



REPUBLIC OF KENYA



**Marete & another v Republic (Criminal Appeal E068 & E070 of 2024
(Consolidated)) [2025] KEHC 309 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E068 & E070 OF 2024 (CONSOLIDATED)
AK NDUNG’U, J
JANUARY 22, 2025**

BETWEEN

JOSEPH KINOTI MARETE 1ST APPELLANT

JOSHUA WANGOMBE WANJOHI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Original Conviction and Sentence In Nanyuki
CM Criminal Case No E829 OF 2022 – L Nyaga, RM)*

RULING

1. The Appellant herein, Joseph Kinoti Marete (2nd Accused during trial) and Joshua Wangombe Wanjohi (1st Accused during trial) were convicted after trial of conspiracy to defraud contrary to section 317 of the Penal Code. They were sentenced to two (2) years imprisonment. The 2nd Appellant was also convicted of obtaining money by false pretenses contrary to section 313 of the Penal Code and he was sentenced to two (2) years imprisonment. The sentences for the 2nd Appellant were ordered to run concurrently. They have separately appealed to this court.
2. Pending the disposal of their appeals, they have applied to be released on bail. The 1st Appellant filed an application dated 17/10/2024 for orders that;
 - i. Spent.
 - ii. The Honourable court be pleased to admit the Appellant to bail pending hearing and determination of the appeal.
 - iii. In the alternative, the Honourable court be pleased to order stay and/or suspension of execution of sentence of the Appellant pending hearing and determination of the appeal.



- iv. The Appellant be released on bail terms similar to the bail terms ordered at the trial court.
 - v. Cost of this application be borne by the Respondent.
3. The application is supported by an affidavit of Murithi Kinoti, the Appellant's advocate where he averred that the Appellant is a retired police officer and now aged 76 years and the trial court erred for failing to consider the probation officer's report. That he had always attended court and he will do so if granted bail and he is willing to provide a suitable surety. That he will suffer irreparable damage if bail is not granted for reasons that he is retired and an old man of the society, he has children, grandchildren and great grandchildren who depends on him and that he suffers acute health conditions requiring ongoing medical treatments. He averred that the conduct of the trial court and the Respondent towards the Appellant were discriminatory, abusive, arbitrary, an illegality, irrational, in bad faith and in breach of human rights.
 4. That he is apprehensive that he will suffer irreparable harm since he was denied an opportunity to enjoy the right to fair hearing and that the appeal which has high chances of success shall be rendered nugatory. Further that the Appellant's family have suffered mental anguish and untold suffering since he is the patriarch of the family and he will suffer irreparable harm while in custody thereby infringing on his right to dignity.
 5. In response, counsel for the Respondent filed a replying affidavit dated 25/04/2024. She deponed that the application lacks merit and does not meet the legal threshold for granting of the orders sought on account that granting of bail/bond is discretionary as the Appellant has been found guilty and the principle of presumption of innocence does not apply. That the Appellant has not demonstrated that his appeal has overwhelming chances of success, he has not demonstrated any peculiar or exceptional circumstances to warrant grant of the orders sought and given the two years sentence imposed, there is no likelihood that he would have served a substantial part of the sentence before the appeal is heard.
 6. For the 2nd Appellant, the counsel filed chamber summons application dated 23/10/2024 for orders that;
 - i. Spent
 - ii. Honourable court be pleased to grant bail to the Applicant pending hearing and determination of the appeal.
 - iii. The court be pleased to order that the execution of the sentence be suspended pending hearing and determination of the appeal.
 - iv. The court do grant such other order or further orders as are just and expedient.
 7. The application is supported by an affidavit of Samuel Ngari Thuku, the Appellant's advocate who deponed that the trial magistrate convicted the Appellant without satisfying herself that the ingredients of the offence of conspiracy to defraud and obtaining money by false pretenses had been proved beyond reasonable doubt. That the Appellant is a first offender and a family man with young children thus deserving to be granted bail pending appeal. That he was out on cash bail and diligently attended court for a period of almost two years as and when required and he is willing to abide by bail terms and conditions that maybe set by the court. That the appeal has a high probability of success and his continued confinement would negate the purpose of his appeal as he would have served the whole or most of the sentence at the time his appeal is heard thus rendering the same nugatory.
 8. In opposing the application, the Respondent's counsel filed a replying affidavit dated 06/11/2024 similar to the replying affidavit filed in respect of the 1st Appellant.



