



**Kirugi & another v Republic (Criminal Appeal (Application)
15 of 2022) [2024] KECA 1079 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 1079 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL (APPLICATION) 15 OF 2022
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JULY 26, 2024**

BETWEEN

NATHAN KIGACHA KIRUGI 1ST APPELLANT

ANDREW MUTURIA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Application for bail pending appeal from the judgment of the High Court in
Chuka (R.K. Limo, J.) dated 11th January 2022 in Criminal Appeal No. 9 of 2016)*

RULING

1. We have before us an application dated 5th December, 2022 in which the appellants/applicants seek orders that;

“This Honourable Court be pleased to grant reasonable bond terms to the appellants pending hearing and determination of this appeal and that pending the hearing and determination of this appeal this honourable Court be pleased to order the release of the appellants on reasonable bond terms as is only just, fair and expedient to meet the end of justice.”

2. The application is based on section 357 of the *Criminal Procedure Code* and Articles 47, 48, 49(1)(h) of the *Constitution*. It is supported by an affidavit sworn by Otieno Justus, Advocate for the appellants/applicants. It is averred that the appellants/applicants herein have shown tremendous respect for the rule of law since they were convicted and have been obediently undertaking the assigned duties by the prison authorities without fail; the appellants/applicants have no record of any bad conduct on their part hence legible for reasonable bond terms; that prior to their conviction the appellants/applicants were released on bond and they dutifully and respectfully attended court without fail and at no point



did they fail to attend trial; that the appellants/applicants have suffered ill health while in custody and request for their release on reasonable bond terms to enable them receive proper medical attention; that their families are living in dilapidated conditions and their kids risk becoming street children as the appellants/applicants were the main bread winners of their families and their absence has greatly jeopardised their livelihoods and that the appellants/applicants undertake to attend trials at all material times and adhere to the terms set for their release and that they shall at all times attend court.

3. The appellants/applicants were charged with the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code*. The particulars of offence were that Francis Muriungi Irimba, Consolata Konja, Vilivina Kabea, Andrew Mutiria, Fabian Mauki Ikunga, Nathan Kigacha Kirugi, Cecilia Gatumi Ikoje and Bernard Munyambu Kirugu on the 8th November 2016 at around 1500 hours at Kirundi Sub-Location of Thiiti Location in Tharaka North Sub-County within Tharaka Nithi County jointly with others not before court murdered Sisinioh Kilonzo Katheriya. They were found guilty of the offence of murder, convicted and sentenced to 30 years' imprisonment. Aggrieved they filed an appeal to this Court which is pending hearing.
4. At the hearing of the application before us on 15th March 2023, Mr. Otieno Justus, learned counsel for the applicants indicated that he had filed written submissions in support of his application dated 27th February, 2023. He submitted that this Court should grant the appellants/applicants bond pending appeal for the reasons that the appellants/applicants were first offenders, that the appeal is not frivolous and has reasonable chances of success and that there exist special and exceptional circumstances that warrant them being released on bond pending the appeal.
5. He submitted that the 1st appellant who is 48 years old has five (5) young school going children aged between 13-21 years old, and that the 2nd appellant is aged 43 years and also has young school going children.
6. He submitted, further, that the appellants/applicants have complied with the bail terms given during their trial and shall do so pending hearing and determination of this appeal and that they are of the view that if they are not released on bail and this appeal succeeds, they will have served a substantial sentence in prison. It was also submitted that the health of the appellants/applicants has deteriorated tremendously due to the conditions of the prison and given their advanced ages they may even lose their lives which will beat the purpose of their sentences which is supposed to be rehabilitative.
7. Further it was submitted that their wives and children are suffering while they are in prison as they were the sole bread winners of their families and that family being a social fabric of the society this is a special circumstance for this Court to consider to release the appellants/applicants. Finally, that the appellants/applicants have raised triable issues of law and facts in their memorandum of appeal that will succeed and overturn the judgement and conviction of the trial court.
8. Ms. Kitoto, Principal Prosecution Counsel, appeared for the respondent. The position taken by the State is that there is no proof of exceptional or unusual circumstances provided by the appellants/applicants to warrant release on bond. Counsel submitted that the principles for granting bail/bond pending appeal were laid down in *Jivraj Shah -vs- Republic* [1986] eKLR and which grounds have not been satisfied by the appellants/applicants.
9. She relied on *Daniel Dominic Karanja -vs- Republic* [1986] eKLR for the proposition that grant of bail pending appeal is at the discretion of the Court. She submitted that the grounds raised by the appellants/applicants that were first offenders and that they had young children aged between 13-21 years old who were school going were in no way unusual or exceptional as laid down in the principles governing grant of bond/bail pending appeal as laid down in *Jivraj Shah -vs- Republic* [1986] eKLR.



