



**Machera v Republic (Criminal Application E088 of 2021)  
[2022] KECA 1064 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1064 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPLICATION E088 OF 2021  
MSA MAKHANDIA, PO KIAGE & F TUIYOTT, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**LUCA MWITA MACHERA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An application for bail or bond pending the hearing and determination of the appeal against the judgment of the High Court of Kenya at Migori (Wendoh, J.) dated 15th July, 2021 in HC.CR. Case No. 10 of 2019)*

**RULING**

1. The applicant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code as per the information presented in the High Court at Migori dated October 14, 2019. The particulars were that on July 16, 2019 along Nyabukarange-Ikerege Road Wangisasa village, Migori County, jointly with others not before court he murdered Festo Mwita Machera. The applicant denied the offence and his trial ensued. At the end of it all, the trial court (Wendoh, J.) in her judgment dated 15<sup>th</sup> July 2021, found the applicant guilty of the offence, convicted him, and sentenced him to twenty years imprisonment.
2. Being aggrieved by the said judgment and sentence, the applicant filed a notice of appeal dated July 28, 2021 signifying his intention to appeal against the whole of the High Court's decision and subsequently filed the instant application brought under Rule 4 of the Court of Appeal Rules and, section 379(4) of the Criminal Procedure Code. He seeks to be admitted to bail pending the hearing and determination of the appeal.
3. The application is supported by the grounds on its face and the affidavit of Joash Momanyi Nyagwencha, learned counsel for the applicant. In essence, the applicant claims that he had preferred an appeal which is arguable and has high chances of success. That he had made the application without



unreasonable delay. That during trial he had been on bail and he had faithfully attended the trial court without fail. That he was ready and willing to abide by any terms and conditions that may be imposed by the court upon granting the application. The affidavit in support of the application merely reiterates and expounds on the above grounds and we need not rehash them. The respondent in opposing the application has filed written submissions in which it states that the application was unmerited as nothing had been brought forth to demonstrate exceptional and unusual circumstances that would tilt the court's discretion in his favour. Further, that the applicant did not attach the draft memorandum of appeal, thereby making it difficult for the Court to discern whether the appeal is arguable and/or has high chances of success.

4. Relying on the case of *Jivraj Shah v Republic* (1986) KLR 605, the respondent maintains that the application should be dismissed for failure to attain the threshold set out in the said case which is that the principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court can fairly conclude that it is in the interest of justice to grant bail, that 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 finally, that the sentence or substantial part of it will have been served by the time the appeal is heard and determined.
5. We have carefully considered the material placed before us, both in support of and in opposition to the application. The issue for our determination is whether the applicant has met the above threshold which would then justify his release on bail pending the hearing of his appeal. The court's discretion to release a convicted person on bail pending the determination of the appeal is provided for in Rule 5(2)(a) of the *Court of Appeal Rules* as follows: -
  - "5(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:-
    - 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."
6. However, in exercising such discretion, the court has to bear in mind that a person who has been convicted by a competent court has been properly convicted and had as a result lost the presumption of innocence conferred on him and or her by *the Constitution* and that during the hearing of the appeal, the burden would be upon him to show that the conviction and sentence was undeserved. Therefore, as it has been stated time and time again bail pending appeal will only be granted in rare and exceptional circumstances. See *Michael Otieno Ademba v Republic* (1982-88) 1 KAR 263 and *Abdi v Republic* [1991] KLR 171. See, *Issack Tulicha Guyo v Republic* [2011] eKLR. Judicial decisions show that, in determining whether or not to grant bail pending appeal, the court should consider: -
  - i. Whether the appeal has overwhelming chances of success. See *Ademba v Republic* [1983] KLR 442, *Somo v Republic* [1972] EA 476, *Mutua v Republic* [1988] KLR 497;
  - ii. Whether there are exceptional or unusual circumstances to warrant exercise of court's discretion into releasing the appellant on bail. See *Raghibir Singh Lamba v Republic* [1958] EA 37; *Jivraj Shah v Republic* [1986] eKLR; *Somo v Republic (supra)*; *Mutua v Republic (supra)*;
  - iii. Whether there is a high probability of the sentence being served before the appeal is heard. See *Chimabhai v Republic* [1971] EA 343.



7. The applicant has not put forward any ground of appeal that would have helped us determine whether the appeal has overwhelming chances of success, nor has he demonstrated exceptional and unusual circumstances facing him that would compel us to consider favourably this application, save to state that he had attended faithfully the trial court during the hearing of the case without fail whilst on bail and will abide by any conditions that may be imposed by this court. The fact that the applicant had been released on bail during the trial and did not abscond or faithfully attend court is not a sufficient ground to release him on bail pending appeal. In the case of *Dominic Karanja v Republic* (1986) KLR 612, it was stated thus: -
- (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.
8. The applicant was sentenced to 20 years on July 15, 2021. He may have served a year or less at the time of hearing this application thus, in the absence of the evidence to the contrary the argument that he will have served the sentence or a substantial part thereof by the time the appeal is heard is untenable.
9. Consequently, we find the application bereft of merit and accordingly dismiss it in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

