



REPUBLIC OF KENYA



**Muchira v Republic (Criminal Appeal E024 of 2023)
[2023] KEHC 23208 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E024 OF 2023
LM NJUGUNA, J
OCTOBER 4, 2023**

BETWEEN

JOHN MURIMI MUCHIRA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant/applicant has filed an application seeking orders that he be released on cash bail and/or bond with surety pending hearing and determination of the appeal. He was charged, on the 1st count, with the offence of stealing contrary to Section 268(1) as read together with Section 275 of the *Penal Code*. On the second count he was charged with making a document without authority contrary to Section 357(a) of the *Penal Code*. At trial, he was found guilty of both counts and was convicted. He was sentenced to 2 years imprisonment or a fine of Kshs 400,000/= on the first count and 4 years imprisonment or a fine of Kshs 100,000/= on the second count.
2. The application for bail pending appeal was accompanied by a supporting affidavit setting out the grounds upon which the said application is premised. He averred that at trial, he had been granted bail and never failed to attend court throughout the trial and his family depends on him for sustenance. That he has a right to bail under Article 49(1)(h) of the *Constitution* and should not be adjudged guilty as the law presumes him innocent until the proven otherwise. That it is fair and just that bail be granted to the appellant/applicant.
3. The application was unopposed and the court directed that the parties do file and exchange their written submissions. Only the appellant/applicant complied.
4. In his written submissions, he stated that the right to bail is enshrined under Article 49(1)(h) of the *Constitution* and Section 357(1) of the *Criminal Procedure Code*. That the court must ensure that the factors to be considered before granting bail pending appeal are satisfied. These are; that the appeal



should have an overwhelming chance of success as was discussed in the case of *Ademba Vs. Republic* (1983) eKLR. That there should be exceptional or unusual circumstances in order for the court to grant this discretionary order as was discussed in the case of *Raghubir Singh Lambar vs. Republic* (1958) eKLR. That there is a high probability that the sentence will have been served before the appeal is heard as was in the case of *Chimabbai Vs. Republic* (1971) EA 343. He also relied on the case of *Republic Vs. Kanji* (1946) 22 KLR in urging the court to allow bail because of his good behavior. That he was sentenced to 2 years imprisonment and is apprehensive that if the court takes too long to decide the appeal, the same may be completed within the time when he is imprisoned and will no longer need the appeal. He argued that his appeal has overwhelming chance of success.

5. Given the arguments made herein and the application, the issue for determination is whether or not the court should grant the appellant/applicant bail pending appeal.

6. Bail pending appeal is provided for under the *Constitution* and the *Criminal Procedure Code* as follows: Article 49(1)(h) of the *Constitution of Kenya* provides that:-

“An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

Section 357 of the *Criminal Procedure Code* provides:

“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.”

7. Bail pending appeal is granted or denied at the discretion of the court and not as of right. Such discretion is exercised when the court satisfies itself that for purposes of the intended appeal, a prima facie case has been established, there exists exceptional circumstances and that the applicant, having been convicted, will have served almost all of the term imposed. The sentiments of the court in the case of *Jivraj Shah vs Republic* [1986] KLR 605 guide me on this as the court held:

“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 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. I have perused the petition of appeal and in my view the case is arguable on appeal. As to whether there exist exceptional or unusual circumstances, the applicant has intimated that he is the only person depended upon for sustenance of his family. Usually, this is not sufficient ground to argue for exceptional circumstances. The applicant also averred that he has previously not absconded court attendance while on bail. In the case of *Dominic Karanja Vs Republic* (1986) KLR 612 the court held:

“(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;

9. Being that the application seeks bail pending appeal, I shall apply discretion on this matter. In the case of *Mkirani Vs Republic* (Criminal Appeal E010 of 2021) [2021] KEHC 300 (KLR) it was stated:

“The Bail and Bond Policy Guidelines March 2015, National Council on the Administration of Justice. Provided at page 27, paragraph 4.30 that with respect bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.”

10. From a perusal of the judgment and the grounds raised in the petition of appeal, it is my view that the appeal is arguable.

11. Therefore, the application is hereby allowed. The appellant/applicant to be released on cash bail of Kshs 50,000/= or in the alternative, bond of Kshs 200,000/= plus one surety of a similar amount.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

