



**Kabuthi v Republic (Criminal Appeal (Application) 003 of 2024)
[2024] KECA 1025 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 1025 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL (APPLICATION) 003 OF 2024
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
APRIL 26, 2024**

BETWEEN

ROSE MADRINE NJERI KABUTHI APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment of the High Court of Kenya at Kerugoya
L. N. Gitari, J. delivered on 4th October, 2021 in HCCR No. 18 of 2015)*

RULING

1. The applicant was charged along with one Ileri Mutugi Muchangi, before the High Court at Kerugoya for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The deceased in the case was her late husband Peter Gitu Muriwa.
2. The applicant and the co-accused pleaded not guilty to the charge and after a full hearing wherein 10 (ten) witnesses testified for the prosecution, and the applicant testifying on oath, she was found guilty, convicted and sentenced to serve 35 years imprisonment. Her co-accused was acquitted after the court found that the prosecution had failed to place him at the crime scene.
3. Being aggrieved with both conviction and sentence, the applicant filed the Notice of Motion dated 12th February, 2024 under Rule 5(2)(a) of the Court of Appeal Rules seeking an order that she be released on bail pending the hearing and determination of the appeal.
4. The application is based on grounds that the applicant's appeal has overwhelming chances of success; that if not released on bond she is likely to serve a substantial part of the sentence; she is of good character; she is ailing and has even undergone surgery while in prison and that she will abide by bail terms if released.



5. The said grounds have been amplified in her affidavit sworn in support of the application dated 12th February, 2024. She has annexed her memorandum of appeal in which she raises three grounds of appeal. Her grounds include that the circumstantial evidence relied on by the court to found a conviction did not lead to the inescapable conclusion that it was the applicant and not any other person who was responsible for the deceased's death. She also states that malice aforethought was not demonstrated.
6. It is noted that in spite of the application being served on the office of the Directorate of Public Prosecution (ODPP) on 20th February, 2024 there is no replying affidavit to the application. There were no submissions filed by the ODPP either.
7. When the application came up for plenary hearing on 17th April, 2024, learned counsel Ms. Wambui Mwai appeared for the applicant, while Ms. Lubanga appeared for the state.
8. Ms. Mwai highlighted the contents of her written submissions and urged that the applicant's illness and surgery while in prison amounts to exceptional circumstances that would call for her release on bail. She reiterated she has a strong appeal and that the applicant is not a flight risk. She urged that the applicant will be better off if released so that she can be medically taken care of by her family. Ms. Mwai placed reliance on this Court's decision in *Jivraj Shah v Republic* [1986] eKLR which succinctly set out the principles that should guide the Court in determining an application for bail pending appeal. Counsel also cited this Court's more recent decision in *Juma vs. Republic* [Nairobi Criminal Appeal No E023 of 2023] where the Court reiterated the guidelines in the *Jivraj Shah Case* (*supra*). She urged us to allow the application.
9. In her oral submissions in opposition to the application, Ms. Lubanga urged that the appeal was devoid of merit; the appellant is serving a lawful sentence and that there is no guarantee that she will present herself to Court for the hearing of her appeal, if released on bond. Counsel further stated that no special or unusual circumstances exist in this case as the applicant's health concerns can be taken care of while in prison.
10. We have considered the application, the supporting affidavit and annexures thereto, the rival submissions by counsel and the applicable law. The principles to guide the courts while dealing with an application as the one before us were succinctly set out in the time honoured *Jivraj Shah case* (*supra*) as follows:-

“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.” (Emphasis added).

Over the years, this Court has adopted the above criteria, and applied the guidelines consistently. We seem, however, to have moved away from the “*prima facie*” test to a more restrictive test of



“overwhelming success” as set out in the case of *Daniel Dominic Karanja v Republic* [1986] eKLR where this Court held:

“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] E A 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.” See also *Juma v R* (supra)

11. Without saying much about the chances of the appeal succeeding, we can safely say that the applicant’s appeal is not hopeless, and it has chances of success in view of the point of law on whether the circumstantial evidence adduced before the Court met the required threshold to sustain a conviction. It passes the prima facie test set in the *Jivraj case* (supra).
12. On the question of existence of unusual or exceptional circumstances we note that the medical evidence availed to the Court is not challenged. We appreciate that ill health, per se, is not a guarantee to one’s release on bond where one is serving a lawful sentence and the same has to be considered within the peculiar circumstances of each case. Other than counsel’s statement from the bar that the applicant’s condition can be managed in prison, there is no deposition to that effect.
13. There is also no evidence placed before us to even suggest that the applicant is likely to abscond if granted the opportunity to pursue her appeal from outside prison. We find that this application passes muster in respect of the first and second criteria set out in the above cited cases.
14. On the whole, we are persuaded that this application has merit.

We allow it and order that the applicant be released on her own bond of Kshs 500,000 plus one surety in like amount or a cash bail of Kshs 300,000 pending the hearing and determination of the appeal. It is so ordered.

DELIVERED AND DATED AT MERU THIS 26TH DAY OF APRIL, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

