



**Akungwi v Republic (Criminal Application 81 of 2019)
[2022] KECA 175 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 175 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPLICATION 81 OF 2019
PO KIAGE, M NGUGI & F TUIYOTT, JJA
FEBRUARY 18, 2022**

BETWEEN

RASHID SHIREKU AKUNGWI APPLICANT

AND

REPUBLIC RESPONDENT

(Application for bail pending appeal from the judgment of the High Court of Kenya at Kakamega (Chitembwe & Dulu, JJ) dated 28th September, 2015 in HCCRA NO. 16 OF 2012)

RULING

1. The applicant is held in custody under a sentence of death meted on him by the Mumias Principal Magistrate on 17th January, 2012 upon conviction on a charge of robbery with violence. His appeal to the High Court was by a judgment dated 28th September, 2015 dismissed by Chitembwe and Dulu, JJ who upheld both his conviction and sentence.
2. He filed a second appeal to this Court raising a single ground in a Memorandum of Appeal filed by his advocates on 29th September, 2020 namely; that the learned judges erred in law by sentencing him to a mandatory sentence contrary to law.
3. Notwithstanding that he does not challenge his conviction, the applicant has now filed an application dated 2nd October, 2019, said to be brought under section 357 of the *Criminal Procedure Code* and Article 49(1) of the *Constitution* seeking to be released on bond/bail pending appeal. The grounds for the application, as may be gleaned from the self-crafted motion, are as follows;
4. That, I may be able to attend to personal and domestic matters pending the dispensation of the appeal.
5. That, I am ready to abide by the any conditions upon which the court may impose for release on Bond/ pending appeal and shall obey and keep peace within the country.



6. That, I was the sole and breadwinner of my family who were since then dropped out of school and risk becoming destitute due to my incarceration hence requesting to be released on Bond/bail terms pending of the hearing and final determination of Kisumu Court of Appeal No. 81 of 2019.
7. Learned counsel Mr. Nelson Ogeto , appeared at the hearing of the application and started his address by positing that Article 50 of the Constitution makes provision for bail. This prompted us to ask him whether the constitutional right to bail in the said Article applied with equal force to bail pending appeal, considering that the presumption of innocence which is a fundamental consideration that informs pre-trial bail, is no longer available. His curious, if startling response was that, to quote him verbatim “The moment you lodge an appeal the presumption of innocence is restored. He stands in the same position as an accused person.”
8. Counsel cannot possibly be right on first principles. We were constrained to ask if he was familiar with the principles governing bail pending appeal to which he responded in the negative, and it showed.
9. Mr. Lokorio, the learned prosecution counsel had little difficulty opposing the motion. Citing *Somo -vs- Republic* [1972] EA 476 a decision of Trevelyan J, counsel stated that the applicant’s solemn assertion that he would not abscond if released on bail do not constitute exceptional circumstances to warrant bail. Nor does the need for the appellant to go attend to personal domestic and family matters advance a case for bail pending appeal for a person who is properly convicted.
10. Mr. Ogeto’s only reply to those submissions was to assert, to our consternation, that the applicant is still innocent until proven guilty. As we have already observed, the applicant has been found guilty and convicted at a proper and regular trial before the Magistrate’s Court, which conviction has been affirmed by the High Court. We are unable to fathom counsel’s basis for asserting innocence in the circumstances especially when he is not contesting the conviction, meaning he has properly been found guilty twice over, as it were.
11. We think that the law on the subject of bail pending appeal is so settled that it is a wonder that counsel pressed the application before us. Nearly half a century ago Trevelyan, J treated the issue as already beyond need for citation of old authorities. The principles were notorious and old that even then, said he;

“Counsel were agreed that the proper principle to apply, when considering whether bail should be allowed pending appeal, is whether there are exceptional or unusual circumstances in the case, with which I entirely agree, and that, as that principle was accurately stated by Spry, Ag.J. (as he then was) in *Lamba v R*, [1958] E.A.337, there was no need to consult earlier authorities to the same effect.”

12. *Somo -vs- Republic (Supra)* contains enough of the then- recent-now-ancient authorities to inform any counsel or intending applicant of what he must show. The case has since been cited in many subsequent cases including *Jivraj Shah -vs- Republic* [1986] KLR 605 and *Dominic Karanja -vs- Republic* [1980] KLR 612 both being decisions of this Court which held, in the latter case, that;
 1. The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.
 2. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. ill health per se would



also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

3. 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.

13. That has remained the law and there is nothing placed before us to persuade us into a reconsideration of it. Indubitably, the applicant does not satisfy the principles and is therefore not entitled to the prayers he seeks.

Being of that mind, we find the application to be devoid of merit and dismiss it.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF FEBRUARY, 2022

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

