



REPUBLIC OF KENYA



**Gikiri v Republic (Criminal Appeal E070 of 2023)
[2024] KEHC 7246 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 7246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E070 OF 2023
DO CHEPKWONY, J
MAY 31, 2024**

BETWEEN

AMOS MWANGI GIKIRI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the Judgment by the Honourable M. A. Opondo (SPM)
delivered on 6th July, 2023 in Kiambu CM Criminal Case No.E469 of 2019)*

RULING

1. The Appellant was arrested, charged, convicted and sentenced to serve ten (10) years imprisonment for the offence of Greivous Harm contrary to Section 234 of the [Penal Code](#) at Kiambu Chief Magistrate’s Court *vide* Criminal Case No.469 of 2019 on 6th July, 2023.
2. Aggrieved by the conviction and sentence, the Appellant lodged an appeal in which he has challenged the same. The Appellant also filed a Notice of Motion application in which he has sought that:-
 - a. Spent.
 - b. Spent.
 - c. That the Honourable Court be pleased to grant the Applicant bond pending appeal on such terms and conditions as may be stipulated by the court pending the hearing and determination of the appeal at the High Court of Kenya at Kiambu.
 - d. Spent.
 - e. That the Honourable Court be pleased to issue any such further orders, directions and or relief it may deem fit and expedient in the circumstances.



3. The application is premised on the grounds set out in its face and Supporting Affidavit sworn by the Appellant. It is the Appellant's averments that bail is a constitutional right and the offence he is charged with is bailable. The Appellant states that there are no compelling reasons to deny him release on bond and had complied with the conditions set out in the bail terms issued for him during his trial before the trial Court and was out on bond from 2019 to 6th July, 2023. The Appellant contends that Section 357(1) of the *Criminal Procedure Code* where an appeal may grant bail to a convicted person who is a party to the appeal and holds that his appeal has overwhelming chance of success as he has raised several substantive grounds of appeal on matters of law, fact and *the constitution* which are weighty, profound and fundamental to the process of fair trial.
4. In response, the prosecution is not opposed to the application by the Appellant save for requesting that a pre-bail report be called for to assist the court in its decision. The court then called for a social inquiry to be conducted on the Appellant by the Probation Officer. The Bail Information Report was filed on 16th January, 2024 wherein it is indicated that the same was considered on the accused family's circumstances, the history and means of the accused, the drugs and substances abuse, previous adherences to bond terms, seriousness of the offence, victim's concerns, community ties, bail sureties and societies.
5. According to the Bail Information Report, the Appellant is 38 years, father of two children who require care and protection. It is stated that the Appellant regrets his actions and pleads favourable terms so that he can stand trial of his appeal.
6. It is reported that his extended family just like his immediate family who are suffering in his absence, support his application for release on bail/bond.
7. On the part of the victim, she exhibited grief and bitterness because of the burns she sustained from a person she loved but she said that she had left everything to God so that, if he is granted release on bond terms, he should be warned not to interfere with her personal life.
8. In the recommendations, the Probation Officer stated that the Appellant can be considered for release on bond terms but the court should put into consideration the victim's concerns and set strict conditions to be complied with such as not interfering with the victim's personal life.
9. The Applicant filed written submissions dated 11th day of October, 2023 whose contents will be considered by the court in the determination.

Analysis and Determination

10. To consider the application dated 17th August, 2023, this Court has considered the grounds upon which the same is premised, the findings and recommendations in the Bail Information Report dated 16th January, 2024, the Appellant's submissions and the relevant constitutional statute and case law. This Court finds that the issues for determination being:-
 - a. Whether the Applicant should be granted bail pending appeal.
 - b. Whether the conviction and sentence should be suspended.
11. Before delving into the gist of the instant application, I wish to point out that although bail/bond is a right guaranteed to every accused under *the Constitution*, upon conviction, his right becomes absolute and is granted at the discretion of a court depending on circumstances of each case. Under Article 49)1) (h) of *the Constitution* gives an accused a right to bail/bond. It 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. The law on Bail pending Appeals is enshrined under Section 357 of the [Criminal Procedure Code](#) which states that: -

[357]. Admission to bail or suspension of sentence pending appeal

- “(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in Sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.”

12. Section 379(4) of the [Penal Code](#) provides as follows:-

- (4) “Save in a case where the appellant has been sentenced to death, a judge of the High Court, or of the Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.

13. The court agrees with the position in the case of [Charles Owanga Aluoch -vs- Director of Public Prosecutions](#) [2015] eKLR, it was held that: -

“The right to bail is provided under Article 49(1) of [the Constitution](#) but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court’s discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

- “(1) The principal consideration in an application for bond pending appeal is 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.
- (2) 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.
- (3) 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 weight and relevance of the points to be argued.”

14. On whether the Applicant should be granted bail pending appeal. The Appellant has lodged an appeal to attack the conviction and sentence meted against him as he believes the same are unjustified and inimical to his right to liberty and movement. In the Case of *Jiv Raji Shab –vs- R.* [1966]KLR 605, the court set the principles that guide the granting of bail pending appeal.
15. In summary, the conditions outlined in the *Jiv Raji case* is that bail and bond pending appeal should only be granted where it is in interest of justice to grant it, and where the appeal has a high chance of succeeding on account of substantial point of law, or if there exist exceptional or unusual grounds. The rationale for considering chances of success of an appeal was set out in the case of *Somo –vs- R.* [972] at Page 480 as follows:-

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the Applicant will be granted his liberty by the Appeal Court. I have used the word ‘overwhelming’ deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the Applicant was convicted, he was properly convicted. That is why, w here he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty 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 overwhelming probability that it will succeed.”
16. The usual and exceptional circumstances were expounded in the case of *Arvind Patel –vs- Uganda S. C. Cr. Appeal No.1 of 2003* to include:-
 - a. The character of the offender,
 - b. Whether the Applicant is or not a first offender,
 - c. Whether the offence of which the Applicant is convicted involved personal violence,
 - d. The appeal must not be frivolous and has reasonable chances of success,
 - e. The possibility of substantial delay in the determination of the appeal, and;
 - f. Whether the Applicant complied with bail conditions granted before the Applicant was convicted during the pending of the appeal.
17. However, the court went on to state that all the listed considerations need not be present. One or two or more of this could be sufficient. In considering all the above-mentioned cases and principles therefrom, the reasons advanced by the Appellant do not present unusual or exceptional circumstances, and neither do they guarantee the success of his appeal. A perusal of the records confirms that the original record of proceedings, typed and certified has been availed, which is an indication that this appeal can be expedited for hearing and determination before the Appellant serves a substantial amount of his sentence.
18. In the circumstances, the court finds the Notice of Motion application dated 17th August, 2023 not meritable and proceeds to dismiss it with directions that:-
 - a. The Deputy Registrar facilitates the compilation, filing and service of the Record of Appeal.



- b. Mention on 3rd June, 2024 for parties to confirm the Record of Appeal and take directions on hearing of the appeal.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS31STDAY OF MAY, 2024.

D. O. CHEPKWONY

JUDGE

