



**Ndege v Republic (Criminal Appeal E021 of 2024)
[2024] KEHC 10448 (KLR) (21 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL E021 OF 2024
FN MUCHEMI, J
AUGUST 21, 2024**

BETWEEN

PACIFICA AKIMBI NDEGE APPELLANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination dated July 1, 2024 seeks for orders for release on bail pending the hearing and determination of the appeal.
2. The applicant was charged in Criminal Case No. 6898 of 2018 at the Chief Magistrate’s Court at Thika with two counts of forgery contrary to Section 345 as read with 349 of the Penal Code; Count III obtaining registration by false pretences contrary to Section 320 of the Penal Code and Count IV conspiracy to defraud contrary to Section 317 of the Penal Code. The applicant was convicted and sentenced as follows; on Count I fourteen (14) months imprisonment Count II fourteen (14) months imprisonment Count III six (6) months imprisonment and Count IV one (1) year imprisonment. The sentences were to run concurrently.
3. The application was supported by an affidavit of the applicant’s eldest daughter one Beverly Moraa Ndege who deposes that the applicant filed an appeal against conviction and sentence and that the appeal has very high chances of success. The deponent further states that the applicant is an elderly lady, of ill health and in need of urgent medical attention. Her continued imprisonment pending appeal will further affect her already worsening health condition.
4. The deponent further states that during the pendency of the trial, the applicant faithfully obeyed the bail terms. The deponent avers that she will assure the court that the applicant shall attend court at all times.



5. The respondent filed a Replying Affidavit on 16th July 2024 to the effect that the intended appeal has no chances of success due to the overwhelming evidence against the appellant. Furthermore, the respondent argues that the applicant has to discharge the burden of proof that the appeal has high chances of success as unlike bail pending trial, bail pending appeal is not a constitutional right. There is a presumption that the applicant was lawfully convicted unless the contrary is proved.
6. Furthermore, the respondent states that the applicant has not discharged the burden that she shall serve a substantial part of the sentence in the event the appeal succeeds nor has the applicant demonstrated any exceptional circumstances to warrant the court's discretion to grant bail pending appeal.
7. The respondent argues that currently the law and practice favour quick determination of matters without unreasonable delay and thus the applicant is unlikely to serve a substantial part of the sentence before the appeal is heard and determined.
8. The respondent states that although the applicant is said to be of ill health and in need of urgent medical attention, no evidence has been produced to prove the same. Further, the prison department takes care of such matters in prison.
9. Parties put in written submissions.

The Applicant's Submissions

10. The applicant relies on Section 357(1) of the Criminal Procedure Code, Articles 49(1)(h), 50(2)(a) and 51(1) of *the Constitution* and submits that an appeal is a new trial and therefore the provisions of bail pending trial as provided in Article 49(1)(h) apply. The applicant further relies on the cases of *Jirraj Shah vs Republic* (1980) KLR 605 and *Republic vs Kanji* (1946) 22 KLR and submits that the applicant has demonstrated exceptional circumstances to warrant grant of bail pending appeal as she has shown that there will be a delay in the hearing of the appeal, the fact that she is a first time offender and the fact that she is of ill health.
11. The applicant argues that from the petition of appeal, she has a prima facie appeal with high chances of success as there appears to be a substantial point of law to be argued on appeal. The petition speaks to the locus standi and authority of the complainant, a perusal of the charge sheet and the testimony of the complainant speaks volumes in that there was no offence committed against the complainant as she was non-existent in that particular period the offence is alleged to have been committed against her. The complainant did not qualify to be a victim and therefore there was no offence to be tried. The applicant further argues that the conviction and sentence were erroneous as there was complete want of evidence.
12. The applicant submits that it is now an established principle of law that she need not demonstrate that all the conditions for admission to bail pending appeal have been met, but having satisfied a combination of two or more conditions sufficiently qualifies for admission to bail pending appeal.
13. The applicant relies on the case of *Gerald Macharia vs Republic (Criminal Appeal No. 119 of 2004)* and submits that at the current stage of appeal, the main consideration remains the right to have the appeal determined finally and the high likelihood of the appeal succeeding. The applicant urges the court to exercise its discretion in her favour and grant her bail pending the outcome of the appeal.

14. The Respondent's Submissions.

15. The respondent relies on Section 357(1) of the Criminal Procedure Code and the case of *Jivraj Shah vs Republic* [1986] eKLR and submits that the applicant has not met the required threshold for an



application for bail pending appeal. Further, the respondent relies on the case of *Somo vs Republic* [1972] EA 476 and submits that the appeal does not have overwhelming chances of success as the evidence shows that the applicant was properly convicted. The respondent further submits that the applicant has failed to demonstrate that he shall serve a substantial part of the sentence if the appeal is likely to succeed.

16. The respondent relies on the case of *R vs Kanji* [1946] 22 KLR and submits that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.
17. Relying on the case of *Chimambhai vs Republic* [1971] EA 343, the respondent contends that currently, the law and practice favour quick dispensation of matters without an unreasonable delay. The respondent argues that the applicant failed to discharge the burden of proof that he is likely to serve a substantial part of the sentence before the appeal is heard which in turn could be successful hence leading to prejudice. The respondent further submits that the applicant's good character and ill health would not constitute exceptional circumstances for there exists medical facilities in prison to serve the convicts and remandees. That notwithstanding, the respondent submits that the applicant has not tendered evidence of ill health such as medical documents.

The Law

Whether the applicant has met the threshold for granting bail pending appeal.

18. Section 357(1) of the Criminal Procedure Code provides for the granting of bail pending appeal, it states that:-

After 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.
19. The principles for granting bond pending appeal were reiterated in the case of *Jivraj Shah vs Republic* [1986] KLR 605 which laid down the principles as follows:-
 - a. 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.
 - b. 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.
 - c. 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.
20. It is trite law that in considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration the following factors.

Does the appeal have overwhelming chances of success?

21. The applicant argues that the appeal has a high probability of success as she was convicted without the case being proved to the standards required.



22. In the application herein, only the judgment on sentence of the trial court was availed but not the proceedings. I have carefully examined the grounds of appeal and without pre-empting the appeal, that the said grounds do not disclose the existence of an appeal with an overwhelming chance of success. This does not mean that the appeal is not arguable. The appellant will still have her day in court to argue her appeal.

Is there a possibility of delay in hearing and determining the Appeal?

23. The applicant was sentenced on 3/6/2024 to fourteen (14) months imprisonment on Count I; fourteen (14) months imprisonment on Count II; six (6) months imprisonment on Count III and one (1) year imprisonment on Count IV. The sentences were to run concurrently.

24. It is highly unlikely that the applicant shall serve a substantial part of the sentence before the appeal is heard. The court diary is accommodative of appeals whereas hearing dates are available. As such, I am of the view that the applicant will not serve a substantial part of her sentence before the appeal is heard and determined.

Demonstration of exceptional or unusual circumstances

25. In *Dominic Karanja vs Republic* [1986] KLR 612 the Court of Appeal held:-

- 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 exceptional circumstances 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;

26. Similarly in *Peter Hinga Ngotho vs Republic* [2015]eKLR it was held that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.

27. In the instant case, the applicant argued that she is an elderly lady and of ill health and in need of urgent medical attention. It is noted that no medical report or treatment notes were produced to support the alleged poor health condition of the applicant if any. However, it is notable that prisons have facilities for treatment of prisoners and where the illness turns out to be serious the sick person can be taken to Government hospitals.

28. It is my considered view that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.

29. I therefore find that the application dated July 1, 2024 lacks merit and is hereby dismissed.

30. It is hereby so ordered

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

