



Njeru & another v Director of Public Prosecution (Miscellaneous Criminal Application E054 of 2023) [2023] KEHC 22945 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CRIMINAL APPLICATION E054 OF 2023
TW CHERERE, J
SEPTEMBER 28, 2023**

BETWEEN

DUNCAN MWIRIGI NJERU 1ST APPLICANT

FESTUS MURUTANI NJERU 2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. Both Duncan Mwirigi Njeru and Festus Murutani Njeru (1st and 2nd applicants respectively) were charged in Tigania Criminal Case No. 367 of 2020 and convicted for obtaining money by false pretences contrary to section 331 of the Penal Code for which each was fined KES. 80,000/- in default of which they are to serve 9 months imprisonment.
2. By chamber summons dated August 24, 2023 filed on August 25, 2023 brought under section 357 (1) of the *Criminal Procedure Code*, Applicants have moved the court for orders that they be admitted to bail pending the hearing and determination of the Meru Cr.app. No. E0110 Of 2023 appeal mainly on the ground that the appeal has a high chance of success.
3. The application is supported by an affidavit sworn by Mr. Moses Kithure Laikuru, advocate for the applicants sworn on August 24, 2023 in which he reiterates the grounds on the face of the application. In addition, counsel contends that applicants are bread winners of their respective families and 1st applicant is sickly.
4. Ms. Rita for the respondent opposed the application on the ground that no exceptional circumstances had been demonstrated to warrant the grant of bail pending appeal.



Analysis and Determination

5. I have carefully considered the application in the light of the affidavit on record and the response on behalf of the State.
6. Section 357 of the *Criminal Procedure Code* provides: -
 - (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
7. This court is thus clothed with the power to grant bail/bond with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal. In granting bail pending appeal, the court is obliged to consider the circumstances of each case so that the discretion is exercised judiciously and not capriciously.
8. In the case of *Jivraj Shah v Republic* [1980] KLR 605, the Court of Appeal set out the parameters to be considered by an appellate court in applications for bail pending appeal as follows: -
 - a. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail
 - b. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.
 - c. 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 *Mutua v R*, [1988] KLR 497 the Court of Appeal stated thus:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”
10. In view of the foregoing, the onus is always on the applicant to demonstrate to the court that there are good reasons why he/she should not be allowed to continue serving sentence but should be allowed to enjoy his/her liberty pending the hearing and determination of his or her appeal.
11. Whereas it is expected that appellant would only appeal when an appeal has high chances of success and that every person released on bond abides by the terms of the bond, a perusal of the application before the court reveals that no material was placed before the court to demonstrate existence of any exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interests of justice to grant bail. Indeed it has not been demonstrated that 1st Applicant who is said to be sickly cannot receive treatment while within the confines of prison.



12. Consequently, I find that the applicants who are convicted and are undergoing punishment because of that conviction has not passed the test for grant of bond pending appeal. The chamber summons dated August 24, 2023 and filed on August 25, 2023 is unmerited and it is accordingly dismissed.

DELIVERED IN MERU THIS 28th DAY OF September 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Applicants - Present

For Applicants - Mr. Laikuru for Laikuru M.K & Co. Advocates

For DPP - Ms. Rita (PC-1)

