Mohammed v Republic (Criminal Appeal E009 of 2025) [2025] KEHC 6655 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6655 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E009 OF 2025

JN ONYIEGO, J

MAY 22, 2025

BETWEEN

YASSIN MAALIM MOHAMMED ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant herein was charged with the offence of Forcible Detainer contrary to section 91 as read with section 36 of the *Penal Code*. The particulars of the offence were that on diverse dates between 10.11.2022 and 13.11.2022 at Neboi location in Mandera East Sub Location jointly with others not before the court being in possession of Plot No. 249 registered in the name of Neboi livestock, without colour of right, held possession of the said land in a manner likely to cause a breach of the peace or reasonable apprehension of the breach of peace against the members of Neboi livestock group who were entitled by law to be in the possession of the said land.

2. The applicant pleaded not guilty to the charge. The matter then proceeded to full hearing with the prosecution calling 3 witnesses while the applicant testified on oath alongside 8 other witnesses. However, he was found guilty, convicted and sentenced to serve 2 years' imprisonment.

3. Being aggrieved with both the conviction and sentence, the applicant filed a petition of appeal dated 12.03.2025. Alongside, is a notice of motion dated 24.03.2025 brought pursuant to section 356(1) and 357(1) of the CPC seeking orders that:

   i. Spent.

   ii. The Honourable Court be pleased to admit the applicant to bail pending hearing and determination of the instant appeal.

   iii. The appellant be released on cash bail similar to the bail/bond terms ordered at the trial court.

iv. Pending the hearing and determination of the appeal herein, the applicant be granted bail on such terms as may be just.

v. Costs of this application be borne by the respondent.

4. The application is anchored on grounds that; the applicant's appeal has overwhelming chances of success; the applicant together with the complainants had visited the office of the District Commissioner in an attempt to unravel the true owner of the land and the investigations are still active; and further, that the applicant has a young family and therefore, not a flight risk.

5. The application is supported by the affidavit of the applicant sworn on 24.03.2025. He annexed his petition of appeal in which he raises 22 grounds of appeal. Generally, it was urged that the trial magistrate erred when he convicted the applicant without sound evidence to support the same. That the applicant together with the complainants had visited the office of the District Commissioner in an attempt to unravel the true owner of the land in dispute and the investigations are still active. That due to the nature of the case, it was only fair that this court grants the prayers sought in this application.

6. The application was canvassed by way of submissions.

7. The applicant in his submissions dated 04.04.2025 urged while relying on the case of Nyambura vs Republic Criminal Appeal No. E103 of 2022 [2023] KEHC 926 (KLR) where the court held that: -

> " ...mostly granting bail pending appeal would be primarily geared to preventing punishment of an innocent person, just in case the trial court misdirected itself, but, at the same time, it must be for the purpose of administering justice..."

8. Learned counsel contended that it is in the interest of justice that the orders sought be granted. On the limb whether the appeal has high chances of success, counsel urged that it is not in dispute that the trial revolved around the identification of the exact plot numbers in dispute, boundaries and the historical records related to land in dispute. That the issue herein lies in the purview of civil claim hence not criminal.

9. Counsel contended that some of the issues that fall due for determination are; the legal ownership of the land in question has not been established beyond reasonable doubt due to lack of clear distinction between the boundaries and or history of the location of plot number 9/Neboi and plot No. 249/ Neboi. It was urged that one of the essential ingredients of an offence of forcible retainer is whether possession of the disputed land amounts to a breach of peace.

10. The applicant thus relied on the case of Republic vs Director of Public Prosecution & 2 Others ex parte Josephine Keramatisho Teeka [2014] KEHC 132 (KLR) to express the position that if a statute provides a mode of dispute resolution, the parties should endevour to exhaust that mechanism first.

11. On whether there exist exceptional circumstances, counsel urged that the applicant has a young family which depends on him for provision of basic needs. That he is not a flight risk as he has prior to the proceedings herein, complied to the bail terms previously issued by the trial court. To that end, reliance was placed on the case of Republic vs Edwin Wijenche & 3 Others [2011] eKLR where the court held that the principles to be borne before granting bail or bond is inter alia the strength of the evidence, the character or behaviour of the accused and the seriousness of the offence. That in the instant case, the applicant's continued stay in prison would greatly cause economic hardship to his young family which depends on him. To that end, this court was implored to allow the prayers as sought.

