



REPUBLIC OF KENYA



**KENYA LAW**  
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**Masai v Republic (Criminal Application . E024 of 2022)  
[2023] KECA 210 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 210 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPLICATION . E024 OF 2022  
MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA  
MARCH 3, 2023**

**BETWEEN**

**BENSON KIOKO MASAI ..... 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 Kajiado (E.C. Mwita, J.) delivered and dated 25th June, 2021 in HC Criminal Appeal No. 4 of 2020)*

**RULING**

**Ruling of the Court**

1. Before us is an application dated September 13, 2022 in which the applicant, Benson Kioko Masai, seeks to be released on bail pending the hearing and determination of his intended appeal against the judgment of the High Court delivered on June 25, 2021 dismissing his first appeal. The application is premised on articles 10, 25(c), 28, 47, 48, 50(2) and 259 of *the Constitution*, section 3A of the *Appellate Jurisdiction Act*, and rule 5 of the *Court of Appeal Rules*, 2010. It is supported by the applicant's affidavit sworn on September 13, 2022.
2. From the pleadings, the basis of the application is that his intended appeal has overwhelming chances of success; that he is not a flight risk; that there is no reason that would bar this court from releasing him on bail pending the hearing and determination of his intended appeal; and, that he is a law-abiding Kenyan who has never been in conflict with the law prior to the conviction that he is appealing against. The applicant also avers that he was on bail during trial and that he will adhere to any conditions set by this court for his release.
3. The papers before us show that the applicant was first charged in the Chief Magistrate's Court at Kajiado in Criminal Case No. 533 of 2015 with five counts of the offence of robbery with violence



contrary to section 295 as read with section 296 (2) of the [Penal Code](#). He was found guilty and convicted on all the five counts as charged. Upon conviction, the applicant was sentenced to 20 years' imprisonment on November 29, 2019. His appeal to the High Court was rejected.

4. When the application came up for hearing, the parties opted to rely on their written submissions. On behalf of the applicant, Mr Kimanzi, learned counsel, submitted that the intended appeal has overwhelming chances of success because the offence was not proved to the required standard. Counsel also informed the court that the applicant will abide by any conditions set by this Court in granting bail. Counsel advanced the argument that the applicant is a family man of good character and the sole breadwinner to his family. Additionally, counsel submitted that there were exceptional circumstances that warrant the release of the applicant on bail pending appeal. In support of this point, counsel submitted that due to the compact diary of this Court, the applicant would have served a substantial part of his sentence before his appeal is heard and determined. Counsel supported his arguments by relying on the case of [Jivraj Shah vs. Republic \[1986\]](#) eKLR.
5. The application is opposed on the grounds that the applicant's intended appeal has no overwhelming chances of success; that there are no unusual circumstances that could justify the grant of bail; and, that there has not been change of the circumstances of the applicant that can compel this Court to consider granting bail. Ms Ngaliuka, counsel for the respondent, buttressed the grounds of opposition by reference to the decision in the case of [Daniel Dominic Karanja vs. Republic \[1986\]](#) eKLR.
6. The sole issue for our determination in this application is whether the applicant has made a case to be granted bail pending the hearing and determination of his intended appeal.
7. Rule 5(2)(a) of the [Court of Appeal Rules, 2022](#) provide as follows:
  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 notice of appeal has been given in accordance with rule 59, 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.
8. The principles guiding the exercise of the stated power by this court were laid down in the case of [Jivraj Shah](#) (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] E A 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. There is a helpful passage



in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7-86.” [Emphasis ours]

9. From the cited authority, it is evident that it is incumbent upon an applicant seeking to be released on bail pending appeal to satisfy this Court that there are exceptional circumstances that justify the grant of bail and that either the sentence or a substantial part of it will have been served by the time the appeal will be determined. Additionally, the applicant is required to satisfy the court that his or her appeal has overwhelming chances of success.
10. We have gone through the memorandum of appeal dated December 15, 2021. Without preempting the outcome of the appeal, we agree that the appeal raises issues of law touching on the quality of the identification parade, the standard of proof in criminal cases, among others. We cannot therefore begrudge the applicant the fact that he has an arguable appeal.
11. However, the fact that an appeal raises arguable issues alone is not sufficient to make this Court exercise its discretion to grant an appellant bail pending appeal. An arguable appeal cannot mean one and the same thing with an appeal with overwhelming chances of success. We are alive to the fact that the applicant has been convicted and the conviction confirmed by the first appellate court and he is therefore serving a sentence as a result of that conviction. The sentence therefore remains lawful until such a time when this court may set it aside, being at the determination of his intended appeal. This was the position taken in *Francis Kamote Mutua vs. Republic* [1988] eKLR when this Court stated:

“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.”
12. The applicant claimed that the special circumstances warranting his release on bail are informed by the busy schedule of this court. He averred that owing to the congested Court diary he will have served a substantial part of his sentence by the time his appeal will be heard and determined. He also argued that there was delay occasioned by the first appellate court’s registry in securing the record of appeal. In our consideration, these do not qualify as exceptional circumstances. As we are aware, this court has put in place various interventions and measures to drastically reduce any backlog that may have existed before. Furthermore, the applicant was sentenced to 20 years imprisonment in November 2019 and he has only served 3 years of that sentence. His appeal before the High Court was determined in June 2021 and his application before this court was filed in September 2022. His first appeal was therefore determined within 2 years of his sentence. We cannot therefore agree with his submission that he will have served a substantial part of his sentence by the time this court determines his appeal.
13. Counsel also submitted that the applicant is a person of good conduct who adhered to the previous bail terms, and is keen and willing to adhere to any bail terms that will be set by this court. On this argument, we find that these are not factors that this court considers in such an application. This position is anchored by the decision of this court in *Akungwi vs. Republic* [2022] KECA 175 (KLR) where it was stated at paragraph 12 that:

“A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.”



14. In conclusion, our analysis of the material placed before us and the law lead us to the inevitable finding that the applicant has not placed anything before us that demonstrates the existence of any exceptional circumstances to warrant the exercise of this court’s discretion to grant him bail pending the hearing of his intended appeal. In the circumstances, we find the present application to be without merit, and it is hereby dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH, 2023**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

**W. KORIR**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

