



REPUBLIC OF KENYA



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**Onyancha v Republic (Criminal Appeal E019 of 2023)
[2023] KEHC 24130 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E019 OF 2023
WM MUSYOKA, J
OCTOBER 27, 2023**

BETWEEN

VERONICA NYANCHAMA ONYANCHA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from judgment by Hon. EA Nyaloti, Chief Magistrate,
CM, in Busia CMCCRC No. 1792 of 2020, of 30th August 2023)*

RULING

1. The appeal herein was lodged on September 4, 2023, *vide* a petition of appeal, dated September 1, 2023.
2. What I am called upon to determine is a motion, dated September 4, 2023, which seeks admission to bail pending appeal, or suspension or stay of execution of the judgment the subject of the appeal. The grounds on the face of the application are that the appeal has substantial points of law, the filing of an appeal restores the presumption of innocence until the appeal is heard and determined, the children of the appellant are suffering as she is a mother and sole breadwinner for them, it would be prejudicial for the appellant to serve part of the sentence should the appeal be successful, and she is not a flight risk. The affidavit, that the appellant swore on September 4, 2023, in support, merely regurgitates the facts and grounds set out on the face of the Motion.
3. There is a replying affidavit by Mrs. Shirley Chepkonga, Principal Prosecution Counsel, for the respondent, sworn on an unknown date in 2023, but filed herein on September 13, 2023. She avers the sentences imposed by the trial court were legal and very lenient, taking into account the nature of the offences, and the penalties prescribed in the law; that bail/bond pending appeal is not a constitutional right and the presumption of innocence was no longer available; the appellant was a convict, undergoing punishment, and the conviction and sentence stand until quashed and set aside by the appellate court; the fact of motherhood and having a young family are not exceptional or unusual



factors to warrant grant of bail pending appeal; grant of bail/bond is at the discretion of the court; there was no likelihood of the appellant serving a substantial part of the sentence before the appeal is heard and determined, as the substantive order is payment of a fine, which can be refunded should the appeal be successful; and there was nothing to show that she has an appeal with overwhelming chances of success.

4. The Motion was argued orally before me, on October 9, 2023, by Mr. Anyoka, Advocate for the appellant, and Ms. Chepkonga, for the respondent. Both sides breathed life to their respective filings.
5. Mr. Anyoka submitted that the appeal raises substantial questions of law, which made the appeal have high probability of success. He argued that there were inconsistencies and insufficiency of investigations, the fraudulent procurement of registration of the title deed was not distinctly alleged, nor proved, and fraud could not be inferred from the facts. He cited *Arvind Patel v Uganda* [2003] UGSC 25 (Oder, JSC), *Jivraj Shah v Republic* [1986] eKLR (Nyarangi, Gachuhi & Apaloo, JJA) and *Samuel Macharia Njagi v Republic* [2013] eKLR (Abuodha, J).
6. Ms. Chepkonga submitted that bail/bond pending appeal was not a constitutional right, and, therefore, it was not automatic, and that the appellant was a convict, to whom the presumption of innocence was not available. She cited *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA). On the fact of the appellant being a mother and a breadwinner, not being an exceptional or unusual factor, she cited *Daniel Dominic Karanja v Republic* [1986] eKLR (Nyarangi, Platt & Gachuhi, JJA). She further submitted that the duty to demonstrate that the appeal raised substantial points of law, arguable on appeal, lay with the appellant, which she had not discharged.
7. The position taken, in *Daniel Dominic Karanja v Republic* [1986] eKLR (Nyarangi, Platt & Gachuhi, JJA), with respect to the immediate family of the appellant facing hardship, takes care of the ground that the appellant was a mother of young children, who would suffer hardship on account of her incarceration. According to the decision, hardship faced by the immediate family of the appellant is, in principle, not an exceptional or unusual circumstance. The same point was also made in *Somo v Republic* [1972] EA 476 (Trevelyan, J). It was pointed out in *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag J), that in an application for bail/bond pending appeal, the court is dealing with a person, who has been properly convicted by a properly constituted court, and who is undergoing a lawful punishment, and the conviction and sentence stand until quashed or set aside by the appellate court. The court, considering an application for bail/bond, should not interfere with the conviction or sentence, pending appeal, from the point of view of the welfare of the appellant, unless there is a real reason, and the best test for that real reason ought to be whether the appeal has overwhelming chances of success.
8. It was argued by Mr. Anyoka, that the filing of an appeal restores the presumption of innocence until the appeal is heard and determined, suggesting, therefore, that bail/bond pending appeal is an automatic right. I am not too sure what the basis of that contention is, for it not a correct statement of the law. The appellant has not cited any constitutional or statutory provisions to support it, neither has he cited any case law. The correct position was stated in *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA), "... that a person ... has been convicted by a properly constituted Court, and is undergoing punishment, because of that conviction, which stands until set aside on appeal." The argument, therefore, that the conviction and sentence are suspended, upon the filing of an appeal, and the appellant is entitled to the benefit of the presumption of innocence, is fallacious. Filing an appeal does not suspend the conviction. A stay of execution of the judgment is not a suspension of the conviction, but only of execution of the sentence. It has nothing to do with entitling the appellant to presumption of innocence during the pendency of the appeal, for he or she remains a convict or a person who has been found guilty of the offence, and who is under sentence.



