



REPUBLIC OF KENYA



KENYA LAW
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**Mwita & another v Republic (Criminal Appeal E058 & E051 of 2023)
[2023] KEHC 27011 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E058 & E051 OF 2023
RPV WENDOH, J
DECEMBER 20, 2023**

BETWEEN

GIBORE MOHERE MWITA 1ST APPELLANT

NYANGORIO GIBORE MOHERE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Gibore Mohere Mwita and Nyangorio Gibore Mohere were convicted by the Senior Resident Magistrate Kehancha in Criminal Case No. 822 of 2022 for two offences i.e.

Count 1: Cutting down trees contrary to section 334 (c) of the [Penal Code](#);

Count II: Destroying crops contrary to section 334 (b) of the [Penal Code](#).

2. On Count I: they were sentenced to five (5) years imprisonment each and on Count II, three (3) years imprisonment each .

Each sentences were ordered to run concurrently.

3. The applicants have lodged appeals against both conviction and sentence.

4. As regards Gibore Mohere, he deponed that he has a right to bond, complied with bond terms during the trial in the lower court, and there is no likelihood of him absconding; that he is the sole bread winner of his young family. The same grounds apply in regards to Nyangorio Gibore.

5. The prosecution counsel opposed the applications by filing grounds of opposition to the effect that the application lacks merit because it does not indicate that the appeal has overwhelming chances of success; that there are no exceptional circumstances to warrant the applicants' release on bond pending appeal; that since the applicants are already convicted and sentenced, the chances of absconding are



high; that the grant of bail pending appeal is discretionary and since the applicants have already lost the right of presumption of innocence, and they have not demonstrated any exceptional circumstances, they should continue to serve the sentence pending the determination of the appeal.

6. Kerario Marwa Advocate filed submissions which are to the effect that the applicants are unlikely to abscond having complied with bond terms in the trial court; that the applicants have right to bond / bail as per article 49 (1) of the *Constitution*. Section 357 of the *Criminal Procedure Code* provides for release of a convicted person on bond pending appeal. Counsel relied on the case of Jivray Shah vs. Republic where the court laid down the principles to be considered in such an application. Counsel submitted that there are exceptional circumstances in that the applicants are closely related and the dispute arose because of an existing land dispute.
7. Though the applicants purported to rely on article 49 (1) of the *Constitution*; it is my view that it does not apply to an application for bail pending appeal but guarantees right to bond of person who is awaiting trial. This position was confirmed in the case of *Charles Owanga Aluoch v DPP* (2015) eKLR where the court said:

“The right to bail is provided under article 49 (1) of the Constitution but is at the discretion of the court; and is not absolute. Bail is a constitutional right where one is awaiting trial.

After conviction, that right is at the court’s discretion and upon considering the circumstances of application the court have over the years formulated several principles and guidelines upon which bail pending appeal is anchored.”

8. Section 357 of the *Criminal Procedure Code* provides for bail / bond pending appeal. It provides as follows:-

“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.

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further applications for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in section 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.”

9. The above provision gives the court the discretion to grant bail / bond pending appeal. The principles upon which the court may grant bail pending appeal were discussed in Jivray’s case (*supra*) 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.”

10. Although the applicant counsel submits that there are exceptional circumstances upon which the bail; should be granted, none were alluded to in the applicant’s affidavits, which amounts to exceptional circumstances varies is from case to case. In *Domnic Karanja v Republic* (1986) KLR 612, the Court of Appeal held that the applicant’s character or the hardships that the applicants’ family were undergoing were not exceptional circumstances. It also held that ill health perse would not constitute exceptional circumstances where there existed medical frailties for prisoners. Further, in the case of *Mutua v Republic* (1988) KLR 497, the Court of Appeal said :-

“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”.

11. In the instant case the applicants have been convicted and sentenced to five (5) years imprisonment each. They have lost the right to be presumed innocent which in enjoyed before conviction. It therefore immaterial that the applicants faithfully attended court during their trial. They now face jail term which is an incentive for them to take flight. They are therefore high flight risk.

12. In the end, I find no merit in the application at all. The applications for bond are dismissed.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 20TH DAY OF DECEMBER, 2022.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Kaino for the State.

Appellant present in person.

Emma / Phelix – Court Assistant

