



**Kosgei v Republic (Criminal Application E002 of 2023)
[2024] KECA 148 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KECA 148 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPLICATION E002 OF 2023
F SICHALE, FA OCHIENG & WK KORIR, JJA
FEBRUARY 16, 2024**

BETWEEN

MESHACK KIPKOECH KOSGEI APPLICANT

AND

REPUBLIC RESPONDENT

(An application for bail pending the hearing of the intended appeal against the judgment of the High Court of Kenya at Kabarnet (M.T. Matheka, J.) dated 18th April, 2023 in HC Criminal Appeal No. E009 of 2021)

RULING

1. The application before us is brought pursuant to rule 5(2)(a) of the [Court of Appeal Rules, 2022](#). Meshack Kipkoech Kosgei, the applicant, seeks to be released on bail pending the hearing of his intended appeal against the judgment of the High Court at Kabarnet in Criminal Appeal No. E009 of 2021. The application is based on the grounds on its face as well as those in the supporting affidavit sworn by the applicant’s learned counsel, Catherine Muiruri, on 12th June 2023.
2. From the pleadings, the applicant’s case is that he was convicted for causing death by dangerous driving in count 1 and careless driving in count 2 by the Magistrate’s Court on 21st April 2021 and subsequently sentenced to 5 years imprisonment in count 1 and fined KSh. 60,000 in default 6 months imprisonment for count 2. His appeal against the decision of the trial court was dismissed by Matheka, J. on 18th April 2023 in Kabarnet High Court Criminal Appeal No. E009 of 2021. He has since lodged a notice of appeal against the decision of the first appellate court and applied for certified copies of the proceedings. While reiterating the proposed grounds of appeal, the applicant avers that the intended appeal is arguable. Further, that he is diabetic and his continued incarceration will have a negative impact on his health and that by the time the appeal is heard and determined, he will have served a substantial part of his sentence.



3. The application is opposed vide a replying affidavit sworn on 12th July 2023 by Jackline Kisoo, Senior Prosecution Counsel. Learned counsel deposes that the proposed appeal has no chances of success as no substantial question of law has been raised. She also avers that the applicant has not demonstrated any peculiar or exceptional circumstances in his application to warrant grant of bail pending appeal. Further, that the prosecution tendered sufficient evidence to warrant the applicant's conviction and that it is in the interest of justice to deny the applicant bail as he has lost his presumption of innocence and is now a convict.
4. This matter came up for hearing on the virtual platform on 30th October 2023. Learned counsel Ms Musili held brief for learned counsel Mr. Nyandieka for the applicant while learned counsel Ms Kisoo appeared for the respondent. They both sought to rely on their filed submissions.
5. Through the submissions dated 20th September 2023, learned counsel for the applicant pointed out that under rule 5(2)(a) of the [Court of Appeal Rules](#), this Court has jurisdiction to grant bail pending appeal. Learned counsel cited the cases of [Jivraj Shah v. Republic](#) [1986] eKLR and [Daniel Dominic v. Republic](#) [1986] eKLR to highlight the principles undergirding the exercise of the discretion to grant bail pending appeal. She reiterated the grounds of appeal as contained in the draft memorandum of appeal and the supporting affidavit in support of her proposition that the intended appeal is likely to succeed. She further submitted that the applicant will most likely have served sentence by the time the intended appeal is heard and determined hence the Court ought to admit him on bail. While beseeching us to allow the application, learned counsel asked us not to overlook the applicant's ill health.
6. In opposition to the application, learned counsel Ms Kisoo placed reliance on the written submissions dated 19th October 2023. She set off by acknowledging the fact that this Court is indeed seized with discretion to either grant or deny bail. Asking us not to allow the application, learned counsel submitted that the applicant had already been convicted by a competent court and as such he had lost the right to be presumed innocent. Additionally, learned counsel submitted that there is likelihood of the applicant absconding Court. Counsel equally relied on [Jivraj Shah v. Republic](#) (*supra*) to highlight the principles to be considered in an application for bail pending appeal. According to her the established principles have not been met because the intended appeal reveals no arguable grounds hence has no chances of success. Further, that the applicant has failed to demonstrate the existence of special, exceptional or unusual circumstances to warrant grant of bail pending appeal. Learned counsel therefore urged us to dismiss the application.
7. This application calls for the exercise of this Court's discretion under Rule 5(2)(a) of the [Court of Appeal Rules](#). In determining such an application, the Court has to assess whether the application reveals the existence of exceptional circumstances to warrant grant of bail pending appeal and whether the appeal has high chances of success. These principles were stated by this Court in [Jivraj Shah v. Republic](#) (*supra*) thus:

“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.”

8. The same principles were restated by the Court in *Simon Mwangi Kirika v. Republic* [2006] eKLR. We will therefore consider the present application based on the established principles. In dealing with the question as to whether the intended appeal discloses substantial merit or has chances of success, we are called upon to consider the applicant’s grounds of appeal vis-à-vis the impugned judgment of the first appellate court. In doing so, we should proceed with caution lest we prematurely render ourselves on the merits of the appeal. We observe that when dealing with the intended appeal this Court will only be enjoined to delve into matters of law as this is a second appeal. Some of the grounds of the intended appeal relates to neglect of duty by the first appellate court and failure to consider the applicant’s submissions and authorities. In our view, these grounds raise questions of law and which would call for determination by this Court. It is therefore sufficient to state that the intended appeal discloses substantial merit.
9. The next question is whether there are exceptional circumstances to warrant grant of bail pending appeal. In dealing with this limb, we find guidance from the statement of this Court in *Daniel Dominic Karanja v. Republic (supra)* that:

“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.”
10. On the question of exceptional circumstances, the applicant submitted that by the time his appeal will be heard he will have served a substantial part of his sentence and that he is currently suffering from diabetes hence he needs close medical attention. It is therefore apparent that the applicant’s prayer for bail does not ride on alleged ill health alone. There is the question as to whether he will have served his custodial sentence or a substantial part of it by the time his appeal is heard and determined. At the time of the delivery of this ruling, the applicant will have served close to ten months from 18th April 2023 when his appeal against the decision of the trial court was dismissed by the High Court. It is not certain when his intended appeal will be heard and determined considering that appeals before this Court are generally heard in the order of the date of filing. As was held in *Jivraj Shah v. Republic (supra)* whether the sentence or a substantial part of it will have been served by the time the appeal is heard is one of the factors to be considered in determining whether to grant bail pending appeal.
11. There was the averment by learned counsel for the respondent that the applicant is likely to abscond if released on bail. This deposition was not supported by any evidence. The material placed before the Court shows that the applicant was out on bond during the trial and he faithfully attended court until his matter was heard and determined. Without anything to support the claim that the applicant is a flight risk, there is no basis for denying him bail based on the assertion that he may not attend Court if released on bail.
12. We have already held that the applicant has an arguable appeal.

If his proposed appeal eventually succeeds, his victory will be of no use as the days spent in prison cannot be restored to him. It is therefore our finding that the applicant’s application for bail pending



appeal is attended by exceptional circumstances that should result in a favorable consideration of his application. Much as the respondent is correct that the applicant has been convicted by a competent court and is serving a legit sentence, we have already pointed out what, in our view, makes the applicant's case unique. We thus exercise discretion in the applicant's favour and grant him bail pending the hearing and determination of his intended appeal. Accordingly, the applicant shall be released on bond of KSh. 400,000 with a surety of a similar amount or cash bail of KSh. 200,000.

DATED AND DELIVERED IN NAKURU THIS 16TH DAY OF FEBRUARY 2024

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

