



**Muraguri v Republic (Criminal Appeal E094 of 2023)  
[2023] KEHC 24087 (KLR) (Crim) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24087 (KLR)

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

**CRIMINAL  
CRIMINAL APPEAL E094 OF 2023**

**LN MUTENDE, J  
OCTOBER 25, 2023**

**BETWEEN**

**JAMES KIRIKO MURAGURI ALIAS PATRICK KIARIE MUGO .... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. James Kiriko Muraguri alias Patrick Kiarie Mugo, the Applicant, through an application dated 26<sup>th</sup> April, 2023 seeks bail pending appeal following his conviction and sentence in Milimani Criminal Case no 1168/2014. The applicant was charged following allegations of being involved in fraudulent acts for which he was convicted.
2. According to the judgment of the lower court, the applicant faced accusation of Forgery of a document namely, a Title Deed for land Reference no Mavoko Town Block 2/1637; Conspiracy to defraud ksh 1.7 Million from a complainant; Making a false document; Obtaining a National Identification Card from the National Registration Bureau knowing it was false; Four (4) Counts of Uttering false documents; Uttering false certificates to the Kenya Revenue Authority and Obtaining Money by false pretences, ksh 1.7 Million from two (2) complainants.
3. The application for bond is premised on the grounds that:  
  
The applicant has appealed against the judgment and sentence of the lower court, where he was sentenced to serve twenty (20) years imprisonment and he has filed 32 strong grounds which have chances of success; That his age and the fact that he is of poor health are exceptional grounds for granting the application; That he stands to serve a substantial part or the entire sentence by the time the appeal is heard and determined which will cause him irreparable injury and loss; and, he is not a flight risk.



4. The application was disposed through written submissions. The applicant submits that he has complied with the provisions of Section 357(1) of the *Criminal Procedure Code*. He urges that though the court has discretion in granting bail, it must be exercised judiciously. That the principles and guidelines provide a framework for the court to evaluate the merits of the appeal, assess the risk factors, consider public interest, and impose appropriate conditions. In this respect reliance was placed on the case of *Gerald Macharia Gitbuka v Republic* Criminal Appeal no 119 of 2004 where it was stated that:

“The cornerstone of justice system is that no one will be punished without the benefit of due process including the right to exhaust the right of appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle”
5. That based on Article 50(2)(q) of *the Constitution* an accused has a right to appeal. That the concept of exceptional circumstances espoused in the case of *Arvind Patel v Uganda* S.C. Cr. Appeal no 1 of 2003 should include the character of the offender, whether the applicant is a first offender and whether the offence involved personal violence. Further, that the appeal must not be frivolous and the possibility of substantial delay in the determination of the appeal should be considered, and, also whether the appellant complied with bond terms at the trial court.
6. That exceptional circumstances in this appeal are that the applicant is 62 years old and that he suffers from an underlying medical condition. That he was referred to Kenyatta National Hospital for medical evaluation but the hospital equipment broke down and there is no communication on its repair. Further that his health condition has deteriorated since his last examination at the prison facility.
7. That the appeal has high chances of success in that he was charged with 5 Counts but was convicted for 10 counts. It also challenges the evidence, following an argument that the sale agreement was not produced in court and that only two transfer forms were produced instead of 3 requisite forms. That: the court relied on circumstantial evidence which was not proved beyond reasonable doubt; there was no evidence showing that the applicant obtained ksh 1,700,000/= from the complainants; no document examiner was called to attest the signatures adduced in evidence and said to belong to the appellant; and, the appellant further argues that he will serve a substantial part of the sentence before the appeal is determined as he has served 4 months since 31<sup>st</sup> March, 2023 when he was sentenced.
8. The Respondent/State through Prosecution Counsel, Mr. Robert Mutuma conceded the application. It submits that bail pending appeal is discretionary as the applicant has lost the presumption of innocence having been convicted and is serving a lawful sentence. This calls upon the applicant to demonstrate warrant of grant of orders sought. That the appellant’s health is being managed at Mbagathi hospital and he is undergoing treatment at Kenyatta National Hospital which is exceptional circumstances.
9. On the question of likelihood of success of the appeal, it is urged that the applicant was initially charged with five counts, that the conviction is on ten counts, there is no indication if the ten counts were read to the applicant or if he was supplied with the charge sheet. That the document examiner was not called to testify to verify his signature and thus the appeal has chances of success.
10. As to whether the appeal would be rendered nugatory, the respondent however contends that the court is currently handling cases for the year 2022 and there would be no delay in hearing the appeal. That the appeal can proceed on priority basis. Therefore, the sentence will not be served before determination of the appeal.



