



REPUBLIC OF KENYA



**Tuei v Republic (Criminal Appeal E020 of 2023)
[2025] KEHC 58 (KLR) (13 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 58 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E020 OF 2023**

**RL KORIR, J
JANUARY 13, 2025**

BETWEEN

EMMANUEL KIPYEGON TUEI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 31st January 2024 where he sought the following orders:-
 - i. Spent.
 - ii. Spent.
 - iii. That an order be and is hereby issued granting the Appellant bail pending hearing and determination of the Appeal.
 - iv. That the Appellant be released on bond of Kshs 100,000/= with one surety of a similar amount or on such terms as the Honourable Court shall deem fit, appropriate and expedient in the circumstances.
 - v. That in the alternative and without prejudice to the foregoing, the Appeal be certified as urgent and is heard and determined on a priority basis.
 - v. That the Appellant be granted leave to amend his Petition of Appeal.
 - vii. That the Honourable Court be pleased to make or grant any other relief as it may deem just and fair to meet the ends of justice.
 - viii. That there be no orders as to costs.



2. The Application was brought under Articles 49(1)(h), 50 and 165(3a), (6) and (7) of the *Constitution* of Kenya, sections 350(2v), 351, 357(1) and 362 of the *Criminal Procedure Code*. It was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Emmanuel Kipyegon Twei on 31st January 2024.

The Applicant's case.

3. The Applicant stated that he was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* and he was convicted and sentenced to serve 10 years imprisonment. That he preferred an Appeal to this court on 28th April 2023 and he sought to amend the said Appeal to add more grounds of appeal. He further submitted that at the time of filing his Appeal, he did not have an advocate but he had since secured one. That the Respondent would not be prejudiced if this court granted the leave to amend his Appeal.
4. It was the Applicant's case that his Appeal was arguable and had a high chance of success.
5. The Applicant stated that there were exceptional circumstances that warranted him being released on bail or bond. That at the time of filing the present Application, his Appeal had not been placed before the Judge for directions and he was apprehensive that the hearing of the Appeal would take longer necessitating his continued stay in prison.
6. It was the Applicant's case that courts have defined exceptional circumstances to include delays in the appeal process, the unavailability or inaccuracy of the court record, the likelihood that the Appeal could not be concluded within a reasonably short time and the risk that the sentence would be served in the pendency of the Appeal.
7. The Applicant stated that he had no other charges against him and did not breach any of the bail conditions that were set by the trial court. That the Prosecution would not suffer any prejudice as their witnesses had already testified.

Applicant's submissions.

8. Through his written submissions dated 4th November 2024, the Applicant submitted that he was of good character and the Respondent did not controvert any of the facts contained in his Application. That even though he was convicted, he urged this court to find that he had an unlimited right of appeal and there was a presumption that the trial court could be wrong. He relied on *Yahya Ahmed Shee alias Basode v Republic* [2021] KEHC 7528. He further submitted that he maintained an excellent character during the trial and he did not tamper with witnesses.
9. It was the Applicant's submission that he was a first time offender. That the record did not indicate that he used force in the commission of the offence therefore he was not a violent person and he qualified for bail pending appeal.
10. The Applicant submitted that his Appeal had arguable and weighty grounds and had a reasonable chance of success.
11. It was the Applicant's submission that there was substantial delay in the hearing of his Appeal. That the Appeal was filed on 28th April 2023 but it had not been set down for hearing when the current Application was filed. It was his further submission that there was a likelihood that by the time the Appeal is determined, he would have served a substantial part of his sentence.



12. The Applicant submitted that if he was granted bail by this court, he will comply with the terms issued. On the guidelines that courts use in granting bail pending appeal, the Applicant relied on *George Wambugu Thumbi v Republic* [2018] KEHC 8118 (KLR) and *Yahya Ahmed* (supra).
13. It was the Applicant's submission that he deserved to be granted leave to amend his Appeal as he had made his Application timeously. That he wanted to add more grounds of appeal to ensure that all the issues are determined with finality. It was his further submission that it was a fair request and the Respondent would not suffer any prejudice.
14. The Applicant submitted that he has given a fair notice of the proposed amendments.

