



**Wachira v Republic (Criminal Appeal E088 of 2023)
[2024] KEHC 14172 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E088 OF 2023
AK NDUNG’U, J
NOVEMBER 14, 2024**

BETWEEN

JOSEPH KARIUKI WACHIRA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellant herein, Joseph Kariuki Wachira was convicted after trial of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* and was sentenced to twelve (12) years imprisonment.
2. He has appealed against the conviction and sentence. Pending disposal of the appeal he filed an undated chamber summons application filed on 27/02/2024 for orders that court be pleased to grant bond or bail pending appeal and that he be released on bail/bond pending hearing of the appeal.
3. The application is supported by an affidavit sworn by the Appellant herein. In his supporting affidavit, he deponed that his incarceration will prejudice his family who rely on him, he will honour court summons once released and that his appeal has high chances of success.
4. In opposing the application, the Respondent counsel filed a replying affidavit dated 21/05/2024. She averred that the Appellant’s application lacks merit in that he was found guilty and the principle of presumption of innocence does not apply, he has not demonstrated that his appeal has high chances of success, he did not demonstrate any peculiar or exceptional circumstances, and that given that he was sentenced to 12 years imprisonment, there is no likelihood that he will have served a substantial part of the sentence before the appeal is heard.
5. The application was canvassed by way of written submissions. In his submissions, he argued that he was released on bond during trial and he attended court without fail and so he will avail himself if released on bond and bind with any terms set by this court. That the gist of the application is that his



appeal will take time to be heard and should the appeal succeed, he will have served substantial part of the sentence, he is married with a daughter and he was the sole bread winner, that he was not accorded a fair hearing during trial and therefore his appeal has high chances of success. He further submitted that he was convicted based on suspicion and the prosecution failed to prove that he committed the offence as charged. That he is of good character and have shown the court that the appeal is likely to be successful on account of substantial point of law. That he is a healthcare worker leaving his service to the community underutilised.

6. The Respondent on the other hand argued that granting of bail under Section 357 of the Criminal Procedure Code is discretionary. She submitted that the Appellant was required to show that his appeal has high chances of success as required under paragraph 4.30 of the Bail and Bond Policy Guidelines and to succeed in this, he had to show a point of law to be argued on appeal that is likely to be successful. That in his petition of appeal, he did not highlight any substantial point of law. Further, his conviction was proper as the case against him was proved beyond reasonable doubt and therefore the appeal have no high chances of success. She submitted that the Appellant did not demonstrate unusual or exceptional circumstances to warrant the orders sought. That his claim that he is the sole breadwinner and a health worker do not qualify to be exceptional circumstances. She submitted that he was sentenced on 18/10/2023 and therefore, he will not have served a substantial part of the sentence before the appeal is determined since the record of appeal is ready and hearing can be expedited.
7. I have considered the application, the replying affidavit and the rival arguments by the parties herein. Section 357 of the Criminal Procedure Code provides for the grant of bail pending appeal or suspension of sentence by the High Court or the subordinate court which convicted or sentenced that person. Under subsection 1 it states;

“(1) 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...”

8. The Bail and Bond Policy Guidelines provides at page 27, paragraph 4.30 that with respect to 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.
9. The court of appeal in *Epungure v Republic* (Criminal Appeal E015 of 2021) [2021] KECA 343 (KLR) while discussing on the right to bail pending appeal stated that;

“As conceded by the applicant in his written submissions, Article 49(1)(h) provides for the right to bail of an accused person. An arrested or accused person has a right to bail or bond since, as provided under Article 50(2)(a), such a person is entitled to the constitutional right to the presumption of innocence. A convicted person, on the other hand, does not enjoy the right to presumption of innocence since, as the Court observed in *Mary Ngechi Ng’ethe v Republic* [2021] eKLR:

“5. However, in exercising such discretion, the Court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him/her by *the Constitution* and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong and the sentence illegal. Therefore, as



it has been stated time and time again bail pending appeal will only be granted in rare and exceptional circumstances.”

10. It therefore follows that right to bail pending appeal is not an outright right but it is given in exceptional cases. The principles to be considered in determining whether an applicant should be granted bail pending appeal were set out in the case of *Jivraj Shah v Republic* (1986) KLR 605 which are 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.”

11. Similarly, the Learned Judge in *Mkirani v Republic* (Criminal Appeal E010 of 2021) [2021] KEHC 300 (KLR) quoted The Supreme Court of India in the case of *Krishnan v The People* (SCZ 19 of 2011), ZMSC 17 where the court 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 merits, 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 suffices that all the 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 application to bail; pending appeal.

12. Having considered the above decisions, I must point out that grant of bail pending appeal is at the discretion of the court guided by the above principles and that the discretion must be exercised judicially. My view is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. It should only be concerned



with the question of whether or not the appeal would be rendered nugatory if bail/bond pending appeal is not granted.

13. It will be noted from the Jivraj case (supra) that one of the principles to be considered in determining whether to grant bail pending appeal is that the appeal has overwhelming chances of success on account of some substantial point of law to be argued in the pending appeal. The Appellant's application, the submissions before this court and the attached petition of appeal do not raise a point of law. It is therefore my view that the Appellant has not placed anything before this court that demonstrates that there is any substantial point of law, that will be argued at the appeal that would justify the Appellant's release on bail pending appeal.
14. As to whether there exist exceptional circumstances, he stated that he is a family man with a young daughter, his wife was unemployed and so he was the sole breadwinner, he is of good character, he was released on bail during trial and he attended court without fail and that he is a health worker and therefore his service to the community is being underutilized. Those are not exceptional circumstances as the Respondent's counsel submitted and as was held in Daniel Dominic Karanja vs Republic (1986) KLR where the court stated that availability of sureties, ill health, suffering of a convict's family were not grounds for the granting of bail pending appeal. However, the anticipated delays in hearing an appeal, the length of the sentence, whether or not the applicant had pleaded guilty and/or admitted the offence and option of a non-custodial sentence were factors that an appellate court could take into account when considering an application for bail pending appeal. See also Krishnan v The People (supra) the fact that he did not breach the bail terms during trial is not an exceptional circumstance. He can also not claim to be of good character bearing in mind the charges he was facing.
15. As to the third ground, the record of appeal is ready, it therefore means that what is remaining is admission of appeal and afterward the appeal will be given a hearing date. The Appellant was sentenced to 12 years imprisonment on 18/10/2023 and it is apparent that the Appeal will be concluded before the lapse of one year. It therefore follows that the Appellant would not have served a substantial part of his sentence.
16. The application herein is devoid of merit and is dismissed.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 14TH DAY OF NOVEMBER, 2024

A.K. NDUNG'U

JUDGE