10. Further it was submitted that there were no medical records availed by the appellants/applicants to show or support the ground that they have special medical needs and challenges.
11. On the ground that the appellants/applicants will have served all or a substantial part of their sentence by the time the appeal is heard, it was submitted that this can be cured by the matter being slated for hearing as soon as practically possible noting the recent efforts by this Court to hear and determine matters; she submitted that there are no delays in hearing of appeals presently sufficient to cause the appellants/applicants to serve a substantial part of their sentence before the appeal can be heard and determined.
12. Finally, it was submitted that the appellants/applicants have simply made a blanket statement indicating that they have raised triable issues of law and fact in their memorandum of appeal and that this does not demonstrate a *prima facie* arguable point of law or fact that would give the appeal a great chance of appeal.
13. We are urged to dismiss the application as this is not a suitable case for the Court to exercise its discretion and grant the appellants/applicants bail/bond pending the hearing and determination of the appeal.
14. We have considered the application and the submissions by the parties. The sole issue for determination as it emerged from the application before us and the applicants' written submissions, is whether the applicants are entitled to bail pending appeal to this Court.
15. The present application has been lodged under section 357 (1) of the *Criminal Procedure Code* and Article 47, 48, 49(1)(h) of the *Constitution*. We can dispense at once with the reliance on Article 47 and 48 which provide for fair administrative action and access to justice respectively and which in our view do not merit interrogation by this Court in relation to the instant application. Article 49(1)(h) on the other hand provides that:

“An accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

16. Article 49(1)(h) provides for the right to bail of an accused person. An arrested or accused person has a right to bail or bond since, as provided under Article 50(2)(a), such a person is entitled to the constitutional right to the presumption of innocence. A convicted person, on the other hand, does not enjoy the right to presumption of innocence since, as the Court observed in *Mary Ngechi Ng'ethe -vs Republic* [2021] eKLR:

“However, in exercising such discretion, the Court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him/her by the *Constitution* and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong and the sentence illegal. Therefore, as it has been stated time and time again bail pending appeal will only be granted in rare and exceptional circumstances.”

17. The principles to be considered in determining whether an applicant should be granted bail pending appeal were set out in the case of *Jivraj Shah -vs- Republic* (*supra*) as being:

- “(i) The existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest 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 the weight and relevance of the points to be argued.”
18. From the principles established in the Jivraj case above, the applicant is under an obligation to demonstrate that there is a set of exceptional circumstances that would justify the grant of bail pending appeal by this Court. Further, that the sentence or a substantial part thereof will have been served by the time the appeal is heard. It is not enough, as the applicants have done in this case, to state that an appeal has overwhelming chances of success. In the appeal pending before this Court the applicants must show the Court that their appeal is likely to be successful on account of some substantial point of law to be argued.
19. We were urged to grant the applicants bail pending appeal as the applicants have health issues and are debilitating in health, however there is no supporting medical report from a medical doctor which failure the appellants/applicants blame on a difficulty in obtaining as they are in prison. In the application and affidavit in support before us, however, other than the mention of the appellants/applicants suffering ill health no mention is made of these health conditions that the appellants/applicants are suffering from.
20. The applicant’s averments in the affidavit before the Court is that they should be released on bail so that they can attend to their families’ basic needs as they were the sole breadwinners. Neither the appellants/applicants state of health, however, nor their need to attend to domestic matters, qualities as ‘exceptional circumstances’ to warrant the grant of bail pending appeal to this Court. The applicants can obtain medical care from the prison facilities, and if need be, they can be referred to government health facilities for further treatment.
21. It was also submitted on behalf of the appellants/applicants that their appeal has high chances of success. The reason for the confidence in the merits of their appeal is solely based on their memorandum of appeal. It will be noted from the Jivraj case that one of the principles to be considered in determining whether to grant bail pending appeal in this Court is that the appeal has overwhelming chances of success on account of some substantial point of law to be argued in the pending appeal. The appellants/applicants have not placed the memorandum of appeal before us.
22. Our analysis of the material placed before us is that the appellants/applicants have not placed anything before us that demonstrates that there is any substantial point of law, that will be argued at the appeal that would justify their release on bail pending appeal. In the circumstances, we find the present application to be without merit, and it is hereby dismissed.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY 2024.

W. KARANJA

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JUDE OF APPEAL

JAMILA MOHAMMED

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JUDE OF APPEAL



A.O. MUCHELULE

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JUDE OF APPEAL

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

Signed

DEPUTY REGISTRAR

