



**Ali v Republic (Miscellaneous Criminal Application E053 of 2022)
[2022] KEHC 17020 (KLR) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E053 OF 2022**

A. ONG'INJO, J

DECEMBER 22, 2022

BETWEEN

HASSAN ALI ALI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Application.

1. Vide a Notice of Motion Application dated 8th April 2022 and filed on 11th April 2022, brought under Article 49, 50 (2) (q) & 165 of *the Constitution* of the Republic of Kenya, Sections 349, 356 and 357 of the Criminal Procedure Code Cap 75 Laws of Kenya, inherent power and jurisdictions of this Honourable Court and all other enabling provisions of the law. The Appellant/Applicant prayed for the following orders: -
 1. That this application be certified as urgent and be heard exparte in the first instance.
 2. That this Honourable Court be pleased to grant the Appellant/Applicant leave to file appeal out of time.
 3. That this Honourable Court be pleased to admit the Appellant/Applicant herein on Bail pending Appeal and/or on such terms this Honourable Court deems appropriate to protect the fundamental freedoms and liberty of the Appellant/Applicant.
 4. That this Honourable Court be pleased to issue such other orders it deems just and convenient to meet the ends of justice.
 5. That the costs of this application be provided for.



2. The application was supported by the grounds therein and the supporting affidavit sworn by the Applicant, Hassan Ali Ali, on 8th April 2022.

Applicant's Submissions

3. The Applicant submitted that he was charged and convicted of the offence of obtaining money by false pretense contrary to Section 313 of the Penal Code and was consequently sentenced to two years imprisonment. That the applicant has remained in custody ever since and is praying for bail pending appeal.
4. The applicant submitted that the trial court gave the Applicant leave to file an appeal if they wished to do so. However, the applicant could not get in contact with an advocate within 14 days within which he should have filed an appeal.
5. The Applicant submits that he risks serving the custodial sentence imposed on him before the determination of his appeal. That the time taken to prepare the typed proceedings, compile the record of appeal and have the same heard, the Applicant might have fully served the sentence.
6. The Applicant submits on whether the appeal has overwhelming chances of success by citing the case of *Motichand v R.* (1972) E. A. 399 where Muli, J. departed from the test in Lamba Case and granted bail on grounds that it had high chances of success. He cited that the probability must not be conclusively demonstrated since that would be tantamount to hearing the merits of the appeal.
7. The Applicant submits by citing Section 357 of the Criminal Procedure Code which provides for the admission to bail pending appeal. The Applicant further submits that the appeal has high chances of success since the conviction was not based on any evidence adduced in court but rather the complainant's testimony that failed to meet the evidential threshold of he who alleges must prove. The Applicant submitted that it was on the basis of the complainant's testimony alone that the trial court meted out a sentence that was harsh and manifestly excessive.
8. The Applicant submits by inviting the court to consider the case of *Chimambhai v Republic* [1971] EA 343, which demonstrated the possibility of the sentence being manifestly excessive, where it was observed by J. Harris in the said case that, "... the law of today 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."
9. The Applicant submitted that he is a first-time offender and has previously complied since he never absconded any attendance in the trial court. That it is the Applicant's humble submission that he be granted bail pending appeal to take care of his family since he is the sole bread winner for his young children who are fully dependent on him.
10. The Applicant prayed that this honourable court considers the holding in the case of *Arwind Patel v Uganda* S. C. Cr. Appeal No. 1 of 2003 where the Supreme Court set out the grounds under which bail pending appeal could be granted which grounds were cited in the case of *Samuel Macharia Njagi v Republic* (2013) eKLR

Respondent's grounds of opposition

11. The Respondent opposed the application on grounds: -
 1. That the Application is frivolous and brought in bad faith and is intended to delay the trial process.



2. That the application is premature and an abuse of the due process of the court.
3. That the applicant/appellant has not met standards for grant of bail pending appeal. That applicant has not demonstrated that the intended appeal stands any chance of success.
4. That the Applicant would suffer no prejudice if the case is heard to its logical conclusion and it is to the public interest that criminal cases be heard and concluded without parties seeking intervention of the appellate court at an interlocutory stage.
5. That it is in the interest of justice and public interest that the orders sought herein be declined and the application be dismissed.

Analysis and Determination

12. Having considered the application by the Applicant, the Applicant's submissions and the Respondent's Grounds of Opposition, the issues for determination are: -
 - i. Whether the Applicant is entitled to leave to file appeal out of time.
 - ii. Whether the Applicant is entitled to bail pending appeal.

On whether the Applicant is entitled to leave to file appeal out of time

13. The Applicant stated that after he was placed in custody at Shimo La Tewa Prison immediately after being sentenced he could not get contact to his family members or an advocate and that time within which he ought to have filed an appeal lapsed.
14. Section 349 of the [Criminal Procedure Code](#) as follows:
'An appeal shall be entered within fourteen days of the date of the order or sentence appealed against: -
Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.'
15. This court finds that the Applicant's reason of lack of contact with his family or an advocate after he was placed in custody at Shimo La Tewa Prison is satisfactory leave to file his appeal out of time, is therefore allowed. Petition of Appeal filed in Criminal Appeal No. E045 of 2022 is deemed properly filed.

On whether the Applicant is entitled to bail pending appeal

16. The Applicant stated that it is a fundamental right enshrined in [the Constitution](#) and the Criminal Procedure Code, the appeal has high chances of success, and that the Applicant is apprehensive of the fact that if he is denied bail pending appeal, he might have served a substantial part of the sentence meted out by the trial court thus rendering his appeal nugatory. The Applicant submitted that the time taken to prepare the typed proceedings, compile the record of appeal and have the same heard, the Appellant/Applicant might have fully served the sentence.



17. This court agrees with the position in *Charles Owanga Aluoch vs. Director of Public Prosecutions* [2015] eKLR, it was held: -

“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 the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

1. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal - being allowed, the particular circumstances and weight and relevance of the points to be argued.”

18. Further, in the case of *Somo v R* [1972] EA 480, it was held: -

“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 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.”

19. This court finds that the Applicant was sentenced to two years imprisonment on 24th February 2022 for the offence of obtaining money by false pretence contrary to Section 313 of the *Penal Code*. This court further establishes that the Applicant has served almost half of the sentence. It is for the interest of justice that the Applicant shall be granted bail pending appeal.
20. In conclusion, the application herein is allowed, the applicant is granted leave to file appeal out of time within 14 days and the Applicant shall further be released on bond of Kshs. 1,000,000 and surety of similar amount or cash bail of Kshs. 500,000 and one person to undertake to avail applicant in addition to cash bail. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 22TH DAY OF DECEMBER 2022**

HON. LADY JUSTICE A. ONG’INJO



JUDGE

In the presence of: -

Barile- Court Assistant

Mr. Ngiri for Respondent

Applicant present in person

