



**Mwangi v Republic (Criminal Appeal E122 of 2023)  
[2024] KEHC 1325 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1325 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E122 OF 2023  
EM MURIITHI, J  
FEBRUARY 15, 2024**

**BETWEEN**

**JOSEPH NGARI MWANGI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was convicted of the offence of Stealing Goods in Transit contrary to Section 279 (C) of the Penal Code and was sentenced to seven (7) years imprisonment on 26/6/2023.
2. He has filed a notice of motion under certificate of urgency dated 29/8/2023 in this court seeking that, “3. This honorable Court be pleased to grant Bond/Bail to the Appellant/Applicant pending the hearing of the Appeal. 4. This honourable court be pleased to suspend the execution of the sentence appealed against by the Applicant pending the hearing of the appeal.”
3. He contends that if he is not admitted to bail/bond, he is likely to serve a substantial jail term before his appeal, which has overwhelming chances of success, is heard and determined. He was granted bond in the lower court which he did not abscond, and he helps his family members, and his elderly parents since he is a casual laborer.
4. On 19/9/2023, the Respondent filed grounds of opposition that “The Applicant was properly convicted and sentenced before the trial court and as such he is serving a lawful sentence; Pursuant to Article 49 (1) (h) of the Constitution, 2010 an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proven guilty unlike in this case where the Applicant has already been convicted before a competent court; The Applicant’s appeal will be rendered nugatory, neither will he be prejudiced if bail pending appeal is not granted since this court has powers to quash the conviction in the unlikely event that they overturn the decision to convict him. Additionally, the Applicant was convicted on 26<sup>th</sup> June, 2023. There is no possibility



that the Applicant would have served a substantial portion of his sentence of 7 years before the appeal is heard and determined; The grant of bail pending appeal is at the court's discretion which must be exercised judiciously. Tied to this, bail pending appeal is not a constitutional right as there is a presumption that the Applicant was lawfully convicted unless the contrary is proved; The Applicant has not demonstrated that he has an arguable appeal with high chances of success; In the circumstances of this case, a draft petition of appeal was not annexed in the Applicant's pleadings. As such, this court is unable to ascertain whether the Applicant's intended appeal has good prospects of succeeding on appeal; Be as it may, from the judgment the Applicant's intended appeal does not have a high chance of success based on the following reasons:-

- a. The Applicant was the driver of trailer motor vehicle registration no. KCV 990 T (herein after referred to as motor vehicle) which was loaded with 28.5 tonnes of Ajab flour.
- b. The Applicant informed PW1 about an accident, however when police arrived at the scene there was no accident. Additionally, the motor vehicle was found not to be carrying any goods.
- c. PW4, the motor vehicle inspector upon inspection noted the motor vehicle had no pre-accident defects or visible damage.
- d. During defence hearing, the Applicant did not produce treatment notes from Meru level 5 hospital to corroborate that he was injured from the accident but only tendered invoices and M-pesa statements.
- e. Section 279 (c) of the *Penal Code* provides "If theft is committed under any of the following circumstances....the offender is liable to imprisonment for fourteen years." The sentence of 7 years meted out was thus legal.

The Applicant has not demonstrated any unusual or exceptional circumstances for the grant of bail pending appeal. The fact the Applicant did not breach the bail conditions before the trial court is not an exceptional circumstance which can warrant a decision to admit the Applicant to bail pending appeal as was held in the case of *Peter Hinga Ngotbo v Republic* (2015) eKLR; The fact that the Applicant helps his family members who elderly and not employed is not an exceptional circumstances since "every person is equal before the law and has the right to equal protection and equal benefit of the law" pursuant to Article 27(1) of *the Constitution*, 2010; Although the Applicant did not abscond during the trial, there is a high incentive to abscond now that he is convicted; In the upshot the Respondent prays that the Applicant's application has no merit and it be dismissed accordingly save that leave be granted to file a petition out of time."

5. The application was canvassed by way of written submissions which were respectively filed on 12/1/2024 and 16/1/2024.
6. The Applicant urged that even for more serious criminal offences like murder and robbery with violence, suspects and accused persons are granted bond. He urged that since he is not a flight risk and he attended the trial while out on bond, he should be given an opportunity to return home so that he can proceed with the appeal when is out on bond. He relied on *John Koyi Waluke & another v Republic* [2020] eKLR and *Republic v Joseph Kuria Irungu & another* [2018] eKLR in support of his application.
7. The Respondent urged that in exercising its discretion to grant bail pending appeal, the court has to bear in mind that the Applicant has been convicted by a competent court and as such he has lost the presumption of innocence conferred on him by *the Constitution*. It urged that the burden is on the Applicant to demonstrate that the conviction was wrong and the sentence illegal as the court observed in *Mary Ngechi Ng'ethe v Republic* (2021) eKLR. It urged that the grounds of appeal do not disclose the



existence of an appeal with overwhelming chances of success and there is no likelihood of the Applicant serving a substantial part of the sentence before the appeal is heard, and cited *Somo v Republic* (1972) EA 480. It urged that the Applicant has not demonstrated the existence of exceptional or unusual circumstances to warrant grant of bail pending appeal, and cited *Dominic Karanja v Republic* (1986) KLR 612.

### Determination

8. The principles to be considered in an application for bail pending appeal pursuant to the provisions of Sections 356 and 357 of the *Criminal Procedure Code* were set out in *Jivraj Shah v R* (1986) KLR 605 which considered earlier decisions of the Court and expounded on the factor of overwhelming chances of success and held 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 5 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. It is almost self defeating to attempt to define phrases or to establish formulae.”

9. The Applicant contends that his appeal has overwhelming chances of success and he is apprehensive that he will have served a substantial part of the sentence before it is heard and determined.
10. It is true that the Applicant was sentenced to 7 years imprisonment on 26/6/2023, and it is highly unlikely that he will have served a substantial portion of the sentence before the appeal is heard and determined.
11. The court finds that the Applicant has not shown any exceptional circumstances to warrant his release on bail pending appeal. The fact that he did not breach the conditions of bail set during trial or that he is a family man taking care of his elderly parents are not exceptional circumstances to warrant his admission to bail pending appeal. The court wishes to point out that bail in *Republic v Joseph Kuria Irungu & another* (*Supra*), cited by the Applicant was granted pending trial, and not pending appeal as alluded to by the Applicant.
12. This court notes that in *John Koyi Waluke & another v Republic* (*Supra*), bail pending appeal was granted purely on humanitarian grounds and in the interest of justice as the court (J. N Onyiego J) observed that,

“There is no law providing for special treatment of certain categories or classes of people based on their status, community responsibility, position or social standing. What matters here is the equal treatment of everybody regardless of one’s social status or position in society. Being a member of parliament is not an exceptional ground to warrant his release.”



## Orders

13. Accordingly for the reasons set out above, the Applicant's application dated 29/8/2023 lacks merit and it is hereby dismissed.
14. However, the Applicant's appeal will be heard on priority basis, in line with the holding in *[Thambura Leonard Mucui v Republic](#)* (2021).
15. Directions as to Hearing to be taken on 26/2/2024.

Order accordingly.

**DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Mathaiya Baru & Associates for the Appellant.

Mr. Masila for DPP.