The Respondent's submissions

15. Through its submissions dated 12th August 2024, the Respondent submitted that the Applicant was convicted and he no longer enjoyed the presumption of innocence. That bail pending appeal was a discretionary power which must be exercised within laid down principles and conditions. They relied on *Dominic Karanja vs R* (1986) KLR 612.
16. It was the Respondent's submission that the Judgement of the trial court was well analysed and based on fact and law. That the trial court upon hearing all the prosecution witnesses, it found their evidence credible and overwhelming and it did not err when it found that ingredients of defilement proved.
17. The Respondent submitted that the Applicant had not demonstrated the existence of any supervening or compelling circumstances that would necessitate the grant of bail pending appeal. That the Applicant's assertion that he would have served his sentence by the time his Appeal was heard was misplaced. They further submitted that the Applicant should ask this court to hear his Appeal on a priority basis.
18. I have gone through and considered the Notice of Motion Application dated 31st January 2024, the Applicant's written submissions dated 4th November 2024 and the Respondent's written submissions dated 12th August 2024. The two issues for my determination are:-
 - i. Whether the Applicant should be granted leave to amend his Appeal.
 - ii. Whether the Applicant should be granted bail pending appeal.

i. Whether the Applicant should be granted leave to amend his Appeal.

19. Section 350 (2) (iv) of the *Criminal Procedure Code* provides:-

.....a petition of appeal may only be amended with the leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose.....
20. The Court of Appeal in *Tarmohamed v Mariakani Holdings Limited & another* [2022] KECA 122 (KLR) held:-

“leave to amend pleadings and documents upon a formal application is a discretionary power, which must be exercised judiciously and upon reason. In the exercise of this discretion, the principles that guide this Court are that a memorandum of appeal is a pleading like any other, and the rules that apply to amendment of pleadings will apply, namely that amendments should be liberally allowed, if they can be made without injustice to the other side, or where such injustice can be compensated by costs.”



21. The Applicant stated that he wanted to amend his Appeal and add more grounds that he could rely on. He further stated that the Respondent would not be prejudiced. The Respondent did not respond to this prayer which meant that the prayer for leave to amend the Appeal was unopposed.
22. It is my finding that the Applicant has satisfactorily explained the reason necessitating the amendment of his Grounds of Appeal. It was his right and would enable this court determine his Appeal fairly.

ii. Whether the Applicant should be granted bail pending appeal.

23. Article 49(1)(h) of the *Constitution* provides that:-

An accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

24. Section 356 of the *Criminal Procedure Code* provides that:-

- (1) The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.
- (2) If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the person, otherwise orders.

25. Section 357 of the *Criminal Procedure Code* provides that:-

- (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.

- (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.
- (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.



26. The principles to be considered in an application for bail pending appeal pursuant to the provisions of Section 356 and 357 of the *Criminal Procedure Code* were set out in the Court of Appeal case of *Jivraj Shah vs Republic* (1986) eKLR which held as follows:-

“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) EA 476 which was referred to by this court with approval in Criminal Application 5 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. It is almost self-defeating to attempt to define phrases or to establish formulae.”

27. I agree with the position of Mulwa J. in the case of *Charles Owanga Aluoch vs Director of Public Prosecutions* (2015) eKLR where she 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 *Jivraj 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.”

28. Similarly, the Court of Appeal in the case of *Dominic Karanja vs Republic* (1986) eKLR stated that:-

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and



children of the applicant are not exceptional or unusual factors: see *Somo v Republic* [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.....”

29. From the case law above, the conditions to be satisfied before a court can grant bail pending appeal can be summarised as follows:-

- i. Whether the appeal has overwhelming chances of success.
- ii. Whether there are exceptional or unusual circumstances to warrant the grant of bail pending appeal.

30. On the issue of whether the Appeal has an overwhelming chance of success, I am persuaded by Odunga J. (as he then was) in *Joshua Kiarie Nguguna vs Republic* (2021) eKLR, where he stated:-

“The rationale for considering the chances of success of the appeal was given in *Somo vs. R* (supra) 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, where 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.”

