



REPUBLIC OF KENYA



**Jwanda v Republic (Criminal Appeal E068 of 2023)
[2024] KEHC 3524 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E068 OF 2023
RPV WENDOH, J
MARCH 14, 2024**

BETWEEN

WILLIAM OTIENO JWANDA APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence by Hon. C. N. Oruo – Principal Magistrate in Principal Magistrate’s Court at Rongo in Criminal Case No. E405 OF 2023 delivered on 6/10/2023)

RULING

1. Before me is the application dated 11/10/2023 in which the applicant, William Otiemo Jwanda seeks to be granted bail or bond pending the hearing of his Appeal.
2. The appellant was convicted by the Principal Magistrate in Rongo for the offence of Cheating contrary to Section 315 of the *Penal Code* in Count I and the offence of Giving false information to a person employed in the Public Service contrary to section 129 of the *Penal Code* in Count II.
3. He was subsequently sentenced to three (3) years imprisonment on 06/10/2023 on each count, with the sentences running consecutively. He has since lodged an appeal in the High Court against the judgment of the Subordinate Court. It is his claim that he suffers serious health and mental issues and he needs to be catered for by his family physician and thus prays to be released on bond to enable him seek medical attention; that he was on bond during his trial and complied with all the terms and is therefore not a flight risk. He also contends that bail / bond is a Constitutional right.
4. The application was supported by the grounds found in the body of the application and supporting affidavit of Mwita Kerario, the advocate on record having conduct of the matter on behalf of the Appellant.



5. The application was opposed. The Respondent filed grounds of opposition dated 15/11/2023, which are to the effect that the appellant has not demonstrated that his appeal has prima facie chances of appeal by demonstrating any arguable ground of appeal or point of law; that the applicant has also not demonstrated the existence of any exceptional or unusual circumstances in the Application to warrant the grant of bond. It was counsel's contention that ill-health per se cannot amount to exceptional or unusual circumstances especially when prison authorities are equipped with medical facilities to cater for the health needs of those in custody. His position is that an assertion by the Applicant that he will not abscond if released is not sufficient ground for releasing a convicted person especially since the constitutional presumption of innocence has already been compromised by the conviction. He consequently urged the court to expediate the hearing and determination of the appeal and deny the Application.
6. Both parties relied on the grounds outlined in their Application, Affidavits and Grounds of Opposition respectively. No submissions were filed.
7. In *Charles Owanga Aluoch vs. DPP* (2015) eKLR, the Court said: -
 - i. "The right to bail is provided under Article 49 (1) of the *Constitution* but is at the discretion of the court; and is not absolute. Bail is a constitutional right where one is awaiting trial.
 - ii. After conviction, that right is at the court's discretion and upon considering the circumstances of application the court have over the years formulated several principles and guidelines upon which bail pending appeal is anchored."

Section 357 of the *Criminal Procedure Code* provides for bail / bond pending appeal. It reads as follows:
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 - iii. "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.
 - iv. Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further applications for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in section 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers."
8. While the above sections provide the statutory mechanism for the grant of Bail/Bond pending Appeal, the same is not automatic and the court has to exercise its discretion on whether or not to grant bail / bond pending appeal. The criteria upon which the court may grant bail pending appeal were discussed in the *Jivray Shah vs. Republic* (1986) which are as follows:
 - v. "(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.
 - vi. (2) 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 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.



- vii. (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.”
9. What amounts to exceptional circumstances varies from case to case. In *Dominic Karanja vs. Republic* (1986) KLR 612, the Court of Appeal held that the applicant’s good character or the hardships that the applicant’s family were undergoing were not exceptional circumstances. It also held that ill health per se would not constitute exceptional circumstances where there existed medical facilities for prisoners. Further in the case of *Mutua vs. Republic* (1988) KLR 497 the Court of Appeal said:
- viii. “It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the Applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so”.
10. In the instant case, the applicant has already been convicted and sentenced to six (6) years imprisonment. It is immaterial that he attended court during his trial. He is now faced with six (6) years jail term if that is an incentive for the applicant to take flight.
11. As stated in the Jivray case above, the principal consideration on whether or not to grant bail/bond pending appeal is the existence of exceptional or unusual circumstances. The exceptional circumstances that the applicant relies upon is that he is hypertensive and suffers from severe pneumonia. He annexed treatment notes dated 03/10/2023 when he visited the Rongo Sub-County Hospital. In my view, this is not an exceptional or extraneous circumstance that cannot be managed and handled in the Prisons medical facilities. Further, I do note that the said treatment dates back to 03/10/2023, even before the sentence was passed. There is no other medical report or treatment notes upon his conviction and/or a demonstration of how his condition has manifested and greatly deteriorated or affected him while in custody upon conviction. This court would need a more detailed report to show that the applicant’s condition is so bad that it cannot be alleviated by medications and medical facilities within the prisons.
12. As to whether the applicants are likely to serve a substantial part of the sentence before the appeal is heard and determined or there is likely to be delay, I doubt that will happen. On a perusal of the trial court file, I have noted that the proceedings have already been typed. The onus is now on the Appellant to prepare and file his Record of Appeal timeously and thereafter fix the Appeal for hearing and determination expeditiously/ at the earliest convenience.
13. In the end, I find that the application for bail/ bond pending appeal is not merited. It is declined.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 14TH DAY OF MARCH, 2024.

R. WENDOH

JUDGE

Ruling delivered in the presence of

Ms. Ikol for the State.

Mr. Mwita for the Appellant.

Applicant Present

Emma / Phelix – Court Assistants

