



REPUBLIC OF KENYA



**Obiero v Republic (Miscellaneous Criminal Application E280 of 2022)  
[2023] KEHC 2801 (KLR) (Crim) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 2801 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E280 OF 2022  
JM BWONWONG'A, J  
JANUARY 25, 2023**

**BETWEEN**

**BEN ONYANGO OBIERO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for bail pending appeal of the judgement, conviction and sentence of 15 years imprisonment delivered by Hon. M. Maroro P.M on 9th June 2022 in Kibera Chief Magistrate's Court in Criminal Case No. 1356 of 2019 Republic vs Ben Onyango Obiero & another)*

**RULING**

**The case for the applicant**

1. The appellant was tried, convicted and sentenced to 15 years imprisonment in respect of the offence of simple robbery contrary to section 296 (1) of the *Penal Code* (cap 63) Laws of Kenya.
2. He has now under certificate of urgency through his notice of motion, applied for both leave to appeal out of time and for bail pending the hearing and determination of his appeal.
3. According to his affidavit to which he has annexed the judgement, from which he has filed an appeal, he was convicted and sentenced on 09/05/2022. He has further averred as follows.
4. On 31/08/2022 the appellant's brother applied for a copy of judgement and proceedings, which he received on 21/09/2022.
5. The appeal has overwhelming chances of success. He has averred that the appellant will have served a substantial part of his sentence before his appeal is heard.



6. He was sentenced to serve 15 years imprisonment. He has sought to be released on bail pending the hearing and determination of his appeal. He will suffer prejudice if he is not granted bail. The appellant is not a flight risk and is willing to abide by any terms the court may impose.

### **The appellant's written submissions**

7. Counsel for the appellant (Messrs Oyugi Ochieng Advocates) have cited article 50 (2) (q) of the *Constitution* of Kenya, which guarantees to an accused who has been convicted of an offence a right of appeal. Counsel has also cited *Salat v IEBC & 7 others* (2014) e-KLR, in which the Supreme Court set out the principles to be applied in exercising its discretion to extend time within which to appeal out of time.
8. In respect of application for bail pending the hearing and determination of the appeal, counsel has cited section 157 (1) of the *Criminal Procedure Code* (cap 75) Laws of Kenya. Counsel has also cited the well-known case of *Jivraj Shah vs R* (1986) KLR 605, in which the Court of Appeal held that the principal considerations in an application for bail pending appeal include the following. The existence of exceptional or unusual circumstances in the appeal.
9. Whether the appeal has overwhelming chances of success in respect of which counsel has cited *Somo vs Republic* (1972) EA 476.

### **The case for the respondent**

10. The respondent filed grounds of opposition in opposition to the application. Counsel for respondent, Ms. Edna Ntabo stated that the application lacks merit and that the applicant has not demonstrated that he is deserving of the court's discretion.
11. Counsel has submitted that the applicant has not demonstrated that his appeal involved unusual or exceptional circumstances.
12. Additionally, counsel has also submitted that the appellant has not demonstrated his appeal has overwhelming chances of success.

### **Issues for determination**

13. I have considered the supporting affidavit, the submissions and the applicable law of the appellant. I have also considered the submissions of the respondent.

As a result, I find the following to be the issues for determination.

1. Whether the appellant has met out a case for the grant of leave to appeal out time.
  2. Whether the appellant has met out a case for the grant of bail pending the hearing and determination of his appeal.
14. This appeal cannot in law be deemed to have been duly filed, because the appeal has to be subjected to provisions of section 352 of the Criminal Procedure Code, which are in relation to admissions or summary rejection of appeals.

### **Issue 1**

15. During the oral hearing of the application the respondent conceded ~ to the applicant's application for leave to appeal out of time. I find that the concession by the respondent is well merited and I uphold. I therefor grant leave to the applicant to file his leave within 20 days.



16. Appeal cannot be deemed to have been filed because an appeal is subject to section 352 of the *Criminal Procedure Code*.

## **Issue 2**

17. I have perused the judgement, the grounds of appeal and the submissions of the appellant. I find that the averment that the appellant is not a flight risk is not a relevant factor in considering an application of this nature. The reason being that the appellant has already been convicted and is longer an innocent person.
18. It is upon the appellant to demonstrate that his appeal has overwhelming chances of success. It is also upon him to demonstrate that his appeal involves exceptional or unusual circumstances. He has failed to do so, with the result that his appeal fails and is hereby dismissed.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2023.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of-**

**Mr. Kinyua court assistant**

Mr. Gweth for the applicant/appellant

Mr. Chege for the prosecutor/respondent.

The applicant in person.

