

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU,

JJ.A.) CRIMINAL APPLICATION NO. E043 OF

2023

BETWEEN

PATRICK OITA NYAPARA.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an application for bond pending appeal arising from the judgment of the High Court of Kenya at Kakamega (R. Ougo, J.) dated February, 2023

in

HCCRC No. 20 of 2019)

RULING OF THE

COURT

1. The application before us is dated 23rd February 2024 in which Patrick Oita Nyapara (“the applicant”), seeks to be released on bail pending the hearing and determination of his appeal. He was charged before the High Court of Kenya at Kakamega, with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. Following a full trial, the applicant was found guilty of the

offence, convicted, and sentenced to life imprisonment in

a

judgment rendered on 23rd February 2023. Immediately after the judgment, the applicant filed a Notice of Appeal evincing his intention to appeal to this Court. Pursuant to the notice, the applicant filed the instant application, anchored on Articles 49 (1) (h) & 50 (2) of the Constitution, sections 357 of the Criminal Procedure Code and all other enabling provisions of the law. The application, which is supported by the affidavit sworn by the applicant dated 23rd February 2024, speak to the facts that: that during his trial, he had been granted bond and at no time did he abscond or breach the terms thereof and will not do so should this Court grant him bail. He also claims that he is a family man blessed with four school-going children but unfortunately his spouse who would have taken care of them is also incarcerated at Kisumu Women's Prison. Additionally, his mother who is aged and sickly has been recommended for hospitalization all these have visited psychological trauma on him. The applicant laments that having had great responsibilities as a sole breadwinner to his family, he is apprehensive that his children will be rendered destitute and it is only fair that, he be given an opportunity to continue discharging these responsibilities at home

pending the hearing

and determination of this appeal. The applicant contends that he is not a flight risk and did not jump bail as he awaited hearing and determination of his case; that his appeal stands high chances of success; and that all the aforesaid reasons viewed as a whole, favour the applicant's admission to bail pending appeal.

3. When the application came up for hearing, the applicant appeared in person virtually and opted to rely fully on the application, the grounds, and the affidavit in support thereof. In opposing the application, the respondent through Miss Busienei, learned Prosecution counsel pointed out that the appellant, had not filed a notice of appeal or attached copy of judgment to enable the respondent know the background of the case and sentence.
4. Guided by the jurisprudence in the case of ***Jivraj Shah vs. Republic [1986] KLR 605***, learned Prosecution Counsel, submitted that the applicant had not met the threshold for the grant of bail pending appeal, contending that just because the applicant was granted bail during trial and did not violate the terms thereof is no panacea for allowing the application; that in any event, upon conviction and sentence, the applicant's

status changed since the presumption of innocence is lost. As a convict, therefore, there was reasonable apprehension that he may abscond. Additionally, apprehension of absconding is more profound in this matter, where the applicant has been sentenced to life imprisonment; that the applicant cannot also cite the plight of his children and the incarcerated spouse as reasons enough for the grant of bail pending appeal. The respondent argued that no exceptional and unusual circumstances had been demonstrated by the applicant to warrant the grant of bail pending appeal.

5. We have considered the application, the submissions by the respondent, the authorities cited, and the law. The jurisdiction of this Court to release a convicted person on bail pending the hearing and determination of the appeal was set out in the case of **Jivraj Shah vs. Republic** (supra) thus:

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual

factors: see Somo vs. Republic [1972] EA 476. A solemn assertion by an applicant

that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.”

6. Having reviewed the proceedings and decision of the trial court and without pre-judging the possible outcome of the pending appeal, it would appear to us that the appeal does not have overwhelming chances of success. In other words, whereas the appeal may appear arguable, it cannot be said to have an overwhelming chance of success.
7. As regards exceptional and unusual circumstances, the applicant argues that he is a family man and sole breadwinner for his family that he has several dependents relying on him and that the family structure would suffer greatly if the court denies his request. Additionally, the applicant claims that he was out on bail during his trial and has given undying assurance to abide by the terms that may be set by this Court in allowing the application. Suffice to state that these claims and assertions are not new. They have been frequently raised by applicants in applications of this nature before this Court. They were however debunked and laid to rest in the case of **Jivraj Shah vs. Republic** (supra). We need not therefore re- invent the wheel.

8. The applicant was convicted on 23rd February 2023 and sentenced to life imprisonment. Given the nature of sentence, it is quite apparent to us that he will not have served a substantial portion of the sentence before the appeal is heard and determined. Consequently, we are persuaded to conclude that the applicant has not met the threshold for the grant of bail pending the hearing and determination of his appeal. We find that the application dated 23rd February 2024 lacks merit and is accordingly dismissed.

Dated and delivered at Kisumu this 13th day of March, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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...
JUDGE OF APPEAL

L. KIMARU

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...
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

DEPUTY REGISTRAR