



**Masika v Republic (Criminal Appeal (Application) E003 of 2021)
[2024] KECA 1452 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1452 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL (APPLICATION) E003 OF 2021
HA OMONDI, JM NGUGI & HM OKWENGU, JJA
OCTOBER 18, 2024**

BETWEEN

LEONARD MASIKA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for bail pending appeal from the decision of the High Court of Kenya at Bungoma (Kiarie, J.) dated 4th October, 2018 in HCRA No. 123 of 2017)

RULING

1. By a notice of motion dated 24th October, 2023, the applicant, Leonard Masika, has moved this Court for an order of bail pending the hearing and determination of an appeal which he has filed. His application has very little details, but from the appeal filed in this Court, we glean that he was convicted by the Chief Magistrate's Court at Bungoma, of the offence of rape contrary to Section 31(a) & (c) as read with Section 33 of the *Sexual Offences Act*, and sentenced to 49 years imprisonment. His appeal against the conviction and sentence was dismissed by the High Court, (Kiarie, J.) on 4th October, 2018. He is now before this Court in a second appeal which is pending hearing.
2. In the motion before us, the applicant contends that his appeal is arguable and has overwhelming chances of success, and that there are exceptional or unusual circumstances upon which the court should grant him bail. He claims to be suffering from underlying chronic medical conditions which requires that he sees a specialist regularly and follow a strict diet. He pleads that he is the sole bread winner, and his family will be destitute if he remains in prison. He also argues that he is not a flight risk and he is ready to adhere to any bail/bond terms that may be imposed by the Court.
3. The application is opposed by the respondent through written submissions that were duly filed by Ms. J. Busienei, a senior Principal Prosecution Counsel in the office of the Director of Public Prosecutions (ODPP). Relying on *Jivraj Shah v Republic*, [1986] KLR 605, counsel argued that the applicant's



motion lacks merit as there is no material evidence presented before the Court in support of the motion.

4. We have considered the applicant's motion and the respondent's submissions. Under Rule 5(2)(a) of the Court of Appeal Rules, the Court has discretion to grant bail pending the hearing of an appeal before it. In the exercise of such discretion, the Court bears in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him or her by Article 49 of *the Constitution*. Therefore, as has been stated time and time again, bail pending appeal will only be granted in rare and exceptional circumstances. (See *Michael Otieno Ademba v Republic*, [1982- 88] 1 KAR 263).
5. As stated by this Court in *Jivraj Shah -vs- Republic*, which was cited by Ms. Busienei, the principle consideration for granting bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court can conclude that it is in the interest of justice to grant bail. Secondly, if it appears 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, bail should be granted.
6. In this case, the applicant has only made bare assertions without demonstrating any unusual circumstances. He has not availed a copy of the judgment of the High Court from which he intends to appeal, nor has he identified any issue of law or demonstrated that he has an appeal with overwhelming chances of success. Although he has stated that he suffers a chronic medical condition which requires specialist regular follow-up, he has not availed any documents in support of the alleged medical condition.
7. In the circumstances the applicant has failed to demonstrate any exceptional circumstances, nor has he demonstrated that his appeal has overwhelming chances of success. We find no merit in his application and the same is dismissed.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar

