



**Wairimu v Republic (Criminal Application E034 of 2024)
[2025] KECA 34 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KECA 34 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPLICATION E034 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JANUARY 24, 2025**

BETWEEN

SAMUEL MUHIA WAIRIMU APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for bail pending appeal from the Judgment of the High Court of Kenya at Voi (Njoki Mwangi, J.) delivered on 19th April 2024 in HCCRA No. E046 of 2021)

RULING

1. The applicant, Samuel Muhia Wairimu, was charged in the Magistrate’s Court at Voi in Criminal Case No. E006 of 2020 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006. Upon conviction and sentence to life imprisonment vide the trial court’s judgment delivered on 30th November 2021, he appealed to the High Court of Kenya at Voi in HCCRA No. E046 of 2021 where, by its judgment delivered on 19th April 2024, the High Court (Njoki Mwangi, J.), upheld his conviction but reduced his sentence to 20 years. He comes to this Court on 2nd appeal in Criminal Appeal No. E030 of 2024, but does not disclose in the Motion before us the grounds on which he moves on appeal to this Court save to state that his appeal “... has very high chances of success once heard and determined on the totality of circumstances in the criminal matter and is most likely to succeed on substantial points of law”.
2. In his undated Notice of Motion, the applicant prays for, inter alia: that the Court be “pleased to grant the applicant bond/bail in the pendency of the main appeal under section 3 of the *Appellate Jurisdiction Act* on such terms and conditions as this Court may deem fit”. The applicant’s Motion is premised on 7 grounds set out on its face and more substantively deposed to in his supporting affidavit sworn on 30th July 2024. Relevant among them are: that the applicant was out on bond/bail of Kshs. 100,000/= during the trial and never abused or flouted any condition imposed by the trial court; that



relatives are ready to post bond/bail in the pendency of the appeal to the Court of Appeal; and that the applicant undertakes to abide by all or any condition imposed by this Court until final determination of the appeal.

3. In support of his Motion, the appellant filed written submissions and a case digest, both of which are undated, but on which he relied at the hearing on the Court's GoTo virtual platform. He cited the cases of *Republic v Danford Kabage Mwangi* [2019] eKLR, submitting that bond/bail can be given at any stage of the trial process, and that the appeal process is part of the trial; and *Jivraj Shah v Republic* [1986] eKLR, highlighting the principles to be considered in determining whether an applicant should be granted bail pending appeal. He urged us to allow his application.
4. In opposition to the Motion, the learned Principal Prosecution Counsel, Ms. Ongeti, filed Grounds of Objection and a list of authorities dated 16th September 2024 on which her oral submissions were founded. Counsel cited the cases of *Mburu v Republic* [2024] KEHC 2757 (KLR); and *Jivraj Shah v Republic* (supra). Counsel submitted that the application totally lacks merit and does not meet the legal threshold for grant of the orders sought; that the applicant is serving a long sentence of 20 years' imprisonment for the serious offence of defilement; that the intended appeal has no chances of success as the prosecution evidence is overwhelming, well corroborated and sufficient to warrant the applicant's conviction; that due to the long sentence, the chances of the applicant absconding are extremely high; that the applicant's innocence was compromised upon conviction; and that the applicant has not demonstrated any peculiar and exceptional circumstances to warrant the grant of the orders sought. She urged us to dismiss the Motion.
5. The right to bail pending appeal to this Court is provided for in section 379(4) of the Criminal Procedure Code, which reads:

379. Appeals from High Court to Court of Appeal

... ..

- (4) Save in a case where the appellant has been sentenced to death, a judge of the High Court, or of the Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.

6. In addition to the foregoing, rule 5(2) (a) of the *Court of Appeal Rules*, 2022 provides that:
 5. Suspension of sentence, injunction, stay of execution and stay of proceedings
 2. Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
 - a. in any criminal proceedings where a notice of appeal has been given in accordance with rule 61, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;
7. With regard to the matters to be considered in determination of an application for bail pending appeal, this Court in *Daniel Dominic Karanja v Republic* [1986] eKLR held that:

“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 v 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. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of ill health arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.” [Emphasis ours]

8. In the same vein, this Court in *Jivraj Shah v Republic* [1986] eKLR, held that:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v Republic* [1972] EA 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae.”

9. In *Francis Kamote Mutua v Republic* [1988] eKLR, this Court held that:

“It must be remembered that a person has been convicted by a properly constituted Court, and is undergoing punishment, because of that conviction, which stands until set aside on appeal. It is not wise to intervene either from the point of view of the welfare of the Appellant or the State, unless there is a real reason why the Court should hold that he should not be deprived of his liberty. The best test of that consideration is whether the Appellant can show an overwhelming chance of establishing his right to be set at liberty. If he does not do so, the law should take its ordinary course.”

10. Having considered the applicant’s Motion, the grounds on which is made, the Affidavit in support, the respondent’s grounds of objection, the cited authorities and the law, we reach the conclusion that the appellant has not demonstrated that the appeal has “overwhelming chances of success.” Neither has he demonstrated that there exist exceptional or unusual circumstances upon which this Court can fairly conclude that it is in the interest of justice to grant bail. Moreover, his good conduct prior to conviction and the solemn assertion that he will abide by any conditions that the Court may impose cannot be considered as exceptional or unusual factors to merit bail. Consequently, the application fails and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NG'ENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

