



**Goko v Republic (Miscellaneous Criminal Application
E032 of 2024) [2025] KEHC 8512 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8512 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CRIMINAL APPLICATION E032 OF 2024**

**AK NDUNG’U, J
JUNE 18, 2025**

BETWEEN

FEDAN MWAI GOKO APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Fedan Mwai Goko[hereinafter, the Applicant] filed a notice of motion application dated 28/10/2024 brought under Article 49[1] [h], 50[q], 51[1] and 165 [3] [a] [b] of *the Constitution* and section 354 [4] [5] and section 357[1], *Criminal Procedure Code* for the main order that he be granted reasonable bail pending the filing, hearing and determination of his appeal against both conviction and the sentence in MCCR 1334/2015.
2. The application is based on the grounds on the face thereof and is supported by an affidavit of the Applicant. He deposed that he was sentenced to 3 years imprisonment for the count of obtaining money by false pretence contrary to Section 313 of the *Penal Code* and 5 years imprisonment for the offence of conspiracy to commit a felony contrary to Section 293 of the *Penal Code* and the sentences were ordered to run concurrently. That the convictions and the sentences were erroneous as they were a grave travesty of justice hence the intended appeal has high chances of success. That the grounds of appeal raise an arguable case that requires to be heard expeditiously and it will be prejudicial if he remains in custody when it is certain that his appeal will succeed.
3. He deposed that there are exceptional circumstances that favour his urgent release pending determination of the appeal. That prior to his arrest, he had no criminal record and was gainfully employed. He is a family man with two kids and his wife has no permanent job and since his incarceration, his family has suffered financially, emotionally, psychologically and mental anguish as he was the sole breadwinner. He has a fixed abode in Nanyuki stadium Estate and his family is well known and that he has an arguable appeal with high chances of success. That he filed his appeal on 20/12/2023



- and have only been getting mentions. That he has actively engaged in social rehabilitation activities and classes while in prison and therefore, it will be just and fair if he is admitted to bail pending hearing of the appeal.
4. In opposing the application, the Respondent's counsel filed a replying affidavit dated 19/11/2024. 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 Applicant has been found guilty and the principle of presumption of innocence does not apply. That the Applicant 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 5 years sentence imposed, there is no likelihood that he would have served a substantial part of the sentence before the appeal is heard.
 5. The application was canvassed by way of written submissions. The Applicant in his submissions argued that he is serving a sentence of 5 years imprisonment after he changed his plea to that of guilty plea and he was sentenced accordingly. He submitted that count 2 was duplex in that he was charged with conspiracy to commit a felony contrary to Section 293 of the Penal Code whereas the offence under Section 293 is of fraudulent appropriation of power but the particulars in the charge sheet disclosed an offence of conspiracy to commit a felony. Hence, there were two offences within the same charge which was against the rule of duplicity which provides that prosecution must not allege commission of two or more offences in a single charge sheet. That he pleaded guilty to a wrong section of the law as the offence under section 293 has no nexus with offence under Section 313 of obtaining money by false pretences. Therefore, the sentence in count II was illegal which is an exceptional or unusual circumstance that should lead the court to grant bail in the interest of justice as was held in *Muasya vs Republic* [Criminal Appeal E017 of 2022] [2024] KEHC 588[KLR] that to constitute an overwhelming chances of success, the Applicant must show the court without necessity of detailed analysis of the evidence of a glaring error committed by the trial court such as illegal sentence.
 6. He submitted that it is not certain that the prosecutor stated the facts to his understanding and neither was he given a chance to dispute the fact or add any relevant facts. The charges were read and were not explained to him despite the fact that he was unrepresented. He was not warned on the consequences of pleading guilty and severity of the sentence hence the plea was not unequivocal. As to sentence, he submitted that he was sentenced to both the main count of obtaining money by false pretence and alternative count of conspiracy to commit a felony. That it is trite law that the sentence on the alternative count ought to be kept in abeyance. Reliance was placed on the case of *Patrick Gitonga vs Republic* [2020] eKLR and *Mbatha Kang'ethe v Republic* [2015] eKLR that once one is convicted on the main count, it is not open for the court to convict on the alternative count.
 7. He argued that he filed his appeal on 20/12/2023 and it raises facts with high chances of success and since filing the appeal, the matter has only been mentioned twice before the deputy registrar which means if the same trend is adopted in 2025, his appeal might be rendered nugatory. Reliance was placed on the case of *Mkirimani vs Republic* Criminal Appeal E010 of 2021 among other cases to emphasise that, the fact that he might have served a substantial part of the sentence due to delay in hearing the appeal, is an exceptional circumstance. That there is a likelihood he would have served $\frac{1}{4}$ to $\frac{1}{3}$ of his sentence before the appeal is heard and determined. That he has already served 1 year 10 months and there is a likelihood he will have served most of his sentence. That he meets the exceptional circumstances that were enunciated in *Arvind Patel vs Uganda* S.C Cr. Appeal No. 1 of 2003 as the offences in question did not involve personal violence hence he does not pose any risk to the society.
 8. The Respondent's counsel on the other hand 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 the Applicant having been 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. That he has further gone ahead to extensively argue the appeal instead of highlighting a substantial point of law that will likely be successful.

9. Further, the conviction was proper as he was convicted and sentenced on his plea of guilty hence the appeal has no overwhelming chances of success that would warrant grant of bail pending appeal. She submitted that the Appellant has not demonstrated unusual or exceptional circumstances to warrant grant of bail pending appeal because his claim that he is a first time offender, that he was engaged in gainful employment, he is the sole bread winner with a wife and two children who are suffering and that he has a well known place of abode do not qualify as unusual or exceptional circumstances as was held in *Dominic Karanja v Republic* [1986] KLR 612. That he was sentenced to 5 years imprisonment on 23/04/2023 and it cannot therefore be said that he will have served a substantial part of his sentence by the time the appeal is heard and determined.

10. I have considered the application and the rival arguments by the parties. 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...”

11. 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.

12. 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.”

13. 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.”

14. 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.

15. 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.



16. 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. The point of law argued by the Applicant is that count II was duplex for reason that he was charged under Section 293 of the *Penal Code* with the offence of conspiracy to commit a felony whereas Section 293 provides for a different offence of fraudulent appropriation of power hence, the conviction and sentence on the said count was illegal. Further, he was convicted and sentenced on count I and alternative count therefore, the conviction in the alternative count was illegal.
17. This can be a point of law to be argued but it is noteworthy that his argument is only based on one count and not both counts. The propriety of Count 1 is not challenged. Further, his argument that the plea of guilty was not unequivocal is a fact to be determined in the appeal and not this application.
18. As to whether there exist exceptional circumstances, the appellant stated that he had no criminal record and was gainfully employed. He is a family man with two kids and his wife has no permanent job and since his incarceration, his family has suffered financially, emotionally, psychologically and mental anguish as he was the sole breadwinner. He has a fixed abode in Nanyuki stadium Estate and his family is well known. 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. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of illhealth 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.”
19. There are therefore no exceptional circumstances to warrant granting of bail pending appeal.
20. As to whether the appellant would have served a substantial part of the sentence before the disposal of the appeal, he was sentenced to 5 years and as such he would not have served a substantial part of the sentence before the appeal is heard and determined.
21. With the result that the application before court lacks merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF JUNE, 2025.

A.K. NDUNG’U

JUDGE

