



REPUBLIC OF KENYA



**Kipaa v Republic (Criminal Appeal E053 of 2023)
[2024] KEHC 4158 (KLR) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E053 OF 2023
SN MUTUKU, J
MARCH 18, 2024**

BETWEEN

FREDERICK KIPAA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Frederick Kipaa, the Applicant, has brought this Notice of Motion (the Application) dated 10th November 2023 under Article 51 of the [Constitution of Kenya](#) 2010 and Section 357 of the [Criminal Procedure Code](#) seeking to be admitted to bail/bond and stay of execution of the sentence pending the hearing and determination of the Appeal.
2. He has backed the application with grounds found on the face of the Application and the Supporting Affidavit sworn by Mr. Stephen Nyarango Ayiera, his legal counsel, on the 10th November 2023. In summary, the Applicant has stated that he was convicted on two counts of rape contrary to section 3(1) (a) (c) (3) and sentenced to serve 15 years imprisonment on each count. The Applicant was dissatisfied with the conviction and sentence and has approached this court on appeal. He states that his appeal has high chances of success and that it is only fair that he is released on bond to avoid his serving substantial part of the sentence.
3. He has stated that he is not a flight risk and that he complied with the conditions of bail set by the trial court. He is apprehensive that the appeal may take considerable time to determine.
4. The Respondent was served but has not filed a Replying Affidavit or Submissions. Ms Kivali, learned prosecution counsel informed the court that the Respondent does not oppose the application and will not be filing submissions.
5. The Applicant filed submissions dated 11th January 2024. He has cited section 357 of the [Criminal Procedure Code](#) as the applicable law in granting bail pending appeal and [Jivraj Shah v Republic](#) [1989]



KLR and *Jeremiah Mwangi Ngatia v Republic* [2013] eKLR on the conditions for granting bail pending appeal.

6. The Applicant has submitted on the issues for determination as follows:

Whether the Appeal has overwhelming chances of success

7. Under this issue, it is submitted that the Applicant has, through grounds of appeal, demonstrated that the appeal has overwhelming chances of success for reasons, *inter alia*, that the trial court failed to comply with section 200 of the *Criminal Procedure Code* and inform the Applicant of his rights thereby violating the rights of the Applicant to a fair trial and prejudicing him.
8. The Applicant relied on *Richard Charo Mole v Republic* [2010] eKLR and *Catherine Mueni Makau v. Republic* [2012] eKLR, among other cases, to support the submissions on failure by the trial court to comply with section 200 of the *Criminal Procedure Code*.

Whether there are exceptional or unusual circumstances to warrant the court's exercise of its discretion

9. It was submitted that there are exceptional or unusual circumstances to warrant this court to exercise its discretion because the trial court failed to accord the Applicant his rights under section 200 of the *Criminal Procedure Code*. The Applicant relied on *Francis Kamote Mutua v Republic* [1988] eKLR where the Court of Appeal held that in a test for whether there are exceptional circumstances, the most important ground would be whether the appeal has overwhelming chances of being successful. It was submitted that the Appeal herein has overwhelming chances of success and given the delay in concluding the appeal.
10. It was submitted that the Applicant was a first offender when he was convicted and that he is a responsible person in society who complied with the terms and conditions of bond during the trial.

Whether there is a high probability of the sentence being served before the appeal is heard

11. It was submitted that the appeal may take a considerable time before it is determined while the Applicant continues serving sentence and that this court ought to admit the Applicant to bail pending appeal because his appeal has overwhelming chances of success.

Determination

12. The Application is not opposed. However, this court has the discretion to consider it and decide whether to allow it or decline it. I have considered the grounds in support of the Application and the submissions. I have also considered the authorities relied on by the Applicant to support his case.
13. To grant the prayers sought in this application is discretionary. I am alive to the fact that it is only after canvassing the appeal and taking arguments by the parties that the court is able to determine whether the appeal has overwhelming chances of success or not. At this stage, it is my view that courts must exercise caution lest they make orders that finally determines the appeal before hearing the parties.
14. I have considered the arguments by the Applicant, especially the fear that this appeal may take time to conclude while he serves term. I have noted that the record of appeal has been filed and served. What is remaining is to give directions on how the appeal shall proceed.
15. To address those fears on the delay in concluding the appeal, it is my considered view that this court is able to fast track the appeal by having parties file submissions on it as soon as they are able to do so and leave it to the court to make a determination on the appeal itself.



16. Consequently, I decline to grant the Application and direct that the Appeal herein be fast tracked by filing submissions on it to enable the court to make a determination on the Appeal. Parties are therefore directed to file and exchange submissions within the next 14 days, each party to take 7 days to file and serve submissions.

17. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 18TH MARCH 2024.

S. N. MUTUKU

JUDGE

