



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi v Republic (Criminal Appeal E006 of 2021)
[2022] KEHC 3230 (KLR) (7 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E006 OF 2021**

TM MATHEKA, J

APRIL 7, 2022

BETWEEN

FRANCIS KIMANI NGUGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By an application dated 19th April, 2021, the Appellant seeks bail pending appeal under the provisions of Section 357 *Criminal Procedure Code* Cap. 75 Laws of Kenya. The same is premised on the grounds on its face and is supported by the affidavit of the Applicant sworn on even date.
2. The Appellant was charged with two counts of Vandalism of Electrical Apparatus contrary to section 169(1) (b) of the *Energy Act* and one of Stealing Of Energy Equipment contrary to Section 169 (1) (C) of the *Energy Act*. He was convicted on all the counts and sentenced to five (5) years imprisonment for each count to run concurrently.
3. He is dissatisfied with the conviction and sentence and has lodged an appeal before this Court. It is his position that his appeal has overwhelming chances of success.
4. He deponed that before the lower court he was granted a bond of Kshs. 300,000/= (three hundred thousand shillings only) with a surety of similar amount and that he always attended court when required.
5. He averred that he has peptic ulcers and in need of constant medical check-ups at Molo Sub-County Hospital and that he is willing and ready to abide by the conditions set by this court.
6. He prays this court considers COVID 19 is a threat to his health and to grant this application.
7. The prosecution did not file a Replying Affidavit to it.



8. The Application was orally argued by the parties.

Appellant's Submissions

9. In arguing the application Mr. Mamwacha for the appellant/applicant reiterated the averments contained in the Supporting Affidavit and in addition submitted that the sentence was too long and he might not get time to attend his regular medical checkups.

Prosecution's Submissions

10. Ms Murunga for the prosecution submitted that the Appellants appeal has no high chances of success as he was caught in the act and convicted for both offences. That in any event the appeal would be disposed off expeditiously as lower court proceedings had already been forwarded to this court.

11. That the applicant had not demonstrated any exceptional circumstances in this case to warrant grant of bail pending appeal. That the peptic ulcers disease is manageable by the prison health service providers; that the applicant had also not provided evidence of medical checkups at Molo County Hospital for the past two years.

Issues For Determination

12. The singular issue for determination is whether the appellant's application has met the threshold for granting of the order of bail pending appeal.

Analysis And Determination

13. Section 357 (1) of the [Criminal Procedure Code](#) provides admission to bail pending appeal, it states that:

“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.”

14. One of the cases where the principles for granting bond pending appeal were set out is in the case of [Jivraj Shah v Republic](#) [1986] eKLR where the court stated;

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.”

Whether the appeal has overwhelming chances of success

15. The Bail and Bond policy guidelines page 27 paragraph 4.30 provides that the burden is on the convicted person to demonstrate that there is an overwhelming chance of success.



16. Thus, the burden is on the applicant to establish that he should be granted bail pending the hearing of his appeal on the basis of the principles set out herein above.
17. The Appellant /applicant simply depones that his appeal has high chances of success without advancing any reason. Without going into the merits of the appeal it is evident that the learned trial Magistrate duly considered the law and evidence in arriving at a conclusion of convicting the Appellant/applicant. No issue of law stands out as having been violated by the subordinate court. See [*Peter Hinga Ngatbo vs Republic*](#) [2015] eKLR. On the facts and the law generally the applicant has the opportunity to have these examined on appeal.

Whether there is a likelihood of the appellant having served a substantial part of the sentence by the time of appeal is heard and determined.

18. Appeals in this court are heard and determined within the target time. The Appellant/applicant was sentenced to serve 5 years' imprisonment on 8th of March 2021. There is no likelihood that he will serve a substantial part of the sentence before the appeal is heard and determined. In fact, had the time spent on this application been spent on the appeal, the court would have spent this time writing the judgment. The delay is usually caused by delay in typing of lower court proceedings but in this case they are ready.

Whether the Appellate /Applicant has demonstrated exceptional or unusual circumstances

19. The Court of Appeal in [*Daniel Dominic Karanja vs Republic*](#) [1986] eKLR stated that;

“The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances.”
20. The court also stated that;

“A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal.
21. The court was of the view that the important thing was whether or not the appeal had high chances of success. Otherwise on the above grounds the application was refused.
22. In view of the foregoing authorities it is clear that the application herein has not met the requisite threshold.
23. The application is denied. The Applicant to pursue his appeal.
24. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF APRIL, 2022.

MUMBUA T MATHEKA

JUDGE

Court Assistant Edna

Ms. Mumbe for State present

Appellant /Applicant Present virtually

Mr. Mamwacha for appellant/applicant

