



REPUBLIC OF KENYA



**Mutembei v Republic (Criminal Appeal (Application)
1 of 2023) [2023] KECA 1613 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KECA 1613 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL (APPLICATION) 1 OF 2023
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JULY 21, 2023**

BETWEEN

BENJAMIN MURANGIRI MUTEMBEI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an application for bail pending determination of an appeal
from the judgment and sentence of the High Court of Kenya at Chuka
(Gitari, J.) dated 12th October, 2022 in Criminal Case No. 11 of 2020)*

RULING

1. The applicant, Benjamin Murangiri Mutembei, was charged alongside another (Phares Mutembei Miriti- the 1st accused) before the High Court of Kenya at Chuka, with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the offence alleged that on 9th May, 2020, at Kimuri Village, Iriga Location, Maara Sub-County, within Tharaka Nithi County, the applicant and his accomplice jointly and unlawfully murdered Shafii Omar. After full trial, the applicant was convicted as charged, and sentenced to serve twenty-two (22) years imprisonment.
2. A brief fact of the case is that the 1st accused, Phares Mutembei Miriti, was a father to the applicant and to Kemfry Mwenda (PW1). The case by the prosecution was that PW1 ran away from home, after complaining that he was being overworked by his father, and sought refuge at the deceased's home. The deceased was his friend. On the fateful day of 9th May, 2020, a group of young men came and informed PW1 that his father had asked to see him. PW1 and the deceased accompanied the young men to 1st accused's house. At the house, the 1st accused is alleged to have assaulted the deceased on allegation that he had harboured PW1, who he was aggrieved had ran away from home. One Muthomi, and the applicant are alleged to have joined the 1st accused to assault the deceased. Prosecution witnesses told the court that the 1st accused was hitting the deceased with a metal rod as the applicant is alleged to have



pinned him down on the ground using his hands. PW2 and PW3 rescued the deceased and rushed him to hospital where he later succumbed to his injuries. The applicant, in his defence statement, denied assaulting the deceased. The post mortem report revealed that the deceased died due to a severe head injury caused by blunt force trauma. The applicant was convicted by the trial court and sentenced to serve a custodial term in prison.

3. The applicant has filed the instant notice of motion under Articles 49 (1) (h) & 51 of *the Constitution*, Sections 124 & 379 of the *Criminal Procedure Code* and all other enabling provisions of the law, seeking to be released on bail on such reasonable terms, or on the bond terms granted by the trial court, pending hearing and determination of his appeal from the conviction and sentence of the trial court.
4. The application, which is supported by an affidavit sworn by the applicant's counsel dated 3rd March, 2023, is based on grounds set out on the face of the motion. The applicant argues that: his appeal has high chances of success as he was convicted on the basis of suspicion, and due to his association to his father who was his co-accused in the case before the trial court; that his was a case of mistaken identity, and the trial court failed to take into account the aspect of polygamous homes in the rural set up; that the prosecution failed to establish its case against the applicant to the required standard of proof beyond any reasonable doubt; that the applicant is a Government-sponsored student at Meru University of Science and Technology, and that this Court should grant him an opportunity to continue with his studies; that he was granted bail pending his trial, and he never violated any of the bail terms set by the trial court; and that he is an upstanding member of the society who has not had any run- ins with the law.
5. The applicant further pleaded that special circumstances warranting his release on bail pending appeal are that: he is young brilliant man with a bright future who needs to pursue his studies at the university where he was a first year student prior to his conviction; that he is not a danger to himself or the society, and incarcerating him for 22 years does not create any positive impact in his life; and that he longs to have a wife and family of his own.
6. When the application came up for hearing before us, learned counsel for the applicant, Mr. Otieno, reiterated the averments on the face of the application. He added that the applicant's family had deposited a title deed with the trial court, and that the same is yet to be surrendered to the family. He urged this court to maintain the same bond terms that were granted to the applicant by the trial court. Counsel submitted that the applicant stands to lose his spot at the university in the event he is not released on bail pending appeal.
7. The Application was opposed. Learned State Counsel, Ms. Nandwa, was of the view that due to the nature of the offence the applicant has been convicted of, and the sentence meted by the trial court, chances that the applicant will abscond if he is granted bail pending appeal are high. She submitted that bail pending appeal is not a constitutional right, but is discretionary, as the presumption of innocence was compromised after the applicant was convicted. Ms. Nandwa submitted that the applicant has not demonstrated any exceptional circumstances warranting his release on bail pending appeal. She invited us to dismiss the application, and order that the appeal be listed for hearing on a priority basis.
8. We have carefully considered the application by the applicant, and the submissions made by counsel for the parties thereto.
9. We note that the applicant was convicted of the serious offence of murder, and sentenced to serve a custodial sentence of twenty- two (22) years.



10. This court is guided by its previous decisions in regard to its jurisdiction to release a convicted person on bail pending hearing and determination of his or her appeal. In the case of *Somo vs Republic* [1972] E.A. 476 this Court observed thus:

“Where he (applicant) is undergoing a custodial sentence he must demonstrate, if he wishes to anticipate the result of his appeal and secure his release forthwith, that there are exceptional or unusual circumstances in the case. That is why when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed.”
11. Further, in the case of *Daniel Dominic Karanja v Republic* [1986] eKLR, this court expressed itself as follows on this issue:

“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.”
12. We have perused the proceedings and decision of the trial court. Having done so, it is our considered view that on the face of it, and without pre-judging the pending appeal, the appeal cannot be said to have overwhelming chances of success. Several eye witnesses placed the applicant at the scene of crime and the prosecution, at the very least, demonstrated common intention between the applicant and his co-accused to cause grievous harm to the deceased. Though the appeal is arguable, on the face it, it cannot be said to have an overwhelming chance of success. For avoidance of doubt, the merits of the appeal will be determined at the substantive hearing of the appeal.
13. On whether there exists any exceptional circumstances to warrant the release of the applicant on bail pending appeal, the applicant contends that he stands to lose his spot as a student at Meru University of Science and Technology, as well as his Government sponsorship, if the court denies his prayer to be released on bail pending hearing and determination of his appeal. We find that there is nothing unusual, rare or exceptional with the applicant being a student. Further, the fact that the applicant was out on bond during the hearing of his case before the trial court, and his submission that he will abide by the terms set by this Court for bond, is not sufficient to have him released on bond pending appeal.
14. The applicant was convicted in 2022, and was sentenced to serve a custodial sentence of twenty-two (22) years imprisonment. There is therefore no likelihood that he will serve a substantial part of his sentence before the appeal is heard and determined.
15. In the premises therefore, having considered the application, the brief facts of the case, the applicant’s intended arguments as against the judgment of the trial court, and the guiding principles cited above, we are of the considered view that at this stage, the applicant has failed to demonstrate that his appeal has an overwhelming chances of being successful. Further, this Court is not convinced that there are any exceptional circumstances to warrant the applicant being granted bail pending appeal. The applicant has not met the required legal threshold.
16. The upshot of the above reasons therefore, is that the applicant’s application dated 3rd March, 2023 lacks merit and is hereby dismissed.



DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JULY, 2023

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

