



REPUBLIC OF KENYA



KENYA LAW
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**Murei v Republic (Criminal Appeal E002 of 2023)
[2023] KEHC 3445 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E002 OF 2023
CM KARIUKI, J
APRIL 27, 2023**

BETWEEN

HARON KIPKOGEI MUREI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Conviction and Sentence of Hon C Muhoro Senior Resident
Magistrate in Nyahururu Chief Magistrate's Criminal Case No. E398 of 2022)*

RULING

1. In the instant matter, the applicant lodged the same, seeking to be admitted to bail pending appeal.
2. The matter was placed before the duty Judge for the Region *ex parte*, and the Learned Judge made orders to the effect that; the applicant admitted bail/bond of Ksh. 100,000 or cash bail of Ksh. 50,000 pending inter parte hearing.
3. The matter came to me for an interparty hearing, and parties filed submissions to canvass the application
4. The Notice of Motion dated 20/1/2023 is anchored on section 357 of [CPC](#) cap 75 and is based on the grounds; -
 - a. That applicant was charged in criminal Case No. E 398 of 2022 before the Chief Magistrate Nyahururu Law Courts.
 - b. That the Applicant was charged with one count of obtaining money by false pretense contrary to section 313 of the [Penal Code](#).
 - c. The Senior Resident Magistrate convicted the applicant and filed the instant appeal.



- d. The applicant has good grounds of appeal with overwhelming chances of success.
 - e. That the respondent will suffer no prejudice if the application is allowed as prayed.
5. It is also supported by the affidavit Ojare Peter Sworn on 20/1/2023, which in summary depones to:
 - i. That the applicant was charged with one count of obtaining money by false Pretence Contrary to section 313 of the *Penal Code* (Annexed hereto and marked OP -1 is a copy of the Charge sheet)
 - ii. That the applicant was released on Bond terms of paying a cash bail of Kenya Shillings One Hundred Thousand (Ksh. 100,000) which was paid. (Annexed hereto and Marked OP -2 is a copy of the receipt).
 - iii. The Senior Resident Magistrate convicted the applicant and filed the instant appeal. (Annexed hereto and marked OP-3 is a copy of the Memorandum of Appeal).
 - iv. The applicant has good grounds of appeal with overwhelming chances of success.
6. The applicant has also sworn a further on 8/2/2023 in which he reiterates what is in the grounds and the replying affidavit. The applicant filed submissions, and so is the Respondent. However, I did not see any replying affidavit by the Respondent on record.

Applicant 's Submissions

7. It is submitted that the applicant in this matter was already granted cash bail of Ksh. 50,000 pending the hearing and determination of this application.
8. The instant application is premised on section 357 of the *Criminal Procedure Code*. On the Principles for granting bail/bond, it is submitted that the same were set out in the case of *Jivraj Shah v Republic* [1986] KLR 605 quoted in *Charles Ratemo v Republic* [2021].
9. It is submitted that the appeal filed herein has a high chance of success, and if the said application is not allowed the appeal will be rendered nugatory. The applicant was sentenced to Eighteen months of imprisonment a period which is less than two years. By the time this appeal is heard and determined it is obviously evident that the applicant would have suffered a substantial period of time in the prison.
10. Due to the requirement that proceeding of the lower court matter be typed the registry may not have the typed proceedings on time. This might take a long period of time while the applicant is denied cash bail when it is evident that there is a high chance of success.
11. The applicant submits further that, the proceedings in the lower court matter clearly indicate that the accused person was merely a witness to the agreement made between the complainant and one Regina Kiboi. The evidence also shows that the money claimed to have been obtained was actually given to the complainant's daughter and that the trial Magistrate failed to appreciate that the accused person was given money by Stephen Wanjohi Kingori as a friendly loan and which loan he had already repaid in the witness of an advocate.



12. The applicant submit that the prosecution did not present a water tight case to guarantee the accused person being put to jail. The elements of Obtaining Money by false pretence were neither presented to the Honourable Court.
13. He relies on the case of *R v Kanji* [1946] 22 KLR quoted in [Charles Ratemo v Republic](#) [2021] eKLR.

