



**Wambua v Republic (Criminal Appeal E022 of 2023)
[2023] KEHC 27333 (KLR) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 27333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E022 OF 2023
SN MUTUKU, J
AUGUST 1, 2023**

BETWEEN

MUMO WAMBUA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. Mumo Wambua, the Applicant, has brought this Notice of Motion anchored on Article 499(1)(h) of the *Constitution of Kenya*, section 357(1) of the *Criminal Procedure Code* (cap. 75 Laws of Kenya), *Bail and Bond Policy Guidelines, 2015* and all enabling provisions of the law seeking the following orders:
 - i. That this Application be certified urgent and the same be heard es parte in the first instance.
 - ii. That this Honourable Court be pleased to issue an ex parte order suspending the execution of the sentence of 15 years meted upon the Appellant pending the hearing and determination of his Petition of Appeal dated June 7, 2023.
 - iii. That this Honourable Court be pleased to issue an ex parte order admitting the Applicant to bail on reasonable bail/bond terms pending the hearing and determination of his Petition of Appeal dated June 7, 2023.
 - iv. That this Honourable court be pleased to issue directions on the hearing and disposal of this Appeal.
2. The Application is supported by the grounds found on the face of it and in the supporting affidavit and the supplementary affidavit both sworn by Grace Ndinda Regina, advocate for the Appellant sworn on June 3, 2023 and July 5, 2023 respectively. I have read all the grounds in support of the application which are summarized in the oral submissions by counsel for the Appellant.



Submissions

3. The application was argued orally in open court. Ms Grace Ndinda Regina submitted that the Appellant was convicted and sentenced to serve 15 years imprisonment for the offence of defilement; that he has preferred an appeal through his Petition of Appeal which raises substantial issues of law and fact and that the appeal has high chances of success.
4. She submitted that the Appellant is a primary school teacher at Kitulu Primary School in Machakos and has attached letters of appointment and posting. She submitted that the Appellant has a place of abode, is married with a three-year-old child and is therefore unlikely to abscond; that he is a person of good character and a neighbour to Ms Grace Ndinda Grace and therefore she would guarantee his attendance to court.
5. Counsel submitted further that it has been over one month since the appeal was filed; that if the appeal is successful, the Appellant will have served substantial time in jail; that he will have suffered psychological and physical damage which will be irreversible and prejudicial to him if the Appeal succeeds.
6. Counsel submitted that the Appellant has been granted cash bail amounting to Kshs 100,000 in the lower court and he attended court without fail.
7. The Application was opposed by the prosecution. Ms Nyaroita submitted that the Appellant is now convicted and that the conditions applicable to an accused person are not applicable to him. Counsel submitted that there are no exceptional or unusual circumstances pleaded and that conduct of a person is not a factor in bail applications pending an appeal. She submitted that the Appellant has not raised points of law that the appeal has high chances of success.
8. Counsel cited *Dominic Karanja v Republic* [1986] eKLR on the applicable principles in granting bail pending appeal.
9. In reply Ms Grace Ndinda Regina cited *Jivraj Shal v Republic* [1986] eKLR on the applicable principles in granting bail pending appeal. She submitted that the appeal has substantive grounds of appeal and overwhelming chances of success.

Analysis and Determination

10. I have considered the application, the grounds in support of the same and the annexures. I have also read the evidence adduced in the lower court and the grounds in opposition to the application. At this stage it would be prejudicial to comment on the evidence or the grounds of appeal before the appeal is argued. I will therefore confine my determination on the applicable principles in granting bail pending appeal.
11. Both counsel have cited Court of Appeal decisions to support their respective submissions. In *Dominic Karanja* case relied on by the counsel for the Respondent, the Court found that the appeal did not have evidence at the time of determining the application for bail pending appeal that the appeal had high chances of success. The same Court, differently constituted, were of a different view in *Jivraj* case.
12. In *Dominic Karanja case*, the Court stated as follows:

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and



children of the applicant are not exceptional or unusual factors: see *Somo v Republic* [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of illhealth arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.”

13. In the above case, the Court emphasized on the case having overwhelming chances of success and exceptional and unusual circumstances as the main considerations in granting bail pending appeal. Previous good character, hardship faced by family, ill health and promise that the applicant will not abscond were not considered exceptional and unusual circumstances.

14. The Court in *Jivraj Sha case* stated as follows on the same issue of bail pending the appeal:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v Republic* [1972] E A 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost selfdefeating to attempt to define phrases or to establish formulae.”

15. Again, the Court laid emphasis on the existence of unusual and exceptional circumstances and the appeal having overwhelming chances of success as the main considerations for granting bail pending the appeal.

16. After careful consideration of all the evidence adduced in the lower court, the grounds in support of this application, the rival arguments by both counsel and the circumstances surrounding this matter, it is my considered view that the Appellant has not persuaded this court to grant him bail pending appeal. Consequently, the orders sought in this application cannot be granted.

17. The notice of motion dated June 8, 2023 is hereby dismissed. The appellant shall prepare a record of appeal and submissions and serve on the Respondent. This shall be done within 14 days from this day. Upon service the Respondent shall file and serve submissions within 14 days.

18. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF AUGUST 2023.

S. N. MUTUKU

JUDGE

