



REPUBLIC OF KENYA



**Odhiambo v Republic (Criminal Appeal E041 of 2023)
[2023] KEHC 22142 (KLR) (13 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E041 OF 2023
SC CHIRCHIR, J
SEPTEMBER 13, 2023**

BETWEEN

CAROLINE AWUOR ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Before this court is the Appellant's Notice of motion dated August 24, 2023. In it, the Appellant seeks to be admitted to bail pending Appeal. It is supported by the grounds appearing on the face of the Application and the Affidavit of Paskal Otieno Odhiambo, who describes himself as the husband to the Appellant.
2. It is the Appellant's case that she has two children, the youngest of whom is 2 ½ years, who have been under her care; that the husband works as a security guard and is not in a position to fully take care of the child, as his work occasionally entails working at night.
3. It is further deponed that the Appellant was out on bail during trial, and she faithfully complied with the bond terms.
4. It is further contended that the Appeal has high chances of success.
5. Finally, it is averred that there are several people who are willing to stand in as sureties for purposes of the bond.

The Respondent's case

6. The Respondent filed grounds of opposition dated August 28, 2023 in objection to the Application.
7. The Respondent contends that the Appellant has already been convicted, and therefore has no absolute right to bail; that the Appeal stands no chance of succeeding; that the punitive purpose of



the sentence would be defeated if the Appellant is released on bail and that there are no exceptional circumstances to warrant bail.

8. The Respondent further urges that the other grounds, among others: the fact that the Appellant is a mother of young children, commitment to abide by the bond terms; or that there are people willing to stand in as sureties are not unusual or exceptional circumstances so as to warrant bail.
9. The Respondent has relied on the decisions in the case of *Jivraj Shah .vs. Republic* (1986) KLR 605 and *Dominic Karanja .vs. Republic* (1986) KLR 612

Determination

10. I have considered the Application, the supporting Affidavit and the Respondent's response.
11. The Applicant was charged with the offence of threatening to kill a then 15-year-old girl, and upon conviction, she was sentenced to 7 years in prison. She has appealed against both the conviction and sentence
12. Article 49(1)h of the *Constitution* guarantees the Right to bail. It provides that an accused person has a right "to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released".
13. However, in the case of *Charles Owango Oluoch vs. 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"
14. The case of Jivraj Shah vs Republic (1986) KLR 605 cited with approval in the case of *Ibrahim samon Ali vs Republic* (2021)Eklr sets out the guidelines for the exercise of the aforesaid discretion. The court set out the principles as follows:
 1. The principle 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".
15. There are also other factors to be considered. These include the question of whether the sentence predisposes the Appellant to flee the jurisdiction of the court.
16. The onus is on the Applicant to prove that all the aforesaid circumstances are present.
17. What are the circumstances in the present case?

The Appellant has told the court that she is a mother of young children , one of whom is two and half years old and , who , until her imprisonment were under her care; that her spouse occasionally works at night and is not in a position to fully take care of the children; that she faithfully complied with the



bond terms during trial; that her Appeal has high chances of success and that there are people who are willing to stand as sureties.

18. The circumstances in my view are not exceptional. In the case of *Dominic Karanja vs Republic* (1986) KLR it was held “ previous good conduct and character of the Applicant and hardships if any facing his family were not exceptional or unusual circumstances. The Applicant in this case is serving a lawful sentence. The hardships that have befallen her children are the natural consequence for anyone serving a custodial sentence, as a punishment and cannot be treated as special or unusual circumstances.
19. Further in *Peter Hinga Ngotoho vs Republic* it was held: “the fact that the Applicant did not breach the bail conditions of court below is not an exceptional circumstance which warrant a decision to admit an Appellant to bail pending Appeal.”
20. On whether the appeal has high chances of success, the burden of proving the chances remain with the Applicant. (see 4.30, page 27 of the Bail and bail policy guidelines). I have perused the record of Appeal. The main ground is that there was inconsistency between the charge the Appellant was being tried for and the evidence tendered. I have perused the record of proceedings and particularly the testimonies of the complainant and her mother , which testimonies remained firm under cross- examination. whereas am careful not to delve into the merits and demerits of the Appeal, I do not agree with the Applicant’s assertion in this regard as I do not see any inconsistency between the charge and the evidence on record.
21. The Appellant is serving a jail term of 7 years. Am satisfied that there is no chance of her serving substantial part of that sentence before the Appeal is heard and determined.
22. On the likelihood of absconding, the offence was committed against a child of 15 years, and the court indeed highlighted the seriousness of the offence when passing the sentence of 7 years. If the Appellant had not taken note of the seriousness of the charge facing her and the attendant penalty, this must have dawned on her after the sentencing. In her circumstances, that is that of a young mother, the likelihood of absconding, cannot be ruled out.
23. In a nutshell, am not satisfied that there are special or unusual circumstances in this case to warrant bail. The Application is without merit and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF SEPTEMBER, 2023.

S. CHIRCHIR.

JUDGE

In the presence of:

E . Zalo- Court Assistant

Mr. Onsongo for the Applicant

No appearance by the Respondent.