9. What emerges from *Daniel Dominic Karanja v Republic* [1986] eKLR (Nyarangi, Platt & Gachuhi, JJA), *Jivraj Shah v Republic* [1986] eKLR (Nyarangi, Gachuhi & Apaloo, JJA) and *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA) is that the main or principal or major consideration is existence of overwhelming chances of success, or the disclosure of some merit in the appeal. I appreciate, of course, that those considerations relate to appeals at the Court of Appeal, under the *Court of Appeal Rules*, and those considerations may not apply to appeals from the magistrates courts to the High Court. The rules of procedure for appeals from the magistrates court to the High Court are set out in the *Criminal Procedure Code*, cap 75, Laws of Kenya. The relevant provisions are in sections 356 and 357. They allow the High Court, and the magistrates courts too, a fairly wide discretion. Bail may be granted on “such terms ... as may seem reasonable to the High Court or the subordinate court.” Under section 356(2), should the appeal be unsuccessful, the appellant would still be liable to serve the suspended sentence, and the period he spent out on bail/ bond, or suspension of execution of sentence, shall be excluded from the computation of the term of his sentence.
10. What that then means is that the considerations discussed in *Daniel Dominic Karanja v Republic* [1986] eKLR (Nyarangi, Platt & Gachuhi, JJA), *Jivraj Shah v Republic* [1986] eKLR (Nyarangi, Gachuhi & Apaloo, JJA) and *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA), are altogether not relevant for appeals from the magistrates courts to the High Court, and what would be more relevant are the principles enumerated in such cases as *Arvind Patel v Uganda* [2003] UGSC 25 (Oder, JSC) and *Samuel Macharia Njagi v Republic* [2013] eKLR (Abuodha, J), around the factors of the appellant being a first offender, the appeal having been admitted, the possibility of substantial delay in the disposal of the appeal, the offence not involving personal violence, the character of the appellant, the appeal not being frivolous and has a reasonable chance of success, and whether the appellant had been on bond at trial and complied with the bond terms there, among others. It was pointed out, in *Arvind Patel v Uganda* [2003] UGSC 25 (Oder, JSC), that all these factors need not be present in every case. This is the criteria that should apply here, and not that in *Daniel Dominic Karanja v Republic* [1986] eKLR (Nyarangi, Platt & Gachuhi, JJA), *Jivraj Shah v Republic* [1986] eKLR (Nyarangi, Gachuhi & Apaloo, JJA) and *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA).
11. Taking those factors into account, I have made note of the following. Firstly, the appeal herein is yet to be admitted. On account of that I am unable to evaluate the grounds of appeal as against the evidence adduced, to assess whether the appeal is frivolous or not, as no record of appeal has been filed, and the trial court file or record has not been made available. I only have a copy of the judgment, which is not enough, as it only captures, from the record, material that was, in the mind of the trial court, relevant for the purposes of the determination by that court. Secondly, and related to that, I cannot tell whether or not the appellant had been admitted to bond during trial, and I cannot tell her conduct or character during the course of the trial. I cannot tell whether she was a first offender. Thirdly, and related to the above, is that I cannot tell without the record the sentences that were imposed. I am told they were principally fines, with default clauses. If that be the case, then the appellant should be able to get a refund of the fines should the appeal herein be successful. Thirdly, the offences for which the appellant was convicted did not involve physical violence. Fourthly, that once appeals are admitted here at Busia High Court, they tend to be disposed of fairly quickly. Finally, I note that one of the offences, for which the appellant was convicted, attracts a fine of up to Kshs. 5,000,000.00 or both such fine and imprisonment.
12. If I were to apply the test in *Jivraj Shah v Republic* [1986] eKLR (Nyarangi, Gachuhi & Apaloo, JJA) and *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA), I would



dismiss the application herein. However, the discretion given to the High Court, in sections 356 and 357 of the *Criminal Procedure Code*, is fairly broad. It would appear that it would be open to the court to grant bail/bond, or suspend the sentence, pending appeal, subject to such terms or conditions as the court may deem reasonable. In exercise of that broad discretion, I do hereby admit the appellant to bond herein, or suspend execution of the sentence herein, subject to the appellant executing a bond of Kshs. 3,000,000.00, with 2 sureties of like amount, or deposit cash bail of Kshs. 1,500,000.00. I direct the appellant to file the record of appeal within 14 days of delivery of this ruling, and the Deputy Registrar to call for the original trial court records forthwith. The matter shall be mentioned after 30 days, for compliance. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27TH DAY OF OCTOBER 2023

W MUSYOKA

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JUDGE

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

