



REPUBLIC OF KENYA



**Ali & another v Republic (Criminal Appeal E034 & E035 of 2023
(Consolidated)) [2023] KEHC 22184 (KLR) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 22184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E034 & E035 OF 2023 (CONSOLIDATED)
ACA ONG'INJO, J
AUGUST 3, 2023**

BETWEEN

MOHAMED ALI 1ST APPELLANT

HUSSEIN SHEIKH 2ND APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellants were jointly charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006 in Mombasa CMC SO No 326 of 2017 where they were convicted and sentenced to serve 15 years imprisonment.
2. Being aggrieved by the conviction and sentence, they have separately filed petitions of appeal and now seek by a Notice of Motion dated May 16, 2023 that an order be issued admitting them to bail pending the disposal of the appeal.
3. The applications in both appeals are supported by the affidavits of Jared O. Magolo Advocate in which he has averred that the appeals have overwhelming chances of success.
4. The respondents were granted an opportunity to file their response and submissions but they did not and the appellant's advocate has urged the court to allow the applications as unopposed.
5. For an application for bond pending appeal to be allowed, Section 357 of the *Criminal Procedure Code* provides: -
 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.

6. The main consideration in an application seeking bail pending trial was best articulated in *Jivraj Shah v Republic* (1986) KLR 605 where it was held: -
 - I. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests 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 weight and relevance of the points to be argued.
7. The Supreme Court of India in the case of *Krishnan v The People* (SCZ 19 of 2011), (2011) ZMSC 17 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.



8. The appellant's ground for bail pending appeal is that they have a reasonable appeal and that they have confirmed from the registry that the hearing will not take place soon.
9. This court has had a cursory look at the proceeding attached to the appellants' application and seen that there is confirmation that a 14 years old mentally retarded girl was confirmed to have been defiled in a house where the court found that the appellants were occupying and in the course of rescuing the complainant, one of the suspects inflicted injuries on a relative of the complainant.
10. The submissions that have been filed by the appellant's counsel have delved into the merits of the grounds of appeal which is not a requirement at this stage. The fear that the hearing of appeal will delay is unfounded because the records are already typed and the appellant's only need to file the records of appeal, serve the respondents and fix the matter for mention for directions on how the appeal will be disposed off.
11. The application therefore lacks merit and the same is dismissed. Mention on 4th October for directions.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 3RD DAY OF AUGUST 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Mr. Magolo Advocate for the Appellant

Applicant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