11. I have considered rival arguments. The provisions of Section 357 of the [Criminal Procedure Code](#) enact that:
  - (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. I must point out that at an appellate stage the court deals with an offender who has been convicted where different principles apply as the person is already convicted; and, in the instant case sentence is being served. (*Vide - Masrani v R.* (1960) EA 321).
13. The appellate court has discretionary power to grant bail pending appeal, however the applicant must demonstrate that: his appeal has high chances of success; his case is exceptional; and, he is likely to serve the sentence during the pendency of the appeal.
14. The conditions are read disjunctively and courts have focussed on the proof of exceptional circumstances in the appellant's case as a material ground.
15. In the case of [Jivraj Shah v Republic](#) [1986] eKLR the Court of Appeal 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.”
16. The [Bail and Bond policy guidelines](#) provides that: “the burden is on the convicted person to demonstrate that there is an overwhelming chance of success.” (See page 27 paragraph 4.30)
17. On grounds 2 and 3 of the Petition of Appeal the appellant/applicant states that he was charged with 5 counts but was convicted on 10 counts. The applicant annexed a copy of charge sheet with 5 counts. He also annexed a copy of judgment where the trial magistrate considered 10 counts. The only reasonable inference that can be drawn is that there was an amendment and /or substitution of the charges. It was the duty of the applicant who alleges to have availed necessary documents. Without clear evidence this court can only rely on the copy of the judgment provided.
18. Regarding the contention that a document examiner was not called to testify and the sale agreement having not been signed in the presence of an advocate; not all transfer forms being produced and proof of the case through circumstantial evidence; these are grounds to be argued on appeal. I must however



add that proceedings of the lower court having not been availed, the court is not privy to such evidence so as to determine whether or not the appeal has overwhelming chances of succeeding.

19. As to whether the applicant case is exceptional or of unusual circumstances; From the record the applicant is currently undergoing medical review and has been treated at Kenyatta National Hospital. The appellant has submitted that his medical condition may jeopardise him if he continues to remain in prison. Further that unless bail is granted to enable him attend a private affordable hospital, his health will continue deteriorating.
20. In the case of *Dominic Karanja v Republic* (1986) KLR 612, the court held that ill health per se does not apply where there exist medical facilities for prisoners. It delivered itself thus:
  - “(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 and 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 it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;
  - (d) Also see the case of *David Kimani Kuria v Republic* [2021] eKLR and .....” *Arjinder Singh Bharna v Republic* [2007] eKLR where the High court referred to the decision in *Dominic Karanja (supra)*.
21. It is demonstrated through a letter authored by a medical officer at the Remand Prison that the applicant has upper gastro intestinal related complaints and awaits oesophagoduodenoscopy at Kenyatta National Hospital, but there is no document from the Hospital to confirm the allegation. However, there being medical facilities that will deal with the complaint, it does not amount to exceptional circumstances that should persuade this court to grant bail at this stage.
22. Whether the sentence may be served before the appeal is determined. It is alleged that the appellant was sentenced on 31<sup>st</sup> March, 2023 to serve twenty(20) years imprisonment. Evidence of sentence meted was also not annexed. But, if this were the case, it is apparent that he will not serve the full term before this appeal is determined.
23. The upshot of the above is that the applicant has not demonstrated grounds for granting bail pending appeal. The application is unmeritorious; accordingly, it is dismissed.
24. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**



Mr. Wanda for Appellant/Applicant

Ms. Chege for ODPP

Court Assistant - Mutai

