



**Okumu alias Chiambe v Republic (Criminal Appeal E082 of 2024)
[2024] KEHC 13568 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E082 OF 2024
RE ABURILI, J
NOVEMBER 6, 2024**

BETWEEN

PETER CHIEMBE OKUMU ALIAS CHIAMBE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an application for bail pending appeal in an appeal from the judgment, conviction and sentence in Maseno Senior Principal magistrate's Court Sexual offences Case No. 18 of 2020 by Hon. M. Ochieng, Senior Principal magistrate delivered on 10/9/2024)

RULING

Introduction

1. The Appellant/Applicant was charged in the Senior Principal Magistrate's Court at Maseno in Criminal S.O.A. Case No. 18 of 2020 with the offence of defilement contrary to Section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on the 18th and 19th April, 2020 at about 2200hours in (Particulars withheld) Location, (Particulars withheld) Sublocation within Kisumu County, he intentionally caused his penis to penetrate the vagina of M.A.O a child aged 15 years. He also faced an alternative charge of committing indecent act with a child contrary to Section 11(1) of the same Act namely, by touching the vagina of the complainant M.O.A a child aged 15 years. The appellant pleaded not guilty to the charges.
3. The appellant was tried and found guilty and convicted on the main charge and sentenced to serve twenty (20) years imprisonment. Being dissatisfied with the conviction and sentence, he filed this appeal vide petition dated 19th September, 2024.



4. The appellant also filed this application seeking to be released on bail pending appeal. The application is undated.

The Appellant/ Applicant's Case

5. At the oral hearing of this application on 5/11/2024, the Applicant submitted urging this court to help him by granting him bail to enable him go home and take care of his surviving parent. In his application, he asserts that it is his constitutional right to be released on bail pending appeal and that it would be prejudicial for him to be detained at the moment in case his appeal eventually succeeds. That he is facing serious health situation which requires intensive care and medication. That his appeal has overwhelming chances of success and that he would have served sentence if he is not released on bail, by the time the appeal shall be heard thereby rendering his appeal an academic exercise.
6. The applicant further asserts that he was on bond pending trial and that he faithfully attended court during the hearing of his case. He avers that he is ready to comply with any conditions that this court may impose.

The Respondent's Case

7. The Respondent through the Principal Prosecution Counsel Mr. Marete opposed the application by the applicant and submitted that the appeal filed by the applicant herein has no overwhelming chances of success.

Analysis and determination

8. The issue which arises for determination is whether the application meets the threshold for the grant of bail pending appeal.
9. Application for bail pending appeal is provided under Section 357(1) of the Criminal Procedure Code (CAP 75 of the Laws of Kenya) which provides that:

“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.”
10. The applicant has complied with the provisions of section 357(1) of the Criminal Procedure Code and has filed an appeal.
11. The principles for granting bond pending an appeal were reiterated in the case of *Jivraj Shah v Republic* [1986] KLR 605 which laid down the principles as follows:
 - “(1) The principal consideration 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 face* 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.”

12. This position was restated by the Court of Appeal in the case of *Mutua -v- Republic* (1988) KLR 497 as follows:

“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.”

13. It follows that the principles for granting bail pending appeal are different from the ones for bail pending trial. The latter is a constitutional right granted on the principle that a person charged with a criminal offence enjoys the right to be presumed innocent until proved guilty. He is granted bail to ensure that he does not suffer before he is found guilty or declared innocent. In the former, the applicant seeks the exercise of court’s discretion.

14. It is trite that when considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judiciously taking into consideration three laid down factors which are:

- (i) Whether the appeal has overwhelming chances of success as stated in the leading authority, that is *Somo v Republic* (1972) E.A.
- (ii) There are exceptional or unusual circumstances to warrant the exercise of court’s discretion, see *Raghibir Singh Lamba v Republic* (1958) E.A 37, *Jivraj Shah v Republic* (Supra) and *Somo v Republic* (Supra)
- (iii) That the applicant is likely to serve the entire sentence or substantial part thereof before the appeal is heard and determined.

