



REPUBLIC OF KENYA



KENYA LAW
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**Ogalo v Republic (Criminal Appeal E042 of 2023)
[2023] KEHC 20978 (KLR) (Crim) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E042 OF 2023

DR KAVEDZA, J

JULY 28, 2023

BETWEEN

CALVIN OTIENO OGALO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an application for bail pending appeal from the conviction and sentence delivered by Hon. Z. Abdul (SRM) on 4th August 2022 at Milimani Chief Magistrate's Court criminal case no. 422 of 2015 Republic vs Calvin Otieno Ogallo)

RULING

1. The applicant was charged and after a full trial convicted on four counts for the following offences. Count I, being in possession of a firearm contrary to section 89 (1) of the *Penal Code*. Count II, being in possession of ammunition contrary to section 89 (1) of the *Penal Code*. Count III, personating a public officer contrary to section 105 (b) of the *Penal Code*. Count IV, forgery contrary to section 345 as read with section 349 of the *Penal Code*. In counts I and II, he was sentenced to serve a term of five (5) year imprisonment each and one (1) years imprisonment for counts III and IV respectively. The sentences were to run concurrently, Being dissatisfied with the decision, he filed a petition of appeal dated February 9, 2023.
2. Simultaneously, he filed a notice of motion dated February 9, 2023, seeking his release on reasonable bail and/or bond pending the hearing and determination of his appeal. The application is premised on the grounds on the face thereof which are reiterated in the supporting affidavit sworn by the applicant of a similar date and a further affidavit dated March 29, 2023. They are that the appeal has overwhelming chances of success. The appellant will have served a substantial part of the sentence. He was admitted to bail before the trial court and did not abscond. He is not a flight risk. His health has



deteriorated since his incarceration and needs medical attention outside the prison. He undertakes to abide by the terms set by the court.

3. In response, the respondent filed grounds of opposition dated April 10, 2023. The grounds raised were that the application is misconceived and unsubstantiated. That it does not meet the threshold for grant of the orders sought.

Applicant's Written Submissions.

4. The appellant submitted that there exist exceptional circumstances upon which bail should be granted pending appeal. He argued that evidence has been provided of his deteriorating health in prison. It was submitted his poor health would not allow him to adequately prepare for his appeal. He urged the court to find that this was an exceptional circumstance and grant the orders sought. He cited the case of *Dominic Karanja v Republic* [1986]eKLR in support.

Respondent's Written Submissions.

5. The respondent submitted that the court ought to consider whether the issue raised constitutes an exceptional circumstance to warrant the grant of bail pending appeal. It was further submitted that the evidence against which the applicant was convicted was cogent and proved the prosecution's case beyond reasonable doubt. On the argument that the applicant will have served a substantial part of his sentence, it was submitted that the appeal can be heard on a priority basis.

Issues For Determination.

6. Having considered the application, the written submissions, and the applicable law, the issue for determination is whether the appellant has met the threshold for the grant of bail pending appeal.

Analysis And Determination.

7. I have considered the pleadings and submissions by the appellant and the respondent. 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.

8. The principles for granting bond pending an 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.”

9. 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.....”

10. Under article 49 of the *Constitution* of Kenya, 2010 an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proven 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.

11. I have carefully examined the grounds of appeal raised by the applicant. The applicant states that the appeal herein has a high chance of success and one need only look at the judgment and petition of appeal to see the trial court failed to rely on the full record of proceedings in writing the judgement.

12. The rationale for considering the chances of success of the appeal was given in *Somo v Republic* [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.”

13. In this case, I have considered the seven 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.

14. As regards the exceptional circumstances, it is argued that the appellant’s appeal is likely to be determined after the sentence is served. In addition, his health has deteriorated since his incarceration, and needs medical attention outside the prison system. The appellant was sentenced to serve a cumulative of five (5) years imprisonment. The appellant’s apprehension, as I understood it 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 and without delay.

15. On the issue of the appellant's health, the alleged ill-health of the appellant is similarly not an exceptional matter, as the Prison facility has not been shown to be ill-equipped to deal with his treatment, and there is always the opportunity to refer a patient to hospitals with higher levels of facilitation should a need arise. It is also immaterial that the appellant has been on bail pending trial as he is now convicted and has lost the presumption of innocence and the flight risk is considerably increased by the reality of a conviction and sentence for an aggregate of 5 years imprisonment.
16. 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 for bail pending appeal is 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.

Joy C/A

