



REPUBLIC OF KENYA



KENYA LAW
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**PSW v Republic (Criminal Appeal E052 of 2023)
[2024] KEHC 16646 (KLR) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 16646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E052 OF 2023
JL TAMAR, J
OCTOBER 7, 2024**

BETWEEN

PSW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from judgement and order of the senior principal Magistrate court, Ngong Senior Principal Magistrate Court, Hon. A.N. MAKAU, P.M delivered on 29th September, 2023 in Ngong MCSO No E057 of 2021, Republic vs Paul Sakwa Wambani)

RULING

1. The appellant herein was charged, convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the sexual offence [Act No 3of 2006](#) now Cap 63A.
2. Dissatisfied with the decision of the Magistrate Court, the appellant file the present appeal on 13th October 2023 challenging Conviction.
3. Subsequent to the filing of petition of appeal, the appellant through the firm of Osundwa and company Advocate filed a chamber summon application under certificate of urgency seeking the orders that;
 - i. The appellant herein be granted bail pending hearing and determination of Kajiado High Court Criminal Appeal no E052 of 2023.
 - ii. That the court may be pleased to issue such other or further order and directions as may appear to it just and convenient.
4. The application is premised on the grounds on the face of the application and supported by the affidavit of SS sworn on 8th may 2024 and further by the affidavit of EW sworn on 18th June 2024.



5. The grounds advanced by the appellant as a basis for his release on bail pending appeal is contained in the two affidavits mentioned above. It is averred that the appellant incarceration pending appeal is prejudicial to the appellant constitutional right to education and that he would be losing academically and his education process derailed. It is stated that the appellant was a second-year student in Wanga Technical and Vocational College undertaking electrical related course. That the appellant is not a flight risk having abided by the terms of the bail during the trial in lower court and he is a man of good character as demonstrated in his appearances during the trial.
6. It is argued that the appellant appeal has an overwhelming chance of success for the reason that the conviction of the appellant was in error as the key ingredients required to establish the offence were not proved to be in existent to the required standard. That the appellant is apprehensive that if not granted bail he will have been unnecessarily incarcerated and his appeal may be rendered nugatory, otiose and a mere academic exercise should he succeed given that he may have served a substantial part of his sentence by the time the appeal is heard and determined. Further that the testimonies of the witnesses had numerous contradictions and the conviction was there based on assumptions and presumptions.
7. The application is opposed by the state who filed grounds of opposition on 17th may 2024 stating inter alia that the application lacks merit, misconceived and unsubstantiated. That the appellant was properly convicted and has not demonstrated any special or unusual circumstances to warrant the grant of bail pending appeal.
8. On whether the appeal has a high chance of success, the appellant submitted that the prosecution case was not proved to the required standard as the same was based on presumptions. For instance, on the evidence of penetration, the appellant submitted that the trial court failed to consider the medical evidence presented which showed that the hymen was not freshly broken and the there was no evidence to link the appellant with its breakage. It is also submitted that the complainant evidence is riddled with numerous contradictions and cannot be the basis to found a conviction.
9. On whether there exist exceptional circumstances meriting bail pending appeal, the appellants pointed out to the fact that the appellant is a second-year student at Wanga Technical and Vocational College undertaking his tertiary studies and that his continued incarceration is prejudicial to his academic progress.

Determination

10. The appellant was convicted and sentenced by the magistrate court and therefore the presumption of innocence is no longer available to him and the principles to be considered by the court on appeal for grant of bail pending appeal is not the same as those of bail pending trial as set out in Article 49 of [*the constitution*](#).
11. The principles were stated by Justice Odunga in the case of Joshua Kiarie Njuguna vs R [2021] e KLR 7. Article 49(1)(h) of [*the Constitution*](#) 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.
12. However, a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the Criminal Procedure Code provides as follows:

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.

13. It was therefore held in *Masrani vs. R* [1060] EA 321 that:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

14. I therefore agree with the position in *Charles Owanga Aluoch vs. Director of Public Prosecutions* [2015] eKLR where it was held that:

“The right to bail is provided under Article 49(1) of *the Constitution* but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial.

15. After conviction that right is at the court’s discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

1. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.

Main criteria are that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.”

16. This position was restated in *Mutua vs. R* [1988] KLR 497, in which the Court of Appeal stated:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.”

17. The supreme court of India in the case of *Krishnan vs people* (2011) zmsc 17 enumerated the following conditions to be satisfied in an application for bail pending hearing of an appeal.

- i. Bail is granted at the discretion of the court
- ii. The court must be satisfied that there are exceptional circumstances that are disclosed in the application
- iii. The fact that the appellant due to delay in determining the appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its own merit depending on what may be presented as exceptional circumstances.



- iv. It is important to bear in mind that in an application for bail pending appeal, the court is dealing with a convict, and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.
 - v. It is not for the court to delve into the merits of each ground. But it is sufficient that all grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim
 - vi. The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an applicant to bail pending appeal
18. It is abundantly clear that the appellant is inviting this court to re-look and re-assess the evidence presented by the prosecution and independently make a finding based on the totality of the evidence. The appellant submitted that the evidence tendered was inadequate, contradictory and should not have been a basis to found a conviction. As such, the appeal has overwhelming chances of success. I agree, the High as a first appellate court, is obliged to re-evaluate the evidence tendered at the magistrate court but only at the appellate hearing and not at the hearing of an application for bail pending appeal. The likelihood of success of an appeal must be based on an identified substantial point of law which directly and substantially affect the right of the appellant. A difference of opinion on the facts and evidence cannot be said to be a substantial point of law.
19. On there being exceptional circumstance to warrant the grant of bail pending appeal, the appellant submitted he was a second-year student at Wanga Technical & Vocation College and that his continued incarceration is prejudicial to his constitutional right to Education. He attached an admission letter stamped 19th June 2024 requiring him to report on 28th January 2022. If indeed the appellant was a continuing student as alleged, there should have been attached transcripts for the first years of study as evidence.
20. The appellant apprehension that the appeal may take long before its heard and determined and that he may substantially serve part of his sentence imposed is not correct. The appellant was convicted and sentenced to 20 years imprisonment slightly over a year ago. Going by this court's diary, the substantive appeal is likely to be heard in the next six months.
21. In the circumstances therefore, I do find that the applicant has not convinced this court that there exist exceptional circumstances to warrant this courts exercise of its discretion in favour of release on bail pending appeal. I direct that the appellant to prepare and serve record of appeal upon the respondent.

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER 2024

JOHN T. LOLWATAN

JUDGE

