



REPUBLIC OF KENYA



**Kamau v Republic (Criminal Appeal E003 of 2024)
[2024] KEHC 5815 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E003 OF 2024
AK NDUNG’U, J
MAY 24, 2024**

BETWEEN

JOSIAH KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from original convictions and sentence in Rumuruti SPM’s
Sexual Offences Case No MCSO/E025 of 2023 – E. Kitbinji, RM)*

RULING

1. By way of a Notice of Motion dated 27/2/24 Josiah Kamau (the Appellant) seeks to be admitted to bail pending appeal having lodged an appeal against the conviction and sentence in Rumuruti SO Case No. EO25 of 2023 where he was charged with defilement contrary to Section 8(1)(2) of the [Sexual Offences Act](#). In that case, the Appellant was tried, convicted and sentenced to twenty (20) years imprisonment.
2. The Notice of Motion frames the orders sought as follows;
 - i. Spent.
 - ii. That the Honourable court be pleased to order that the appellant be released on bail and/or bond with the similar terms during trial pending the hearing and determination of the appeal.
 - iii. That the court be pleased to order the suspension of the execution of the sentence appealed against pending the hearing of the appeal.
 - iv. Costs of this application be provided for.
3. The application is supported by the affidavit of the Appellant herein and based on the following grounds;



- a. The Appellant has already lodged an appeal against the whole of the conviction and sentences emanating from the judgment in Rumuruti SPM's Court SOA Case No. E025/2023 Republic -Vs- Josiah Kamau.
 - b. The appeal is yet to be admitted to hearing.
 - c. The appeal is yet to be heard and determined.
 - d. The Appellant has been sentenced to 20 years.
 - e. The judgment and conviction are not safe but amount to miscarriage of justice.
 - f. The appeal has overwhelming chances of success.
4. The application is opposed and in a replying affidavit, Peter Gitimu, a prosecution counsel, has deponed that the application lacks merit and does not meet the legal threshold for the orders sought. That granting bail pending appeal is a discretionary power as the applicant has been found guilty and the presumption of innocence no longer applies. It is averred that no exceptional circumstances have been demonstrated to deserve the orders and neither has it been shown that the appeal has overwhelming chances of success.
 5. The application was canvassed by way of written submissions.
 6. The Main stay of the Appellants submissions is that an accused person who has lodged an appeal as in this case is in the status of one presumed innocent just like one facing trial. It is urged that the appeal is in the nature of a re-trial and a sentence ought not to be implemented during the pendency of the appeal since if the sentence is executed and the Appellant succeeds in his appeal, it is tantamount to punishment before proof of guilt. It is urged that it matters not whether the sentence is short or long.
 7. It is submitted that bail pleading appeal is a matter of judicial discretion which must be exercised judiciously. Either way, it is urged that the complainant will suffer no prejudice as should the appeal fail, the sentence will still be executed.
 8. Counsel submits that the appeal has overwhelming chance of success as there are 2 unresolved contradictions on the age of the complainant. The charging Section 8(1)(2) relates to a child of 11 years or less. The particulars of the charge state that the complainant was 15 years. It is urged that the defect was never resolved by amendment or at all before the judgment. Counsel adds that in the impugned judgement, the trial court ruled that the victim was 15 years while relying on a certificate of birth showing date of birth as 27/5/2008. The calculation would be 14 and not 15 years.
 9. Finally the judgment is attacked on the basis that penetration was not proved. The court is invited to render a definition of what constitutes exceptional or unusual circumstances applying a liberal approach in interpretation of *the Constitution*.
 10. The Respondents submissions addressed the principles applied in grant of bail pending appeal. Reliance is placed on the case of Jiuraj Shah V Republic [1986] kLR 605.
 11. It is submitted that bail pending appeal is not a Constitutional right. The Applicant having been convicted by a competent court has no benefit of presumption of innocence. It is urged that the grant of bail pending appeal is discretionary under Section 357 of the Criminal Procedure Code. That Section is not couched in mandatory terms the operative word being "may".



12. It is urged for the Respondent that the Appellant must demonstrate that the pending appeal is arguable and has overwhelming chances of success. Counsel cited the Bail and Bond Policy guidelines page 27 paragraph 4.30 which provides that the burden is on the convicted person to demonstrate that there is a chance of success.
13. In rejoinder to the alleged defect in the charge and the absence of DNA results linking the Appellant to the offence, it is submitted that contrary to the Appellant's submission, the issue is not sufficient to demonstrate that the appeal has overwhelming chances of success. It is contended that the issue forms the very basis of the appeal and should not be considered at this stage.
14. It is the Respondent's case that no substantial point of law has been raised which would position this appeal as one likely to succeed. That the ingredients of the offence of defilement were proved to the required standard of beyond reasonable doubt.
15. It is contended that the Appellant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bail. Counsel submits that despite inviting the court to redefine and expand the scope of what constitutes exceptional or unusual circumstances, the Appellant never mentioned any specific circumstances he faces that need to be considered.
16. Finally, it is urged that the Appellant having been sentenced to 20 years imprisonment, it cannot be said that he will have served a substantial part of his sentence by the time the appeal is heard and determined. The appeal can be expedited once the proceedings and judgement are provided.
17. The place of the court's jurisdiction to grant bail pending appeal must of necessity be distinguished from the court's jurisdiction to grant bail before trial. The present application has been lodged under section 357 (1) of the Criminal Procedure Code and Article 49 of *the Constitution*. I can without much ado dispense at once with the reliance on Article 49 of *the Constitution* 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.”
18. Thus 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 as the Court observed in *Mary Ngechi Ng'ethe v Republic* [2021] eKLR:
19. Section 357 of the Criminal Procedure Code envisages a situation where a person has gone through a trial and a court of competent jurisdiction has considered the material before it and found the person guilty. The section provides;
 - (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:.....
20. The power to grant bail pending appeal is thus discretionary. 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.