12. The respondent in their submissions dated 01.04.2025 opposed the application by citing two issues for determination as follows:

    i. Whether the appellant/applicant's appeal has overwhelming chances of success.

    ii. Whether there exists any exceptional and or unusual circumstances to warrant his release on bail pending appeal.

13. On the first issue, it was submitted that the appeal has no chance of success as none of the grounds on the affidavit in support of the application establishes any chance of success. That the conviction against the appellant was not only proper but also legal. It was argued that in considering whether an appeal the basis of an application for bail pending appeal has overwhelming chances of success, the court ought to be very cautious not to look into the merits or otherwise of the appeal, but must be very limited to weighing the chances on an obvious substantial points of law only. To buttress that position, reliance was placed on the case of Ndirangu vs Republic [2005] KEHC 1469 (KLR).

14. It was contended that the trial magistrate convicted the applicant on cogent evidence and as such, there are no glaring signs of overwhelming chances of success thus this Honourable Court must hold the presumption of propriety of the conviction and reject the application herein.

15. On the second issue, counsel submitted that there are no exceptional circumstances that have been demonstrated by the applicant to warrant this court to grant the prayers sought. It was urged that there exists the presumption that the applicant's impugned conviction was proper and secondly, that due to his conviction, he no longer enjoys the presumption of innocence hence not entitled to bail. That in as much as there is no exhaustive definition of what amounts to exceptional and /or unusual circumstances as far as justification for grant of bail pending appeal is concerned, none of the circumstances raised by the applicant amount to such exceptional and /or unusual circumstances. In the end, this court was urged to exercise its discretion judiciously by dismissing the application herein.

16. I have considered the application herein and the submissions by both parties. The only issue that fall for determination is whether the application herein is merited.

17. The principles to guide a court while dealing with an application such as the one before this court were considered and set out in the case of Jivraj Shah vs Republic 1986 eKLR as follows:-

> " 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. The decision in Somo v Republic [1972] EA 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued." (Emphasis added). Over the years, this Court has adopted the above criteria, and applied the guidelines consistently. We seem, however, to have moved away from the "prima facie" test to a more restrictive test of "overwhelming success" as set out in the case of Daniel Dominic Karanja

v Republic [1986] eKLR where this Court held: "The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. 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. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of ill health arises. We are not to be taken to mean that ill- health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country." See also Juma v R (supra).

18. Similar position was held in the case of Somo vs Republic [1972] EA 476 where the court held that;

> " Where he (applicant) is undergoing a custodial sentence he must demonstrate, if he wishes to anticipate the result of his appeal and secure his release 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 an overwhelming probability that it will succeed."

19. Without saying much about the chances of the appeal succeeding, the issues that have been raised more particularly the contestation over a dispute on land ownership and the general circumstances of the case does reveal that the appeal is not hopeless. This being a court of law and fact, it is my considered view that a prima facie test has been met as was set in the Jivraj case (supra).

20. On the question of existence of unusual or exceptional circumstances, counsel cited two grounds namely; that the applicant has a young family which depends on him for provision of basic needs and that he is not a flight risk as he has prior to the proceedings herein, complied to the bail terms previously issued by the trial court. In the case of Peter Hinga Ngatho versus Republic [2015] eKLR it was held that the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.

21. I appreciate that being the sole bread winner of a family or having complied with the previous bail/ bond terms are not guarantees to one's release on bond where one is serving a lawful sentence. In my opinion, none of the quoted reasons qualify to be exceptional circumstances to justify release of the applicant on bail pending appeal. It is apparent that unlike bail pending trial, the ground that the applicant is still innocent does not apply in the circumstances of this appeal. The presumption of innocence is not applicable anymore until the appeal is heard and determined.

22. On the question whether the sentence is so short that the appellant may end up serving sentence before the appeal is heard, the same was not pleaded. However, two years is not such a short sentence that they can be served before the appeal is heard and determined given that the court's diary can accommodate faster processing of the appeal.

23. Without delving into the merits of the appeal and on account of the reasons stated above that the appeal is not hopeless, the applicant has met the test for grant of bail pending appeal. Accordingly, he shall be released on a bond of 300,000/= with one surety of same amount.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF MAY 2025

J. N. ONYIEGO

JUDGE