31. Similarly, Ochieng J. (as he then was) in *Sammy Libechi vs Republic* (2008) eKLR held that:-

“.....I am fully alive to the fact that should I be satisfied that the appeal had an overwhelming chance of success, there would be no good reason to keep the applicant behind bars pending the hearing and determination of his appeal.

32. The *Judiciary Bail and Bond Policy Guidelines* provide at page 27, paragraph 4.30 that:-

With respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.

33. The onus fell on the Applicant to persuade this court that he had an Appeal with overwhelming chance of success. I have gone through the grounds contained in the Appeal filed on 28th April 2023. I have also gone through the intended amended grounds to be added in the Appeal. It would be prejudicial to discuss the merits or demerits of the grounds of Appeal at this stage. From my perusal of the grounds of Appeal raised by the Applicant, I am satisfied that the Appeal is arguable. I am however not persuaded that *prima facie* the Appeal had overwhelming chances of success.

34. The second condition that the Applicant had to satisfy was the existence of exceptional or unusual circumstances. The Applicant stated that the exceptional circumstances were that the Appeal had not



been set down for hearing and the delay was prejudicial to him. That by the time the Appeal would be heard there would be a possibility that he would have served a substantial part of his sentence. On the other hand, the Respondent submitted that the Applicant's exceptional circumstances were misplaced and that he ought to have asked the court to hear his Appeal on a priority basis.

35. The conditions to be satisfied before a court grants bail pending appeal are quite stringent compared to bail pending trial. The court must always remind itself of the fact that the Accused person had been lawfully tried, convicted and sentenced. The Court of Appeal in *Mutua vs. Republic* (1988) KLR 497 stated:-

“It must be remembered that an applicant for bail pending appeal (emphasis mine) 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.

36. The same was restated by Onyiego J. in *John Koyi Waluke & another vs Republic* (2020) eKLR, where he stated:-

“For a court to grant bail pending appeal, it has to bear in mind that the applicant is no longer innocent. In other words, his/her benefits for release on bail terms under Article 49 (1) (h) of the *Constitution* are limited.”

37. That said, this court has discretion on whether or not to grant the Applicant bail pending appeal. The same was held in *John Koyi Waluke* (*supra*) where the court held:-

“.....The court has however the discretion to grant or not to grant a bail application depending on the circumstances of each case.....”

38. Similarly, the Court of Appeal in the case of *Mutua vs Republic* (1988) KLR 497 held:-

“.....It is trite that when considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judiciously.....”

39. I have considered the reasons fronted by the Applicant to be granted bail pending Appeal and it is my finding that they do not fall under exceptional or unusual circumstances. Firstly, the Applicant was lawfully convicted and properly serving his sentence. Secondly, on the likelihood of his Appeal facing delay, I have perused the record. It shows that the home-made Petition of Appeal was received in the court registry on 28th April 2023 whereupon the Deputy Registrar of the court called for the record of the lower court on 3rd May 2023. The process of admission of the Appeal was subsequently derailed by the present Application contributing to the delay. The Appeal has since been admitted pending the amendment as sought by the Applicant. The fear of delay in the disposal of the Appeal is therefore not founded. The Applicant is encouraged to prosecute his Appeal expeditiously.

40. In the final analysis, it is my finding that the Applicant had not demonstrated any exceptional circumstances to warrant grant of bail pending Appeal. It is my further finding and in exercise of this court's discretionary power that the Applicant does not merit bail pending Appeal. He however has an unlimited right of Appeal and a right to present his case before this court.

41. In the end, I make the following orders;

- i. The Notice of Motion dated 31st January 2024 succeeds partially as the Applicant is granted leave to amend his Appeal filed on 28th April 2023.



- ii. The Amended Grounds be filed within 30 days of today's Ruling.
 - iii. For avoidance of doubt, the Applicant is denied bail pending appeal.
- Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY, 2025.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant acting in person, Mr. Njeru for the State and Siele (Court Assistant).