15. Certainly, the conditions applicable for grant of bail pending trial and grant of bail pending appeal are different as the accused is no longer presumed innocent after trial and conviction. Granting bail pending appeal is therefore no longer an automatic right but a judicial discretion and the applicant must demonstrate that:

- a. The appeal has overwhelming chances of success;
- b. There are exceptional or unusual circumstances warranting exercise of judicial discretion to grant bail pending appeal;
- c. There is a high probability of the sentence being served before the appeal is heard.

16. This court shall therefore assess whether the present application has met the required threshold under the above three heads:

i. Whether the appeal has overwhelming chances of success

17. On whether the appeal has high chances of success, the Applicant averred in the application that his appeal has overwhelming chances of success and that the appeal shall be rendered an academic exercise unless he is released on bail pending appeal.



18. In the grounds of appeal whose merits I shall not delve into, the applicant laments that he was convicted based on contradictory evidence which was inconsistent, that the police investigating officer never testified hence investigations were shoddy, that he was convicted based on presumptions and that evidence against him was cooked.
19. On the grounds raised on appeal, my view is that the applicant has the opportunity to present his arguments during the hearing of the main appeal.
20. I have perused the trial court record which is already availed to this court on 2/11/2024 as well as the judgment of the trial court. Without delving into the merits and demerits of the appeal, I am of the respectful view that trial magistrate considered the law and evidence adduced by the prosecution in reaching the verdict against the applicant herein. In his defence, the applicant stated that the charges against him were not true and left it to the trial magistrate to determine. That was in his right under Article 50(2) of *the Constitution*.
21. In *Somo v Republic*, the court considered the rationale for considering whether the appeal has overwhelming chances of success. The court stated that this is based on the presumption that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate if he wishes to secure his liberty, that there are exceptional and unusual circumstances. These, the applicant herein has not demonstrated.

ii. Whether there are exceptional circumstances to warrant exercise of Court's discretion to grant bail pending appeal

22. The second limb for grant of bail pending appeal is whether there are any exceptional circumstances to warrant the appellant to be admitted to bail pending appeal. In *Dominic Karanja v Republic (1986) KLR 612*, the Court of Appeal stated in alia:
 - (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.”
23. The respondent's submission was that the appeal has no overwhelming chances of success. The applicant in his application asserted that he has a health issue which requires urgent medical attention but he never annexed any evidence of ill-health or urgency for medical attention.
24. It is my view that 20 years in jail is indeed a very severe punishment that would generally tempt any convict to abscond if released on bail. The Court of Appeal in *Dominic Karanja v. Republic (supra)* stated that:

“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;”
25. The Applicant submitted that he was previously released on bond during the trial and that he abided to the set bond terms. Further, that he is ready and willing to abide by any conditions that this court may impose for the conditional bail release.
26. However, it is my view that the fact that Applicant was released on bond terms in the lower court does not form a valid ground to support his present application for bail pending appeal as the circumstances



have changed. Thus, albeit the Applicant did not abscond during trial, chances are higher now since he has been convicted.

27. In *Peter Hinga Ngatho versus Republic* [2015] eKLR, it was held that the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal. It is therefore my view that the Applicant has not demonstrated any exceptional circumstance in this application to justify his application for release on bail pending appeal.

iii. Whether there is a high probability of the sentence being served before the appeal is heard

28. In *Chimambhai v Republic* [1971] E.A. 343, J. Harris observed that:

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...”

29. In the same case above, Harris, J. granted the application because, an anticipated delay in the hearing of an appeal together with other factors can constitute a good ground for the granting of the application.
30. The Applicant argues that he is bound to suffer prejudice for serving conviction and sentence. The appellant was sentenced to 20 years’ imprisonment on 19/09/2024, less than 2 months ago.
31. The burden of proof was on the Applicant to demonstrate that he is likely to serve a substantial part of the sentence before the appeal is heard. I hold the view that it is not likely that the Applicant will serve a substantial period before the appeal is heard and determined.
32. This is because the lower court record is already here and the court is ready to admit the appeal to hearing and issue directions on the mode of hearing of the appeal and from the reputation of this court of hearing and determining cases expeditiously, the appellant is assured that in less than two months, he will have his appeal heard and determined on its merits. It follows that he need not fear the length of time it will take for his appeal to be heard and determined.
33. In the end, and the circumstances above, I find and hold that the undated application for bail pending appeal has not satisfied the basic requirements for the grant of bail pending appeal. I find that the application lacking in merit and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 6TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

