition since he was 12 years. Wasn’t that a significant issue that the Applicant would have wanted to bring to the attention of the court? He did not raise it. Is it possible then that the issue of sickness is being raised now as an afterthought? Asthma is another chronic condition, but its onset it can be anytime in a person’s life. So, I will not make an issue out of this.
 - b. I also have an issue with the medial records. They were all obtained after the conviction of the appellant. Considering, again, that diabetes1 is a chronic condition it is expected that past records dating back to the period prior to conviction would be available



- c. Finally, diabetes and Asthma are condition that are manageable within the confines of prison. In the case of *Daniel Dominic Kuria Karanja v Republic* (1986)e KLR cited by the Respondent herein, the court of Appeal expressed the view that ill- health would not necessarily constitute an exceptional or unusual circumstance in every case. The court then went on to point out that, in any event, there are medical facilities available in prison.
25. The Applicant was sentenced to 20 years in prison. There is no likelihood of him serving that period before the appeal is determined.
26. In conclusion, the applicant has failed to convince this court that he is deserving of bail pending appeal. The application is hereby dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF JULY 2023

S. CHIRCHIR

JUDGE

In the presence of: -

Eric- Court Assistant.

Mr. Nyaberi for the Applicant

Ms. Osoro for the Respondent.

