



REPUBLIC OF KENYA



KENYA LAW
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**Kiruthi & 7 others v Republic (Criminal Appeal E224 of 2023)
[2023] KEHC 21438 (KLR) (Crim) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E224 OF 2023
DR KAVEDZA, J
JULY 28, 2023**

BETWEEN

**FREDRICK KINYANJUI KIRUTHI 1ST APPLICANT
NGAI NJERU 2ND APPLICANT
IRENE WANGUI WAWERU 3RD APPLICANT
CHARITY MUMBU NJUE 4TH APPLICANT
GERALD MAINA GACHAU 5TH APPLICANT
ANNE WAMBUI WAWERU 6TH APPLICANT
REGINAH NJERI KINYANJUI 7TH APPLICANT
JOYCE WAMBUI WAWERU 8TH APPLICANT**

AND

REPUBLIC RESPONDENT

*(Being an application for bail pending appeal of the judgment, conviction
and sentence of Hon. Martha Mutuku- CM delivered on 8th July,
2022 in Milimani Chief Magistrates' Court Case No. 873 of 2011)*

RULING

1. The applicants/appellants were each charged with various offences ranging from obtaining money by false pretences contrary to section 313 of the Penal Code, obtaining registration by false pretences contrary to section 320 of the [Penal Code](#), and acquisition of property from the proceeds of crime contrary to section 4(a) as read with section 16(1)(a) of the [Proceeds of Crime and Anti-Money](#)



Laundering Act to which they were convicted and subsequently, the trial court imposed diverse sentences.

2. In particular, the 1st, 2nd and 3rd applicants were charged and convicted with four counts, to wit; obtaining money by false pretences contrary to section 313 of the Penal Code as per counts I and II, and obtaining registration by false pretences contrary to section 320 of the Penal Code under counts III and IV. The said 1st, 2nd and 3rd applicants were consequently sentenced to a cumulative sentence of 2 years imprisonment.
3. It is noteworthy that the 4th, 5th, 6th, 7th and 8th applicants were similarly convicted and sentenced to various fines, in default to serve respective terms. However, having paid fines in the interim, the application subject of this ruling only concerns the 1st, 2nd and 3rd applicants.
4. Nevertheless, being dissatisfied with the decision of the trial court, the applicants filed a memorandum of appeal. Simultaneously, the applicants filed an application dated 1/12/2022 seeking to be released on reasonable bail and/or bond terms pending the hearing and determination of the appeal. The application is premised on the grounds on the face of the application and supporting affidavit of Stanley Kang'ahi, advocate for the applicants, of even date.
5. The grounds are that the applicants are likely to serve the whole or a substantial part of their sentences before the appeal is determined. Further, that the appeal has overwhelming chances of success. It was also averred that the applicants were all out on bond during the hearing at the trial court and are therefore willing to abide by any reasonable bail terms that the court may grant.
6. In response to the application, the respondent filed grounds of opposition dated 14th July, 2023. The grounds raised are that the applicants have not demonstrated any special or unusual circumstances to warrant the grant of bail pending appeal. Further, that the application lacks merit and should be dismissed.

Applicants' written submissions

7. Mr. Kang'ahi, learned counsel for the applicants submitted that there are exceptional and unusual circumstances to warrant grant of bail pending appeal for the 1st, 2nd and 3rd applicants. He urged that the said applicants having been sentenced on 12/7/2022 have served half of the imposed sentence, and that taking into account remission, they have a balance of less than 6 months. The court was therefore urged to allow the application failure to which the appeal would be rendered nugatory.

Respondent's written submissions

8. Ms. Edna Ntabo learned counsel for the respondent submitted that the appellant has not demonstrated any exceptional circumstances to be granted bail pending appeal. Secondly, on whether the appeal has high chances of success, learned counsel submitted that the nature of the offence committed and the weight of evidence adduced will require a thorough evaluation upon appeal to make a concrete decision.
9. Finally, learned counsel submitted that there would be no inordinate delay in hearing the appeal as the court is currently handling 2023 matters. The appellant's appeal will be therefore expedited and heard and determined within a reasonable time. Counsel asserted that the appellant has not met the threshold to be released on bail pending appeal.



Issues for determination

10. I have considered the application and the rival submissions by the parties. As a result, I find that the issue for determination is whether the 1st, 2nd and 3rd applicants have met the threshold for the grant of bail pending the hearing and determination of the appeal.

Analysis and determination

11. The provision of law that applies to bond/bail pending appeal is section 357 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya which provides as follows:
- (1) 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.
12. The principles for granting bond pending appeal were reiterated in the case of [Jivraj Shah v Republic](#) [1986] KLR 605 which laid down the principles as follows:
- “(1) 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.
- (2) If it appears prima face 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.
- (3) 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.”
13. In the case of [Chimambhai v Republic](#) 1971 EA 343 J. Harris made another observation in such an application when he said:
- “The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....”
14. Under Article 49 of the [Constitution](#) of Kenya an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proved guilty, unlike a case where one is already convicted. In the above cases, the courts also held that anticipated delay in the hearing of the appeal, together with other factors may be grounds for grant of bail pending appeal.
15. Firstly, has the applicant demonstrated overwhelming chances of the appeal being successful? I have carefully examined the grounds of appeal raised by the applicant. Primarily, the 1st, 2nd and 3rd applicants



contend that the trial magistrate erred in law and in fact in convicting and sentencing them whilst failing to note that counts I and II related to a cumulative payment of the same subject matter, to wit, land parcel Kajiado/ Kaputei North/1420 and thus, a sentence on each count was unfounded.

16. The court is called upon at this stage to evaluate the evidence and make a finding as to whether, on the basis of the alleged error, the appeal has overwhelming chances of success, hence result to an acquittal. It is trite law that the measure of what is an appropriate sentence in a given case is left to the discretion of the trial court. In as much as I find the ground raised by the applicants to be arguable, I am however not convinced that the appeal has overwhelming chances of success.
17. As to the question whether there are any exceptional circumstances, the applicants have argued that they are bread winners on whom their families depend on. However, this does not constitute unusual or exceptional circumstances that warrants their release on bail pending appeal.
18. It was further argued that the applicants are likely to serve a substantial part of their sentence before the appeal is heard and determined. The applicants were sentenced to serve a cumulative term of two (2) years. The applicants' apprehension, as I understood is that the appeal will take long to be heard. However, it is my view that it is possible to have this appeal heard and determined expeditiously, without delay.
19. 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. The application dated 1st December, 2022 is therefore dismissed.

It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2023.

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Chege for the State.

Mr. Kang'ahi for the respondent.