21. It will be appreciated that at the application for bail pending appeal the court is not invited to weigh the full arguments for or against the appeal. The scope is narrow and is restricted to evaluating whether the Appellant has achieved the legal threshold for the grant of bail pending appeal as set in the now very well set principles.
22. 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* as being:
 - (i) 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.”
23. 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 to state that an appeal has overwhelming chances of success. There must be a clear demonstration on a factual or legal basis to show that the appeal does really have overwhelming chances of success.
24. These principles have been elaborated by the Supreme Court of India in the case of *Krishnan v The People*{SCZ 19 of 2011}, {2011} ZMSC 17 where the court enumerated the following conditions to be satisfied in an application for bail pending hearing of an appeal:
 - i. Bail is granted at the discretion of the court.
 - ii. The court must be satisfied that there are exceptional circumstances that are disclosed in the application.
 - iii. The fact that the appellant due to delay in determining the appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances.
 - iv. It is important to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict, and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.
 - v. It is not for the court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.



- vi. The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an application to bail; pending appeal.
25. I will start with the requirement to show that exceptional circumstances exist to warrant the grant of bail pending appeal to the Appellant. I have read through the supporting affidavit to the Notice of Motion. There is no averment at all showing the existence of exceptional circumstances. Apart from challenging the conviction and sentence based on reasons that I shall come back to shortly, the Appellant only averred that his wife and children are deprived of a sole bread winner as he stands to lose his employment as a prison officer or a civil servant for an offence framed on him.
26. In *Dominic Karanja v Republic* (1986) KLR 612, the Court of Appeal stated in alia:
- “(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;
 - (b) 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;
 - (c) 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;
 - (d)
27. Without shirking the responsibility of this court to interpret *the constitution* in the manner decreed under Article 159, and specifically Sub-Article (1)(b) thereof that requires an interpretation that advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights, much as am prodded by the Appellant’s counsel to, in his words, “I urge the court to set a precedent in rendering a definition of what constitutes exceptional or unusual circumstances giving it the necessary impetus and breathing life to *the constitution* in a liberal approach, I find no wriggle room in the matter. *The constitution* expressly guarantees the right to bail to an accused or arrested person during trial. That right in my considered view cannot be stretched to extend an automatic right to bail to a person who has been tried and convicted. The power of the court to grant bail remains a discretionary one and in exercise of the 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.
28. On the whole am not persuaded that the Appellant has established any exceptional circumstances as envisaged in the applicable principles.
29. On the question whether the appeal has overwhelming chances of success, it is not for the court at this stage to delve into the merits of each ground of appeal raised. This is not the space for such and the final finding on the merit or lack thereof of the appeal must be left to the court hearing the appeal. For now, it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim or bright as the case may be.



30. I have had occasion to consider the grounds of appeal as particularized in the Petition of Appeal. Whereas I find grounds 1,3,5,6 and 7 arguable, (and this not in any way belittling any of the grounds of appeal), I do not find them offering the appeal overwhelming chances of success. Looking at the grounds in the petition, the affidavits on record and submissions by the parties, I see a tough legal duel whose outcome will only become clear after full arguments in the appeal are proffered.
31. It is inappropriate and I do not wish to enter into a consideration of the full merits of the appeal bearing in mind that this is an application for bail pending appeal and the appeal is yet to come up before me lest I prejudice the parties' respective cases. Suffice it to state, on the material before me it is not clear cut that the appeal has overwhelming chances of success.
32. Turning to the question whether a substantial part of the sentence will have been served by the time the appeal is disposed of, counsel for the appellant submits that the length of the sentence whether short or long or whether it will have been served before the appeal is heard and determined does not matter. His take is that the conviction and the sentence having been challenged, both ought to be suspended. For the Respondent, it is submitted that the Appellant was sentenced to 20 years imprisonment and it cannot therefore be said that he will have served a substantial part of the sentence by the time the appeal is heard and determined. In any event, the appeal can be expedited.
33. The proceedings before our constitutionally established courts are clothed with constitutional and legal armor. I would find it inimical to the known tenets of justice that an appellate court would as a matter of right suspend any decision of a subordinate court whenever an appeal is filed without a full hearing of the said appeal. This would be a sure recipe for anarchy in our judicial system. The proceedings of a court conducted according to the constitution and the law must be held as sacrosanct until faulted through due process and overturned.
34. That is not to say that even where good grounds exist, such suspension cannot be allowed. That is why provisions like Section 357 Criminal Procedure Code exist. It also happens all the time in our civil jurisdiction through stay orders. What must be underlined is that it is upon an applicant to show justification within the law for such suspension, or, as in this case, why bail should be granted post trial.
35. I agree with counsel for the respondent that the Appellant is not likely to serve a substantial part of the sentence before the appeal is heard and determined. The lower court's proceedings and judgement are ready. This appeal can be expedited by the timeous filing of the record of appeal. I also take judicial notice that the court's diary is accommodative of an early hearing date.
36. From the foregoing, and for reasons above stated, I find no merit in the Notice of Motion dated 22/4/24. Accordingly, same is hereby dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF MAY 2024.

A.K. NDUNG'U

JUDGE