9. Parties were ordered to canvass the applications by way of written submissions. Counsel for the Appellant submitted that the Appellant always attended court at trial and he is willing to provide security. That prima facie the appeal was likely to succeed. He added that the Appellant was ailing. He asks the court to be guided by the bail and bond policy. The judgement of the trial court is faulted.
10. The 2nd Appellant's counsel submitted that the petition of appeal raises arguable points of law with high probability of success since the ingredients of the offences charged with were not proved. That PW4 admitted that the complainant knew that the Appellant was not the registered owner of the properties and therefore, there was no false information given by the Appellant to the complainant. That the other arguable point is that the information contained in the title deeds was that the 2nd accused owned the land and the Appellant believed him. Reliance was placed on the case of Samuel Macharia Njagi v Republic (2013) eKLR where the court granted the Appellant bail pending appeal on account that the appeal had some reasonable prospects of success coupled with the fact that the offence convicted with did not involve personal violence.
11. The Respondent's counsel on the other hand filed submissions dated 06/11/2024 in respect of the 1st Appellant and submissions dated 19/11/2024 in respect of the 2nd Appellant which are similar in content.
12. She argued that granting of bail pending appeal is discretionally under section 357 of the Criminal Procedure Code since the presumption of innocence does not apply having being convicted by a competent court. That the discretion must be exercised judiciously and within the law as was observed in Francis Kamote Mutua v Republic (1988) eKLR. As to whether the appeal has overwhelming chances of success, she submitted that the burden is on the convicted person to demonstrate that the appeal has chances of success as provided under the Bail and Bond Policy Guidelines Paragraph 4.30 and the principle is that the success of an appeal is pegged on account of some substantial point of law to be argued as was held in Jivraj Shah vs Republic (1986) KLR 605. That the Appellants' grounds of appeal do not highlight any substantial point of law that when raised during the appeal, is likely to succeed since the grounds are the usual grounds and none that stands out as likely to succeed even before the same is argued.
13. Further, the convictions were proper as all the ingredients of the offences were proved and the evidence was clear and direct and therefore the appeals do not have overwhelming chances of success that would warrant granting of bail pending appeal. She submitted that the 1st Appellant has not demonstrated unusual or exceptional circumstances to warrant grant of bail pending appeal because his claim that he is the sole bread winner, he is elderly and ailing do not qualify as an unusual or exceptional circumstances as was held in Dominic Karanja v Republic (1986) KLR 612. Same as 2nd Appellant's claim that he is the sole breadwinner and that he will abide by bail terms set by the court do not qualify as exceptional circumstances. That they were sentenced to 2 years imprisonment and it cannot therefore be said that they will have served a substantial part of their sentence by the time the appeal is heard and determined.
14. I have considered the applications and the rival arguments by the counsels herein. I have also perused the attached trial court judgment. Section 357 of the Criminal Procedure Code provides for the grant of bail pending appeal or suspension of sentence by the High Court or the subordinate court which convicted or sentenced that person. Under subsection 1 it states;
 - “(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...”

15. The Bail and Bond Policy Guidelines provide at page 27, paragraph 4.30 that with respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.

16. The court of appeal in *Epungure v Republic* (Criminal Appeal E015 of 2021) [2021] KECA 343 (KLR) while discussing on the right to bail pending appeal stated that;

“As conceded by the applicant in his written submissions, Article 49(1)(h) provides for the right to bail of an accused person. An arrested or accused person has a right to bail or bond since, as provided under Article 50(2)(a), such a person is entitled to the constitutional right to the presumption of innocence. A convicted person, on the other hand, does not enjoy the right to presumption of innocence since, as the Court observed in *Mary Ngechi Ng’ethe v Republic* [2021] eKLR:

“5. However, in exercising such discretion, the Court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him/her by *the Constitution* and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong and the sentence illegal. Therefore, as it has been stated time and time again bail pending appeal will only be granted in rare and exceptional circumstances.”

17. It therefore follows that right to bail pending appeal is not an outright right but it is given in exceptional cases. The principles to be considered in determining whether an applicant should be granted bail pending appeal were set out in the case of *Jivraj Shah* case (*supra*) which are 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.”

18. Similarly, the Learned Judge in *Mkirani v Republic* (Criminal Appeal E010 of 2021) [2021] KEHC 300 (KLR) quoted The Supreme Court of India in the case of *Krishnan v The People* {SCZ 19 of 2011}, {2011} ZMSC 17 where the court enumerated the following conditions to be satisfied in an application for bail pending hearing of an appeal:

- “i. Bail is granted at the discretion of the court.
- ii. The court must be satisfied that there are exceptional circumstances that are disclosed in the application.



- iii. The fact that the appellant due to delay in determining the appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances.
 - iv. It is important to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict, and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.
 - v. It is not for the court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.
 - vi. The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an application to bail; pending appeal.
19. Having considered the above decisions, I must point out that grant of bail pending appeal is at the discretion of the court guided by the above principles and that the discretion must be exercised judicially. My view is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. It should only be concerned with the question of whether or not the appeal would be rendered nugatory if bail/bond pending appeal is not granted.
 20. It will be noted from the Jivraj case (supra) that one of the principles to be considered in determining whether to grant bail pending appeal is that the appeal has overwhelming chances of success on account of some substantial point of law to be argued in the pending appeal.
 21. The 1st Appellant's application and the attached petition of appeal do not raise a point of law. The application only mentioned that the Appellant's rights to fair trial were infringed but he did not state in which way. The 2nd Appellant did not raise any substantial point of law that will be argued at the appeal that would justify the Appellant's release on bail pending appeal.
 22. As to whether there exist exceptional circumstances, the 1st Appellant's counsel argued that the Appellant is a 76 years old retired police officer, he has children, grandchildren and great grandchildren who depends on him and that he suffers acute health conditions requiring ongoing medical treatments. That his family have suffered mental anguish and untold suffering since he is the patriarch of the family and he will suffer irreparable harm while in custody thereby infringing on his right to dignity.
 23. For the 2nd Appellant, the counsel stated that the 2nd Appellant is a first offender and a family man with young children, he was out on cash bail and diligently attended court for a period of almost two years as and when required, that he is willing to abide by bail terms and conditions that maybe set by the court and that the appeal has a high probability of success.
 24. The court in Daniel Dominic Karanja v Republic(supra) held that;

“The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo v Republic [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.”



25. There are therefore no exceptional circumstances to warrant granting of bail pending appeal.
26. As to whether they would have served a substantial part of the sentence before the disposal of the appeal, the Appellants were sentenced on 17/10/2024 to two (2) years imprisonment and it is apparent that they would not have served a substantial part of the sentence before the appeal is heard and determined. In any event, this can be forestalled by an expedited hearing which looking at the diary of this court is possible.
27. With the result that the consolidated application is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF JANUARY 2025

A.K. NDUNG’U

JUDGE

