



REPUBLIC OF KENYA



KENYA LAW
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**Epungure v Republic (Criminal Appeal E015 of 2021)
[2021] KECA 343 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 343 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL E015 OF 2021
PO KIAGE, J MOHAMMED & M NGUGI, JJA
DECEMBER 17, 2021**

BETWEEN

PETER EKAI EPUNGURE APPLICANT

AND

REPUBLIC RESPONDENT

*(Application for bail pending appeal from the judgment of the High Court in
Lodwar (Wakiaga, J) dated 3rd October, 2019 in Criminal Appeal No. 4 of 2019)*

RULING

1. We have before us an undated application filed in this Court on 10th March 2021 in which the applicant seeks to be released on bail pending his appeal from the judgment of the High Court dated 3rd October 2019 dismissing his first appeal. The application is based on section 357 of the *Criminal Procedure Code* and Article 49(1)(h) of the *Constitution*. It is supported by an affidavit sworn by the applicant. The applicant avers that his appeal before this Court has overwhelming chances of success; that he wishes to be granted reasonable bail or bond terms and notes that this Court has original jurisdiction over criminal and civil matters and therefore has the power to grant bail or bond pending appeal; that the Court should grant him bail or bond pursuant to Article 49(1)(h) of the Constitution; and that he is seeking release on bail to enable him attend to personal and domestic matters. He avers that he is willing to abide by any conditions that the Court may impose for his release on bail.
2. The applicant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. He also faced an alternative charge of committing an indecent act with a minor contrary to section 11 (1) of the said Act. The particulars of the offence were that on the 28th of September 2016 at around 7:00pm in Turkana County, the applicant had intentionally caused his penis to penetrate the vagina of FL, a child aged 15 years.



3. The applicant was found guilty of the offence of defilement, convicted and sentenced to 20 years' imprisonment. Upon appeal to the High Court, his appeal was dismissed with regard to conviction but the sentence imposed was reduced to 15 years. The applicant was still aggrieved and avers that he has filed a second appeal to this Court which is pending hearing.
4. At the hearing of the application before us on 7th October 2021, the applicant's Learned Counsel, Mr. Mukuna, indicated that he had filed written submissions which he had placed before the Court that morning. He submitted that this Court should grant the applicant bail pending appeal as he has a debilitating condition; that he has a medical report from Lodwar Hospital which shows that he has hypoglycemia; and that he is on medication and has developed a problem that predisposes him to asthmatic attacks.
5. Learned Counsel further submitted that aside from his medical condition, the applicant's appeal has high chances of success as the High Court erred by failing to consider his evidence on appeal, and had failed to consider his alibi defence. It was also his submission that the sentence meted out on the applicant was excessive.
6. The applicant submits in his written submissions dated 6th September 2021 that he may have served a substantial part of his sentence before his appeal is heard, hence his application for bail pending appeal.
7. The respondent filed grounds of opposition to the application dated 6th October 2021. The position taken by the State in these grounds is that there are no circumstances indicating that the appeal is likely to succeed, and there are no exceptional circumstances to warrant the granting of bail pending appeal. Learned Prosecution Counsel, Ms. Okok expounded on these grounds in her oral submissions in opposition to the application. She submitted that the principles for the grant of bail pending appeal had been settled in the case of *Jivraj Shah v Republic [1986] KLR 605*. She noted that while the applicant was contending that he was unwell, prison facilities had medical personnel and the applicant could also be referred to a government hospital for treatment.
8. Regarding the applicant's contention that his appeal has overwhelming chances of success, the State's response was that this was not the case as the alibi evidence that the applicant raises had been dislodged by the prosecution's third witness.
9. To the submission by the applicant that he would have served a substantial part of his sentence before his appeal is heard, the State's response is that the applicant was sentenced to 20 years' imprisonment in 2019 and his appeal to the High Court was dismissed in June 2021. The State therefore submitted that the applicant was not entitled to the orders that he was seeking. We note that the judgment of the High Court dismissing the applicant's appeal was delivered by Wakiaga, J on 3rd October 2019 not June 2021 as submitted by the State.
10. We have considered the application and the submissions by the parties. We note that in the written submissions, Learned Counsel for the applicant makes

reference to an application dated 15th June 2021. However, the application before us is the undated application filed in Court on 10th March 2021. Nonetheless, the sole issue for determination as it emerged from the application before us and the applicant's written submissions, is whether the applicant is entitled to bail pending his appeal to this Court.



11. The present application has been lodged under section 357 (1) of the Criminal Procedure Code and Article 49(1)(h) of the Constitution. We can dispense at once with the reliance on Article 49(1)(h) which provides that:

“ An accused person has the right:

...

(h)to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

12. As conceded by the applicant in his written submissions, 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 v Republic [2021] eKLR*:

“ 5. 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.”

13. Section 357 of the Criminal Procedure Code provides for the grant of bail pending appeal or suspension of sentence by the High Court or the subordinate court which convicted or sentenced that person. The applicable provision with respect to applications for bail pending appeal before the Court of Appeal is Rule 5(2)(a) of the *Court of Appeal Rules*, which provides that:

“ (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.”

14. 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 v 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.”

15. 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 applicant has done in this case, to state that an appeal has overwhelming chances of success. The appeal pending before this Court being a second appeal, the applicant must show the Court that his appeal is likely to be successful on account of some substantial point of law to be argued.

16. We were urged to grant the applicant bail pending appeal as the applicant has a debilitating condition, reliance being placed on a report said to be from the Lodwar Hospital which shows that he has hypoglycaemia, is on medication and has developed a problem that predisposes him to asthmatic attacks. In his application and affidavit in support before us, however, no mention is made of these conditions nor is a medical report annexed.
17. The applicant's averments in the affidavit before the Court is that he should be released on bail so that he can attend to personal and domestic matters. Neither the applicant's state of health, however, nor his need to attend to personal and domestic matters, qualify as 'exceptional circumstances' to warrant the grant of bail pending his appeal to this Court. As submitted by the State, the applicant can obtain medical care from the prison facilities, and if need be, he can be referred to government health facilities for further treatment.
18. It was also submitted on behalf of the applicant that his appeal has high chances of success. The reason for the confidence in the merits of his appeal is that the High Court had erred by failing to consider his evidence on appeal; had failed to consider his alibi defence; and the sentence meted out on him was excessive.
19. 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 applicant has not placed a memorandum of appeal before us. However, from the submissions made by his counsel at the hearing of the application, among the grounds that he wishes to raise is that the trial court did not consider his alibi defence, and neither did the first appellate court. He was also aggrieved at the failure of the trial court to consider a *voire dire* of the complainant. These two grounds were considered by the first appellate court, and it found no merit in them.
20. While we do not wish to enter into a consideration of the facts before the trial and first appellate court bearing in mind that this is an application for bail pending appeal and the appeal is yet to come up before us, we note that both the trial court and the High Court found that there was no need to conduct a *voire dire* as the complainant, who was aged 15, was not a child of tender years. The High Court also found, upon a consideration of the evidence, that the applicant's alibi defence, which was raised only at the defence stage, had been displaced by the prosecution evidence.
21. Our analysis of the material placed before us by the applicant leads us to the inevitable conclusion that he has not placed anything before us that demonstrates that there is any substantial point of law, that will be argued at his appeal that would justify his 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 NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