Respondent's Submission

14. The respondent relies on the principles for granting bond pending Appeal as set out in the case of [Jivraj Shah v Republic](#) (1986) eKLR.
15. It is submitted that; the the appeal has no overwhelming chances of success. The bail and bond policy guidelines page 27 paragraph 4.30 provided that the burden is on the convicted person to demonstrate that there is an overwhelming chance of success. In particular instance the record is not ready hence I cannot completely tell whether the appeal has overwhelming chances of success. A perusal of a copy of the charge sheet, a copy of receipt for payment of bond at Kshs. 100,000 and a copy of a memorandum of appeal does not demonstrate that there is existence of overwhelming chances of success of the appeal, for the appellant/applicant ought to have annexed copies of the proceedings and/or judgment.
16. Further, it is submitted that the appellant was sentenced to 18 months imprisonment on 11/1/2023; hence there is no likelihood of him having served a substantial part of the sentence before the proceedings are typed, and the appeal heard and that the Appellant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending Appeal as held in [Dominic Karanja v Republic](#) 1986 KLR 612 that the previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual circumstances. Also relied on is the case of [Peter Hinga Ngogho v Republic](#) 2015 eKLR .and Appeal No E002 of 2022 in [Chrispus Kariuki Ndungu v Republic](#) .

Determination

17. Bail pending appeal is granted depending on the cogency of the grounds of appeal, the exercise of the court's discretion, and the case's particular facts. Section 357 (1) of the [Criminal Procedure Code](#) provides for admission to bail or suspension of sentence pending appeal. It provides that:

“-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.”
18. The principles governing the grant of bail pending appeal differ from that governing bail before conviction and include: -i) Whether leave to appeal has been granted. I) Whether there is a strong likelihood of success of the appeal) Whether there is a risk that if bail is not granted, the sentence will have been served by the time the appeal is heard. In [Dominic Karanja v Republic](#) [1986] KLR 612, the Court of Appeals considered conditions that an applicant for bail pending appeal should satisfy before the application can be granted.
19. The court 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. 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 an exceptional circumstance where there existed medical facilities for prisoners. (c) A solemn assertion by an applicant that he will not abscond if released, even if sureties support it, is not sufficient ground for releasing a convicted person on bail pending appeal. (d).

20. A single factor is not enough to warrant a grant of bail, but the totality and cumulative considerations of all the facts of the case. Unlike an application for bail pending trial, where the applicant has a constitutional right to be considered innocent until proven guilty (article 49 of the Constitution), an applicant for bail pending appeal stands on the premise that he has already been found guilty of the offense. In an application for bail pending appeal, the principal consideration is whether the appeal is likely to succeed (*Ademba v Republic* [1983] KLR PG 442).
21. At this stage, the burden lies with the applicant to establish that the appeal has a high chance of success and that the applicant is likely to serve a substantial part of his sentence before his appeal is heard.
22. The applicant has raised the issue that the proceedings in the lower court matter clearly indicate that the accused person was merely a witness to the agreement made between the complainant and one Regina Kiboi. The evidence is said to demonstrate that the money claimed to have been obtained was actually given to the complainant's daughter and that the trial Magistrate failed to appreciate that Stephen Wanjohi Kingori gave the accused person money as a friendly loan and which loan he had already repaid in the witness of an advocate.
23. The prosecution does not rebut this. Thus, prima facie presents an overwhelming chance of success as it would negate the elements of Obtaining Money by false pretenses. This is the principal element of the bail/bond pending appeal grant.
24. The appellant was sentenced to 18 months imprisonment on 11/1/2023, and the time-lapse since then is about four (4), and proceedings have not been typed, nor directions given the record be prepared. Taking to account that August to September vacation and December /January months reduces the time for the processes aforesaid, there is the likelihood that the applicant will have served a substantial part of the sentence before the proceedings are typed and the appeal heard if bail/bond already given exparte is now withdrawn in this application.
25. I find the circumstances of these case demonstrate an element of exceptional circumstances as the court is called to withdraw an already bail/bond granted except in the aforesaid scenario.
 - i. Thus, I affirm and uphold the orders granting bail/bond by my brother Judge herein and order the appeal be heard on a priority basis.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 27TH DAY OF APRIL 2023.

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CHARLES KARIUKI

JUDGE

