Case Number:	Criminal Application 532 of 1986
Date Delivered:	17 Dec 1986
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Barabara Kiprugut Tanui
Citation:	Douglas Kaariuki Mundia v Republic [1986] eKLR
Advocates:	Mr Harwood for the Republic Mr Khaminwa for the Applicant
Case Summary:	**Mundia *v* Republic** High Court, at Nairobi December 17, 1986 Tanui J Criminal Application No 532 of 1986 (In an intended appeal from a conviction and sentence of the Senior Resident Magistrate's Court at Kiambu, Ombonya Esq) ***Bail*** *– pending appeal – admission to – power to grant – discretionary power – exercise of – factors to be taken into account.* The appellant had been charged and convicted by the magistrate's court of the ofences of malicious damage to property and assault causing actual bodily harm contrary to sections 339(1) and 251 of the Penal Code respectivley. He was sentenced to 18 months imprisonment on both counts, the sentences to run concurrently. The appellant then made the application for bail pending entering of appeal under section 356 of the Criminal

Procedure Code (cap 75).

Held:

1. The Criminal Procedure Code (cap 75) section 356 permits admission to bail pending appeal.

2. Admission to bail pending appeal is a discretionary power which the court must exercise judicially in accordance with laid down principles.

3. Once a person has been convicted and sentenced, his application for bail pending appeal will be granted only in exceptional circumstances.

4. There is a presumption that once a person is convicted he was properly convicted.

5. The chances of the appeal succeeding is a factor for consideration in arriving at a decision in an application for bail pending appeal.

6. Bail pending appeal may be granted where there is a risk that the sentence will have been served by the time the appeal will be heard but there must exist the major issue of overwhelming chances of the appeal in the first instance.

7. In the present case there were no exceptional circumstances or combination of factors favouring the granting of bail.

Application refused.

Cases

1. *Motichand v Republic* Criminal Application No 21 of 1972 (unreported)

2. *R v Watton* (1979) 68 Crim App Rep 293

Statutes

1. Penal Code (cap 63) sections 251, 339(1)

2. Criminal Procedure Code (cap 75) section 356

3. Constitution of Kenya

Advocates

	Mr Harwood for the Republic *Mr Khaminwa* for the Applicant
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application Refused.
History County:	Kiambu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPLICATION NO. 532 OF 1986

DOUGLAS KAARIUKI MUNDIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

In this case the applicant was jointly charged with 6 others at Kiambu Senior Resident Magistrate's court with malicious damage to property contrary to section 339 (1) of the Penal Code and assault causing actual bodily harm contrary to section 251 of the Penal Code as the second count.

The appellant was convicted on both counts and was sentenced to 18 months imprisonment on each count both sentences to run concurrently. He has made this application to this Court for grant of bail pending entering of appeal under section 356 of the Criminal Procedure Code.

Mr Khaminwa for the applicant argued that the appeal (grounds of the proposed appeal attached to this Chamber Summons) has an overwhelming chance of success and quoted various authorities in support of his further contention that it was not, in fact, necessary for the applicant to be successful to show that the appeal had overwhelming chances of success but rather it would be sufficient if the applicant demonstrated a probability of success on appeal. The learned advocate also argued that the applicant suffered from high hypertension and diabetes. He submitted to the Court a certificate in support of that submission. He maintained that the custodial sentence was inappropriate in the present case and that the Court below should have considered imposing a fine or placing the applicant on probation.

Mr Harwood for the Republic strongly opposed the application. He submitted that one of the factors for consideration in a matter such as this one was whether or not the appeal had an overwhelming probability of success. He pointed to some parts of the evidence in the case saying that the learned magistrate had considered the evidence before him properly. Mr Harwood appeared to me to be saying that the appeal did not have any reasonable probability of success either on conviction or sentence. He further submitted that the prison authorities were capable of looking after the prisoners who are afflicted with disease such as the ones the applicant is suffering from.

I have considered with atmost care the authorities cited and the submissions made by the both sides. Section 356 of the Criminal Procedure Code permits admission to bail pending appeal. This discretion has to be exercised judicially and the authorities which have been cited lay down the principles that have to be followed. Mr Justice Muli, as he was then, correctly pointed out in *Motichand v Republic* (Criminal Application No 21 of 1972) that the fundamental rights and freedoms of the individual to his liberty of which the Constitution of the Republic Kenya enjoins should not be deprived of except as may be authorized by law. He allowed Motichand's application saying *inter alia* "the prospects of the appeal to me to reach realm of overwhelming probability of success". It is well established that after a person has

been convicted and sentenced his application for bail pending appeal will be granted only in exceptional circumstances in *Republic v Watton* (1979) 68 Criminal Appeal R 293 CA it was said that “the true test is” are there exceptional circumstances which would drive the court to the conclusion that justice can only be done by granting of =bail"

The chances of appeal succeeding is a factor for consideration in arriving at a decision in an application such as this one. However one would not lose sight of the fact that there is a presumption that once a person has been convicted he was properly convicted. Mr Khaminwa stated that in respect to the charge of assault only one person had claimed to have seen the applicant striking the complainant and that the High Court would not uphold the said conviction. Mr Harwood however pointed out that in fact the complainant had said the applicant had hit him and that his wife and daughter had both seen the applicant hit him. The evidence given by the three witnesses is that the applicant hit the complainant with a piece of wood. It follows therefore that in this case there may be arguable points but it cannot at this stage be said that the chances of appeal will almost inevitablly or even probably succeed.

Turning to the issue of the health of the applicant which was dealt with at length by Mr Khaminwa, I must point out that at nowhere has Dr Mngola said in his certificate that the applicant suffers from uncontrollable diabetes mellitus. The said doctor is very brief indeed and does not say anything more than that the applicant is suffering from hypertension and diabetes and has been under his medical care for the same since 1982. Although Hannah, the applicant’s wife swore in her affidavit of December 11, 1986 that the applicant had had to attend regular medication drugs and had to be attended very keenly and delicately as he is developing bouts of attacks of the disease it is surprising that Dr Mngola in his above certificate of December 8, 1986 said nothing of the sort.

Hannah stated in her affidavit of December 8, 1986 that if the applicant were to be kept in prison his condition was likely to worsen with unpredictable consequence. In it she went on to say that the applicant had to make extensive use of drugs and they cannot be adequately be administered at the prison conditions. I am not prepared to accept all these more so in view of the fact that Dr Mngola’s certificate is altogether silent on these matters. Mr Harwood for the Republic stated that diabetes was not an uncommon disease nor was it deadly as had been stated by Mr Khaminwa. He agreed that it required regular proper diet and was generous enough to suggest that prison authorities be contacted to enlighten the Court as to what facilities they had for such patients as the applicant. To this suggestion Mr Khaminwa’s reply was a big “NO”. To be honest this stand by the learned advocate for the applicant left me with surprise. I may point out here that medical facilities for prisoners who suffer from diseases such as these of the applicant do exist at the prisons of the Republic. I need not say that in a few bad cases the prison authorities do transfer them to hospitals for special treatment whenever necessary.

Bail pending entering appeal may also be granted where there is a risk that the sentence will have been served by the time when the appeal will be heard but there must exist the major issue of overwhelming chances of appeal in the first place. The trial court has a discretion on the nature and extent of the sentence to be imposed. The risk I referred to herein above does not exist in the present case.

I am not satisfied that there are exceptional circumstances or combinations of factors which in their totality amount thereto in the present case for granting the bail and consequently the application is refused.

Order accordingly.

Dated and Delivered in Nairobi this 17th day of December 1986.

B.K.TANUI

JUDGE