



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYAHURURU**  
**CRIMINAL APPEAL CASE NO. 01 OF 2021**  
**DAVID KIMANI KURIA.....APPELLANT**  
**-VERSUS-**  
**REPUBLIC.....RESPONDENT**

**RULING**

1. By application dated 01/02/2021, the Appellant seeks bail pending appeal under the provisions of **Section 357 Criminal Procedure Code Cap. 75 Laws of Kenya**. The same is based on the grounds on the foot of the application and is supported by the affidavit of the Applicant's advocate one Joseph Kariuki Mwangi sworn on 02/02/2021.
2. The same in summary sets the background as follows;
3. That the Appellant was charged with three counts of **Robbery with Violence** contrary to **Section 296(2) of the Penal Code Cap. 63** and one of **Rape contrary to Section 3(1) (a) of the Sexual Offences Act**. He was convicted on all the counts and sentenced to suffer death.
4. It is averred that the conviction and sentence meted out the Appellant is unjustified and inimical to the Appellant's right to liberty and movement. Thus he is dissatisfied with the conviction and sentence and has lodged an appeal before this Court as appears in the petition of appeal and proceedings on record.
5. It is deponed that, appeal herein has a high probability of success and one need only look at the judgment and petition of appeal to see the glaring contradictions and inconsistencies that were hallmark of the trial in the lower court.
6. At the moment he is serving member of the Administration Police Unit and was prior to his incarceration and arrest working as an Administrative Police Constable at New-Site Bahati Administrative Post. As such, the Appellant is a law-abiding citizen and no prejudice shall be suffered by the Prosecution or the State by the conditional release of the Appellant.
7. The Appellant is apprehensive that if not granted bail the sentence meted out, being a capital sentence, is the most steep/severe sentence/punishment that may be levied and it is only fair and just that the Appellant presents his appeal and in a sober and settled state of mind which cannot be achieved while he is incarcerated. The psychological and physical damage that will be suffered while the Appellant is incarcerated may never be undone even after a successful appeal.
8. That the Appellant has always attended court when required and will always continue to do so if released on bail pending appeal. More so the Appellant is able to provide a suitable surety who has not been discharged.
9. The prosecution has not filed a replying affidavit to it. The parties agreed to canvass the same application via written submissions. The Applicant submissions are not on record.

**PROSECUTION SUBMISSIONS**

10. The Prosecution/Respondent submissions is to the effect;
11. The principles for granting bond pending appeal are well set out in the case of **Jivraj Shah v Republic [1986] eKLR** which include;
  - a. **The existence of exceptional or unusual circumstances upon which a court of appeal can fairly conclude that it is in the interest of justice to grant bail.**

**b. Whether the appeal has overwhelming chances of success.**

**Whether there is a likelihood of the Appellant having served a substantial part of the sentence by the time of Appeal is heard and determined.**

12. It is submitted that, it should not be lost that an Appellant under sentence of imprisonment seeking bond lacks one of the elements normally available to an accused person seeking bail before trial and that is the presumption of innocence.

**Does the appeal have overwhelming chances of success?**

13. The Bail and Bond policy guidelines page 27 paragraph 4.30 “provides that the burden is on the convicted person to demonstrate that there is an overwhelming chance of success. In this particular instance the record is not ready hence I cannot completely tell whether the appeal has overwhelming chances of success. A perusal of the judgment demonstrates that the trial Magistrate duly considered the law and evidence in arriving at a conclusion of convicting the Appellant.”

**Is there a possibility of delay in hearing and determination of the Appeal?**

14. The Appellant was sentenced to serve the death sentence on 26/01/2021 hence there is no likelihood of him having served a substantial part of the sentence before the proceedings are typed and the appeal heard. Furthermore, the courts have currently up scaled work and the possibility of the appeal taking long to be heard should not arise.

**Demonstration of exceptional or unusual circumstances**

15. The Appellant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal. In **Dominic Karanja v Republic [1986] KLR 612** it was held that the previous good character of the Applicant and the hardships if any facing his family were not exceptional or unusual circumstances.

16. Similarly, in **Peter Hinga Ngotho v 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.

17. In this case the issue of whether the Appellant is a first offender and whether the Appellant complied with the bail conditions granted before conviction, is not a condition for granting bond pending appeal as it does not constitute exceptional or unusual circumstance.

18. It is urged that, at this point the court takes note of the fact that the Appellant has lost the presumption of innocence and is now a convict and hence should be treated as such.

**ISSUES, ANALYSIS AND DETERMINATION**

19. After going through the pleadings judgement and submissions on record, I find the issues are **whether the appellant application has met the threshold for granting of bail pending appeal and if the above in positive, what are the conditions?**

20. I have considered the pleadings and submissions by the Applicant and Prosecution. The provision of law that applies to bond/bail pending appeal is **section 357 of the Criminal Procedure Code** which provides as follows:

**“(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:**

21. The principles for granting bond pending an appeal were reiterated in the case of **Jivraj Shah v Republic (supra)** 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.”**

22. In the case of **Chimambhai v Republic 1971 EA 343 J. Harris** made another observation in such an application when he said;

**“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.....”

23. Under **Article 49 of the Constitution of Kenya** an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proved guilty, unlike a case where one is already convicted.

24. In the above cases, the courts also held that anticipated delay in the hearing of the appeal, together with other factors may be grounds for grant of bail pending appeal.

25. 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;**

**(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;**

**(d) .....**”

26. 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.

27. In the **Bond and Bail Policy guidelines** correctly quoted by the prosecution, in such an application, the burden lies with the applicant to establish that the appeal has high chances of success or that he is likely to serve a substantial part of the sentence before the appeal is heard.

28. I have carefully examined the grounds of appeal raised by the applicant. The applicant states that appeal herein has a high probability of success and one need only look at the judgment and petition of appeal to see the glaring contradictions and inconsistencies that were hallmark of the trial in the lower court.

29. That, the case was not proved beyond reasonable doubt; that his defence was disregarded by the court and that the sentence meted out the Appellant is unjustified and inimical to the Appellant’s right to liberty and movement interalia.

30. In this case, only the judgment of the trial court was availed to this court but the proceedings were not. The court has not had the benefit of perusing the said record to determine whether the grounds of appeal disclose an arguable appeal with high chances of success.

31. The Appellant was sentenced to serve the death sentence on 26/01/2021 hence there is no likelihood of him having served a substantial part of the sentence before the proceedings are typed and the appeal heard. Furthermore, the courts have currently adopted a policy of quick disposal of cases and the possibility of the appeal taking long to be heard does not arise.

32. On the aspect of demonstration of exceptional or unusual circumstances, court observes that, the Appellant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.

33. It is trite that Previous good character of the Applicant and the hardships if any facing his family were not exceptional or unusual circumstances. See **Dominic Karanja v Republic supra**.

34. Further 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. See **Peter Hinga Ngotho v Republic supra**.

35. In this case the issue of whether the Appellant is a first offender and whether the Appellant complied with the bail conditions granted before conviction, is not a condition for granting bond pending appeal as it does not constitute exceptional or unusual circumstance.

36. The court thus finds no merit in the instant application and makes the following order;

**i. The application is dismissed.**

**ii. The appeal be fixed on priority basis.**

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 13<sup>TH</sup> DAY OF MAY, 2021**

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**CHARLES KARIUKI**

**JUDGE**