



**Ogallo v Republic (Criminal Appeal E045 of 2021)
[2023] KEHC 2639 (KLR) (Crim) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E045 OF 2021
JM BWONWONG'A, J
FEBRUARY 28, 2023**

BETWEEN

CALVIN OTIENO OGALLO APPLICANT

AND

REPUBLIC RESPONDENT

(Hon. Lady Justice C.W Githua on 21st April 2022)

RULING

1. The appellant was tried and convicted by the trial court for the offence of trafficking in narcotic drugs contrary to section 4 (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#), No. 4 of 1994.
2. He was sentenced to a fine of Kshs. 2 million in default to serve one year imprisonment. In addition, he was sentenced to serve 7 years imprisonment.
3. He appealed against his conviction and sentence in this court. In a judgement delivered by Hon. Lady Justice C.W Githua on 21st April 2022, his appeal was dismissed in its entirety.
4. The appellant filed his notice of appeal on 5th May 2022. Additionally, the appellant filed his appeal in the Court of Appeal on 5th May 2022.
He now wishes to appeal to the Court of Appeal.
5. He has approached this court by way of a chamber summons dated 5th December 2022, seeking to be released on bail pending the hearing of his appeal in the Court of Appeal.
6. The application is brought pursuant to section 6 (a) of the [Appellate Jurisdiction Act](#), section 357 (1) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya, and article 50 (2) (q) of [the Constitution](#) of



Kenya. The application is grounded on the facts on the face of the notice of motion and supported by an affidavit sworn by the applicant's advocate dated 5th December 2022.

7. The applicant has raised the following grounds. The applicant intends to prefer an appeal to the Court of Appeal. By the time his appeal is heard and determined, he will have served a substantial part of his sentence. The applicant has previously complied with the conditions of his bail/bond which were imposed by the lower court, thus making him a candidate for the grant of the orders sought.
8. He has an arguable appeal with high chances of success. He is sickly, and has a young family depends on him.

The applicant's written submissions

9. Mr. Ogutu, learned counsel for the applicant submitted that the appellant has enumerated several grounds of appeal, which he argues indicates that his appeal has high chance of success. He submitted that the appellant is likely to serve a substantial part of his sentence before his appeal is heard. Further, the instant application has not been opposed, as such he should be granted the orders sought.

The respondent's written submissions

10. The respondent did not file any submissions; despite being given the opportunity to do so

Issues for determination

11. I have considered the application, the written submissions and the applicable law. As a result, I find that the following are the issues for determination.
 - i) Whether this court has jurisdiction to entertain and determine the application.
 - ii) Whether the orders sought should be granted.

Analysis and determination

14. I have considered the application and the respective submissions. I will first address the issue of jurisdiction; whether the court can entertain the application as presently filed. It was held in *Owners of the Motor Vessel "Lillian S" v Caltex Oil(Kenya) Ltd* [1989] KLR 1, (Nyarangi J.A.) that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

15. The matter before the court was brought under section 6 (a) of the *Appellate Jurisdiction Act* which states:

“The High Court may, if it thinks fit, pending the determination of an appeal from the High Court to the Court of Appeal

- (a) admit the appellant to bail;”

16. It is clear from this section that in order for this court to exercise its jurisdiction to admit the applicant (Cap 9) Laws of Kenya to bail an appeal must be pending for determination. A reading of section 6 shows that it is left to the Court's discretion to grant or not to grant bail. The discretion of the Court must however, as always, be exercised judiciously.



17. Additionally, section 379 (4) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, also confers jurisdiction on this court to grant bail pending the hearing and determination of the appeal, which provisions state that:

- “(1)
- (2)
- (3)
- (4) Save in a case where the appellant has been sentenced to death, a judge of the High Court, or of the Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.”

18. The principles for the grant of bail pending appeal are settled. These are the existence of exceptional or unusual circumstances upon which the appellate court can fairly conclude that it is in the interests of justice to grant bail and secondly the court must be satisfied that the appeal has high chances of success and the sentence or substantial part of it will have been served by the time the appeal is heard.

19. In the instant application it is alleged that the appeal has high chances of success and the appellant will have served a substantial part of his sentence. I have carefully examined the grounds of appeal raised by the applicant. The rationale for considering the chances of success of the appeal was explained in *Somo v R* [1972] EA 472 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.”

20. In this case, I have considered the grounds of appeal raised in the petition of appeal. However, I am not satisfied that the said grounds disclose the existence of an appeal with overwhelming chances of success. Whereas the appellant may succeed in arguing the said grounds at the hearing of the appeal, I am not satisfied that the chances of the appeal succeeding are overwhelming. The grounds relied upon are the usual grounds and no ground stands out as one that is very likely to succeed even before the same is argued.

21. As regards the exceptional circumstances, it is argued that the appellant’s appeal is likely to be determined after the sentence is served. The appellant was sentenced to a cumulative sentence of 7 years imprisonment. The appellant’s apprehension, as I understood it is that the appeal will take a long time to be heard and determined.

22. However, it is possible to have this appeal heard and determined expeditiously and without delay.



23. The upshot of the above analysis is that the applicant has not demonstrated the existence of exceptional or unusual circumstances to warrant the grant of bail pending appeal. He has also not demonstrated that his appeal has overwhelming chances of success.

24. The application for bail pending appeal to the Court of Appeal is hereby dismissed.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE THIS 28TH DAY OF FEBRUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of: -

Mr. Kinyua court assistant

Mr Ogutu for the applicant

Mr Otieno for the respondent

