



**Kipkemoi v Republic (Criminal Appeal E007 of 2023)  
[2024] KEHC 51 (KLR) (Crim) (16 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 51 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E007 OF 2023  
K KIMONDO, J  
JANUARY 16, 2024**

**BETWEEN**

**SGT ROBERT KIPKEMOI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Application for bail pending appeal from the decision of B. Ochoi, Judge-Advocate, dated 5th October 2023 in Court Martial No. 20 of 2021 sitting at Kahawa Garrison)*

**RULING**

1. The appellant was convicted by the Court Martial sitting at Kahawa Barracks on two counts relating to conduct to the prejudice of good order and service discipline contrary to section 121 of the [Kenya Defence Forces Act](#) 2012.
2. The particulars were that on diverse dates between 9<sup>th</sup> February 2021 and 11<sup>th</sup> April 2021 he solicited money from Joseph Kimutai Choge and Mercy Chepkemoi Choge on the pretext that he had influenced the recruitment of the latter into the Kenya Defence Forces.
3. He was imprisoned for 6 months on each count; the sentences to run concurrently.
4. The appellant lodged a petition of appeal dated 11<sup>th</sup> October 2023. It would seem to be against the conviction and also a ruling delivered earlier by the Judge-Advocate on 29<sup>th</sup> September 2023.
5. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 11<sup>th</sup> October 2023 pleading for bail. It is supported by his deposition of even date.



6. The appellant contends that the appeal has overwhelming chances of success primarily on grounds that the court martial was not legally constituted; that the Judge-advocate failed to establish the identity of the appellant; and, that his impartiality was cast into doubt.
7. The appellant's learned counsel filed detailed submissions. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail.
8. The application is contested by the Republic through grounds of opposition dated 17<sup>th</sup> November 2023 and written submissions dated 20<sup>th</sup> November 2023. Learned prosecution counsel submitted that all the elements of the charges, which related to corruption, were proved; and, that the appeal is hopeless.
9. This morning, I heard further arguments from learned counsel for the appellant and the respondent.
10. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj Shah v Republic* [1986] KLR 605-

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 is *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.

11. I resist the temptation to comment about the merits of the appeal. It will be the duty of the first appellate court to re-evaluate the records and establish whether the proceedings before the court martial were legal; whether there was proper identification; or, whether the evidence supported the amended charges. The less I say about it the better.
12. I can however safely state the following. The issue of the identity of the appellant was live before the trial. The question of legality of the composition of the court martial or impartiality of the Judge-Advocate was also the subject of the appellant's notice of motion dated 26<sup>th</sup> September 2023. It was dismissed on 29<sup>th</sup> September 2023 and is also the subject of this appeal.
13. I find that the 22 grounds of appeal are arguable, but am not persuaded that a substantial point of law has been urged on that aspect to sway the court to grant bail pending appeal.
14. The appellant was sentenced to 6 months in jail. Assuming that he earns his full remission in prison, his earliest date of release would be on or about 5<sup>th</sup> February 2024, just a few days away. If he fails to earn the remission, his full term may run a little longer. I thus readily find that the sentence or a substantial part of it, will have been served by the time the appeal is heard. *Somo v Republic* [1972] EA 476. Purely on that ground, I will exercise my discretion in favour of the applicant.
15. The appellant may be released upon executing a cognizance in the sum of Kshs 1,000,000 together with one surety of a similar sum. The appellant must appear at every mention or hearing of the appeal; in default of which the bond will be cancelled and the surety called to account.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JANUARY 2024.**

**KANYI KIMONDO**



## **JUDGE**

Ruling read virtually on Microsoft Teams in the presence of: -

The appellant.

Mr. Kiprono & Mr. Sang for the appellant instructed by CK Advocates.

Ms. Tumaini Wafula for the respondent instructed by the office of the Director of Public Prosecutions.

