



REPUBLIC OF KENYA



KENYA LAW
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**Nzioka v Republic (Criminal Appeal 74 of 2023)
[2023] KEHC 26634 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 74 OF 2023
DR KAVEDZA, J
DECEMBER 20, 2023**

BETWEEN

ERICK NGYEMA NZIOKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an application for bail pending appeal from the decision of the Court Martial sitting at Langata Garrison delivered on 12 May 2023 in Court Marial no. 31 of 2023 Republic vs Erick Ngyema Nzioka)

RULING

1. The appellant was charged and after a full trial convicted for the offence of committing a civil offence contrary to section 133 (1)(b) of the *Kenya Defence Forces Act*, in counts I, II and III. He was found guilty and convicted on the three counts charged. He was sentenced to serve one- year imprisonment for each count. The sentences were to run consecutively. Being dissatisfied with the decision, he filed a petition of appeal dated 26th May 2023.
2. He filed an application dated 2nd June 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 that the appeal has overwhelming chances of success. The appellant is a law-abiding citizen, and prior to his conviction, served in the Kenya Defence Forces serving 2009. In addition, that he has already served 2 years in prison having been arrested in 3rd June 2021. Further that he will abide by all the conditions that the court may impose. He is apprehensive that unless granted bail he will have served a substantial term of the sentence and will be prejudiced when the court ultimately upholds his appeal.
3. In response, the respondent filed grounds of opposition dated 15th November 2023. The grounds raised are that the application lacks merit and is misconceived. The application is an abuse of the court



- process as the appellant was properly convicted and sentenced. The applicant has not demonstrated any unusual circumstances to warrant the grant of bail pending appeal.
4. I have considered the application, the response, the written submissions and the applicable law. The issue for consideration is whether the appellant has met the threshold for the grant of bail fox pending appeal.
 5. 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:
 - (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."
 6. 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. The principle of granting In the case of Chimambhai v Republic 1971 EA 343 J. Harris made another observation in such an application when he said:
 - (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."
 7. 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.....”
 8. Under Article 49 of the [Constitution](#) of Kenya an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proved 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.

9. 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 relied on inadmissible evidence and there were glaring inconsistencies which is a hallmark of a successful appeal.
10. The rationale for considering the chances of success of the appeal was given in *Somo v R* [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 RIGINAY 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.”

11. In this case, I have considered the ten 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. The grounds are the usual grounds and no ground stands out as one that is very likely to succeed even before the same is argued based on the state of the record.
12. As regards the exceptional circumstances, it is argued that the appellant's appeal is likely to be determined after the sentence is served. The appellant was sentenced to a cumulative term of six 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. The record of appeal is ready, submissions have been filed and the appeal has a judgement date in February 2024. The appeal will therefore be concluded expeditiously.
13. 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 20TH DAY OF DECEMBER 2023.

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D. KAVEDZA

JUDGE

In the presence of:

Mr. Otieno for the State.



Mr. Kirimi for the Appellant

Joy Court Assistant.

