



**Mkirani v Republic (Criminal Appeal E010 of 2021)
[2021] KEHC 300 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E010 OF 2021
JM MATIVO, J
DECEMBER 3, 2021**

BETWEEN

JOHNSON SILVANO MKIRANI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Vide an application dated 19th July 2021, the appellant seeks to be admitted to bail pending hearing and determination of this appeal. The appellant states that aggrieved by the conviction and sentence of 4 years imprisonment, he filed the instant appeal. He states that the appeal will take time to be heard and should the appeal succeed, he will have served a substantial part of the sentence. He states that he has a young family and that he was involved in a road traffic accident and has a metal plate inserted around his knee and to that extent, he has a disability.
2. The application is opposed. On record is the Replying affidavit of Joel Kibet Chirchir dated 5th August 2021. He states that he is employed the Director of Public Prosecutions. He averred that the applicant was convicted of 2 counts of assault and he was sentenced to serve 2 years for each count, both sentences to run concurrently. He deposed that having a young family or being a bread winner and his health are not grounds to persuade the court to grant the bail sought. Lastly, he deposed that having been convicted, the applicant lacks the presumption of innocence.
3. Mr. Mwazigne, the applicant's counsel submitted that Article 49 (1) (h) of the Constitution provides for the right to be released on bond or bail on reasonable grounds pending a charge or trial unless there are compelling reasons not to be released. He also cited section 357 (1) of the *Criminal Procedure Code*¹ which provides for admission to bail or suspension of sentence pending appeal. He submitted that the fact that there is no suiting judge in Voi qualifies to be exceptional circumstances to justify the orders

¹ Cap 75, Laws of Kenya.



sought and cited *R v Kanji*² in support of the proposition that the delay in hearing an appeal coupled with the good character of the appellant constitutes exceptional circumstances.

4. Mr. Chirchir, counsel for the Respondent relied on his Replying affidavit.
5. Section 357 (1) of the Criminal Procedure Code which provides for admission to bail or suspension of sentence pending appeal reads: -

(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:

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.

6. The main consideration in application seeking bail pending trial were best articulated in *Simon Mwangi Kirika v Republic*³ citing *Jivraj Shah v Republic*⁴ in which it was stated: -
 - i. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.
 - ii. 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.
 - iii. 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.
7. The Bail and Bond Policy Guidelines⁵ provide 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.
8. Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. Decided cases are in agreement that before bail can be granted to an applicant for bail pending appeal there must always be a reasonable prospect of success of the appeal. However, even where there is a reasonable prospect of success bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. The proper approach should be

² {1946} 22 KLR.

³ Criminal App No. NAI 3 of 2006 (UR).

⁴ {1986} KLR 605.

⁵ March 2015, National Council on the Administration of Justice.



towards allowing liberty to persons where that can be done without any danger to the administration of justice. To apply this test properly it is necessary to balance both the likelihood of the applicant absconding and the prospects of success. These two factors are inter-connected because the less likely the prospects of success, the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail. Although the opportunity for interfering with evidence is not that real at this stage, the possibility that a convicted person may abscond when on bail pending the appeal, is increased. This aspect was not canvassed in the submissions made before me.

9. As Harris J observed in *Chimambhai v Republic*⁶:-

“The case of an appellant under sentence of imprisonment seeking bail 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. As to the measure of that recognition the decision in *Kanjis case*⁷ is directly on the point. There, two persons had been convicted of assault causing actual bodily harm and sentenced to terms of imprisonment. Each appealed against both conviction and sentence and applied to the magistrate for bail pending the hearing of the appeal. The magistrate granted bail to one of the appellants but not the other, where upon the latter applied to the court by way of appeal from such refusal. Although in his judgement the judge said it was not the practice to grant bail to an appellant after he had been convicted and sentenced to imprisonment except in very exceptional circumstances, he went on; nevertheless, to illustrate what he considered would be circumstances justifying the granting of bail to such an applicant. The mere fact of anticipated delay in hearing an appeal, he said, was not of itself exceptional circumstance but might become one when coupled with other factors, and added that the good character of the appellant together with such an anticipated delay might constitute an exceptional circumstance.”

10. The Supreme Court of India in the case of *Krishnan v The People*⁸ 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.

⁶ (No 2) {1971} E.A.343.

⁷ {1946} 22 KLR 17.

⁸ {SCZ 19 of 2011}, {2011} ZMSC 17.



- 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.
11. The appellant's apprehension, as I understood it is that the appeal will take long to be heard because there is no judge in this station. That being the core ground, it is my view that it is possible to have this appeal heard and determined in the next 14 days. In this regard, the appellant's counsel is directed to file his submissions on the appeal within 2 working days and not later than close of business on 7th December 2021 and serve the Respondent who will be required to file theirs by close of business on 9th December 2021. In the event of non-compliance with the foregoing, the court will proceed to render the judgment the failure notwithstanding. Judgment shall be delivered virtually on 17th December 2021 at 8.00am. In view of the above finding, the prayer for bail is refused. Instead, the hearing and determination of this appeal will be expedited as aforesaid.

Right of Appeal

DATED, SIGNED AND DELIVERED AT VOI THIS 3RD DAY OF DECEMBER 2021.

JOHN M. MATIVO

JUDGE

