

**IN THE COURT OF APPEAL
AT NAKURU**

[CORAM: SICHALE, OCHIENG & KORIR, JJ.A.]

CRIMINAL APPLICATION NO. E002 OF 2022

BETWEEN

VINCENT KIPKIRUI KOROS APPLICANT

AND REPUBLIC..... RESPONDENT

*(Being an application for bail pending appeal from the conviction and sentence of the
High Court of Kenya at Kericho, (A. N. Onger, J.) dated 1st July, 2022*

in

HC.CR.A. NO. E012 OF 2022)

RULING OF THE COURT

1. Before us is a Notice of Motion dated 22nd November, 2022 brought under a certificate of urgency. The applicant seeks orders that; this Court be pleased to admit the applicant to bail/bond pending the hearing and determination of the appeal herein. In the alternative, the applicant prays for the sentence to be suspended or stayed pending the hearing and determination of the appeal herein.
2. The application is based on the following grounds: that the applicant was convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment; aggrieved, the applicant filed the present appeal against the conviction and sentence; the appeal has overwhelming chances of success as the conviction was

not founded on the weight of evidence on record; the proceedings before the trial court proceeded while the applicant was on bail and he never absconded from attending court; it would be unnecessary to keep the applicant in jail if his conviction would eventually be quashed; there would be no miscarriage of justice if the applicant is admitted to bail or if the sentence is suspended; the applicant undertakes to abide by any conditions the court will impose; the appeal raises points of law; a substantial part of the sentence will have been served by the time the appeal is heard; it is only fair that the applicant presents his appeal in a sober and settled state of mind which cannot be achieved if he is incarcerated; the applicant's application for bail pending appeal before the High Court was dismissed on grounds that there were no unusual circumstances and that the applicant was charged with a serious offence; the prosecution witnesses evidence did not support the conviction; and that the court's findings in law and fact were contrary to the evidence submitted.

3. The application was further supported by the affidavit of Omari Kefa, advocate in which he reiterated the grounds on the face of the application.
4. At the hearing, Mr. Kefa, learned counsel for the applicant while relying on his written submissions argued that the appeal had overwhelming chances of success. He contended that the trial court did not sufficiently analyze the evidence which was contradictory. He pointed out that PW4, the doctor, did not find any evidence of defilement. He submitted that the applicant needed a sober atmosphere to canvass the appeal. He further stated that the applicant was on bail during trial and never

absconded. He attended court and was of good character. He noted that the delay in processing the proceedings was an exceptional circumstance, the applicant having been convicted in July 2022.

5. Counsel further relied on the provisions of **Rule 5** of the Court of Appeal Rules, 2022 and the case of **Jivraj Shah v Republic [1986] eKLR** in outlining the laid down principles for granting bail/bond pending appeal. Relying on the case of **Chimambhai v Republic [1971] EA 343** counsel maintained that the appeal raises substantial points of law as highlighted in the draft memorandum of appeal. Further relying on the case of **Gerald Macharia Githuka v Republic, Criminal Appeal No. 119 of 2004** counsel stated that even though the applicant had lost the presumption of innocence, the law provides for situations where there is a possibility of the conviction being erroneous. Counsel further invoked the Court's discretion which he noted was based on the following factors; whether the appeal has overwhelming chances of success; there are exceptional or unusual circumstances; and there is a high probability of the sentence being served before the appeal is heard.
6. In opposing the appeal, Ms. Mburu for the State contended that bail pending appeal was not an absolute right and that **Rule 5** of the Court of Appeal Rules, 2022 uses the word "may". She contended that the applicant had not demonstrated any exceptional circumstance and that the appeal did not have high chances of success. She stated that upon conviction, there was no longer a presumption of innocence on the part of the applicant. She was apprehensive that the applicant might abscond

given that he had been sentenced to life imprisonment. She maintained that the applicant had not been illegally detained. The applicant was convicted and sentenced after the full trial process. She also contended that it would be premature to consider evidence at this stage.

7. We have carefully considered the application, affidavit in support, submissions by counsel and the law. The issue for determination is whether the applicant has satisfied the conditions for grant of bail/bond pending appeal.

8. **Article 49(1)(h)** of the Constitution 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.

9. However, in the case of **Masrani v Republic [1960] EA 321**, the Court held thus:

"Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction."

10. In the case of **Dominic Karanja v Republic [1986] KLR 612** the Court stated that:

"(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."

11. In the case of **Charles Owanga Aluoch v Director of Public**

Prosecutions [2015] eKLR, the Court 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 principle 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 face 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 a 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."

12. The applicant submitted that he had lodged an appeal with overwhelming chances of success. On the issue of exceptional circumstances, the applicant submitted that

there was a delay in obtaining proceedings. He further stated that he needed a sober and clear mind in order to prosecute his appeal, a state which he could not attain while incarcerated. The applicant further submitted that he is of good character, a first offender and that he never absconded court while on bail during trial.

13. It follows therefore, that the prayer for grant of bail pending appeal is at the discretion of the court. We are however, aware that the discretion should be exercised judiciously. We are also called upon to exercise caution and take into account the fact that the applicant was convicted by a properly constituted court.

In the case of **Mutua v Republic [1988] KLR 497**, the Court stated:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.”

14. In the present application, the burden was upon the applicant to establish that the appeal has high chances of success or that he has a high likelihood of serving a substantial part of the sentence before hearing of the appeal. However, the proceedings in this matter were not made available before this Court. Only the judgment of the first appellate court was made available. Therefore, this Court is not in a position to establish whether or not an arguable appeal with high chances of success has been disclosed by the grounds of appeal.
15. However, we have considered the grounds in the draft memorandum of appeal and we are not satisfied that the said grounds disclose the existence of an appeal with

overwhelming chances of success. Whereas the applicant may well succeed in arguing the said grounds at the hearing of the appeal, we are not satisfied that the chances of the appeal succeeding are overwhelming. The grounds are the usual grounds and there is no ground that stands out as one that is very likely to succeed even before the same is argued based on the state of the record.

16. Further, the applicant has not demonstrated the existence of an exceptional or unusual circumstances to warrant grant of bail pending appeal. The fact that the applicant did not breach bail conditions in the trial court, is of good character or that there is delay in processing proceedings are not exceptional circumstances to warrant admission to bail pending appeal. In **Jivraj Shah v Republic** (supra), this Court that:

"There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in Somo v Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued."

17. The applicant was sentenced in July 2022 to life imprisonment. There is no doubt in our minds that there is no likelihood of him having served a substantial part of the sentence before the appeal is heard. It is very unlikely that the appeal will take the applicant's lifetime to be determined.
18. From the foregoing, we find no merit in the application. The application is dismissed. Let the applicant expedite the process of the hearing of his appeal.

Orders accordingly.

Dated and delivered at Nakuru this 12th day of May, 2023.

F. SICHALE

.....
JUDGE OF APPEAL

F. OCHIENG

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR