



REPUBLIC OF KENYA



KENYA LAW

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**Omaiko v Republic (Criminal Appeal E023 of 2022)
[2022] KEHC 18068 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 18068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E023 OF 2022
WA OKWANY, J
DECEMBER 21, 2022**

BETWEEN

GEORGE OMAIKO APPELLANT

AND

THE REPUBLIC RESPONDENT

*(Being an Appeal against the Sentence of Hon. B. M. Kimtai (Mr.)
– PM Keroka dated and delivered at Keroka in the original Keroka
Principal Magistrate’s Court Traffic Case No. E266 of 2022)*

RULING

1. Through the application dated December 2, 2022, the appellant herein seeks bail pending appeal under section 357 of the *Criminal Procedure Code* (CPC). The application is supported by the appellant’s affidavit and is based on the grounds that: -
 - “(a) The applicant was convicted and sentenced on a traffic offence of operating a private motor vehicle as a public service vehicle and using un roadworthy motor vehicle on a public road.
 - (b) That the applicant pleaded guilty and convicted and sentenced to a total of 6 months in prison or fine of 30,000/= in the first count and 50,000/= in the second count by the Hon Bethwel Kimutai Matata (RM) sitting at the magistrates’ court at Keroka in MCRT E266/2022.
 - (c) The applicant being dissatisfied with the judgment and sentence has lodged an appeal *vide* HC criminal appeal No 23 of 2022.



- (d) That the appeal herein has a high probability of success as the plea was unequivocal in that the particulars of the charge and facts do not disclose the offences charged.
- (e) The appellant is a family man and as such, the appellant is a law-abiding citizen and no prejudice shall be suffered by the prosecution or the state by the conditional release of the appellant.
- (f) The appellant is apprehensive that if not granted bail the sentence meted out, is the most steep/severe sentence/punishment that may be levied and it is only fair and just that the appellant presents his appeal and in a sober and settled state of mind which cannot be achieved while he is incarcerated. The psychological and physical damage that will be suffered while the appellant is incarcerated may never be undone even after a successful appeal.
- (g) That the appellant attended court when required and will always continue to do so if released on bail pending appeal. More so the appellant is able to provide a suitable surety.
- (h) That given the time it will take to hear the appeal and the charge being traffic offences the nature of the sentence, if successful the appeal will be rendered nugatory.
- (i) The applicant has a medical condition that may jeopardize him if he continues to remain in prison as well as being the sole bread winner of the family.”

2. The state did not file a response to the application. However, when the matter came up for hearing, Mr Majale, learned counsel for the state opted to give an oral response and objected to the application.
3. It was submitted that since the applicant was convicted on his own plea of guilty, the sentences meted out are lawful and further, that the appeal does not have any chances of success.
4. It was further submitted that the applicant was a flight risk having absconded court in another case being criminal case No E034 of 2022.
5. It was the respondent’s case that the applicant is a flight risk and therefore not a suitable candidate for bail pending appeal.
6. Mr Bosire, learned counsel for the applicant submitted that the appeal is arguable with high chances of success since the guilty plea was not unequivocal. It was the applicant’s case that the allegation that the applicant had absconded court was resolved and the warrant of arrest lifted.
7. I have considered the application and the respective arguments by the parties.
8. The principles governing the granting of bail pending appeal were explained in the case of *Jivraj Shah v Republic* [1986] eKLR 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 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 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.”

9. Section 357 of the *Criminal Procedure Code* stipulates as follows: -

- “(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: Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application 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 sections 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.
- (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.
- (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.”

10. The granting of bail pending appeal is at the discretion of the court, to be exercised judicially guided by the above principles. The burden lies with the applicant to prove that the appeal has high chances of success or that the applicant is likely to serve a substantial part of the sentence before the appeal is heard.
11. In the instant case, neither the judgment of the lower court nor the proceedings thereof were produced before this court and the court has therefore not had the benefit of perusing the same in order to ascertain if the grounds of appeal disclose an arguable appeal with high chances of success.
12. Be that as it may, I note that besides the sentence for six months, the appellant was also given the option of a fine. Under these circumstances, it cannot be said that the appeal will be rendered nugatory should it be successful as the applicant can get a refund of the fine paid should he be successful on appeal.
13. On the aspect of demonstration of exceptional or unusual circumstances, I note that even though the applicant alleged that he has a medical condition that may be aggravated if he remained in prison, no material was placed before this court to establish/prove the same.
14. In sum, I find that the application is not merited and I therefore dismiss it with a rider that the appeal should be fixed for hearing on priority basis.

Ruling dated, signed and delivered via Microsoft Teams this 21st day of December 2022.



W. A. OKWANY
JUDGE

