



**Mutua & 3 others v Republic (Criminal Appeal E065 of 2023)  
[2024] KEHC 2154 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2154 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL E065 OF 2023  
AK NDUNG’U, J  
MARCH 6, 2024**

**BETWEEN**

**STANLEY MUTUA ..... 1<sup>ST</sup> APPELLANT  
KENNEDY MURIITHI ..... 2<sup>ND</sup> APPELLANT  
NICODEMUS BUNDI ..... 3<sup>RD</sup> APPELLANT  
SEBASTIAN MARETE ..... 4<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal From Original Convictions And Sentences In Nanyuki  
Cm Criminal Case No 2225 Of 2021 – V Masivo, SRM)*

**RULING**

**Ruling On Bail Pending Appeal**

1. The Appellants herein, Stanley Mutua, Kennedy Muriithi, Nicodemus Bundi and Sebastian Marete were each convicted after trial of dealing with wildlife trophies of an endangered species without a permit contrary to Section 92(2) of the *Wildlife Conservation and Management Act*, 2013 (Count I) and being in possession of wildlife trophies of an endangered species without a permit contrary to Section 92(4) of the same Act (Count II). They were each sentenced to seven (7) years imprisonment in Count I and fined Kshs 3,000,000/- and in default to serve 12 months imprisonment in Count II.
2. They have each appealed against conviction and sentence. Pending disposal of their appeal the Appellants have applied to be released on bail vide chamber summons application dated 04/09/2023. The application is grounded on the grounds on the face thereof and the supporting affidavit of Jason Kiambi Mungania, the Appellants’ advocate.



3. It was deponed that the instant appeal has high chances of success and the Appellants are apprehensive that if not granted bail, their appeal may be rendered nugatory should they succeed given the fact that they may have served most of their sentence by the time the appeal is heard and determined. That the Appellants always attended court and will continue to do so if released on bail.
4. The application was opposed by the Respondent who filed a replying affidavit dated 21/09/2023. She deponed that the application lacks merit and does not meet the legal requisite of the orders sought. The evidence that was tendered by the prosecution was overwhelming and the grounds raised in the memorandum of appeal lacks merit therefore, the appeal has no chances of success. That the Appellants' chances of absconding court due to the nature of the offence and the sentence imposed is very high and granting of bail pending appeal is discretionally as the Appellants have been found guilty and the principle of presumption of innocence no longer applies. Further, they have not demonstrated any peculiar and exceptional circumstances to warrant grant of the orders sought and given the seven years sentence imposed, there is no likelihood that the Appellants would have served a substantial part of the sentence before the appeal is heard.
5. In rejoinder, the counsel for the Appellant filed a supplementary affidavit. He stated that the 4<sup>th</sup> Appellant has since developed a serious medical condition as was affirmed by the medical report from Nanyuki GK prison dispensary attached thereto.
6. The application was canvassed by way of written submissions. On behalf of the Appellants, it was argued that in an application for bail pending appeal, the applicant must establish that the appeal has overwhelming chances of success, the existence of exceptional or unusual circumstances and the length of time it might take for the appeal to be heard. On the success of the appeal, it was stated that there was no evidence linking the Appellants as persons who knew each other since there was no data that was produced to show that the Appellants communicated with each other. The Appellants denied knowing each other in court hence it was incumbent for call data to be produced. That the motor cycle alleged to have ferried the wildlife trophies was not produced in court as evidence and it was released by the court instead of being forfeited.
7. That there was no evidence that the Appellants were in possession of the wildlife trophies since there were no photographs that were taken at the scene to verify that indeed they were in possession as alleged. Further, PW3 who analysed the trophies did so without the benefit of seeing the Appellants and therefore it is right to conclude that the element of possession was not proved. Further, the evidence of the officers who were at the scene that is PW1, PW2, PW4 and PW5 materially differed suggesting that their evidence was fabricated.
8. On exceptional and unusual circumstances, counsel quoted the case of Arvid Patel vs Uganda S.C Criminal Appeal No 1 of 2003 where the court stated that unusual and exceptional circumstances include the character of the offender, whether the applicant is a first offender, whether the offence is personal violence, the appeal must not be frivolous and has reasonable chances of success, the substantial delay in determination of the appeal and whether he complied with conditions of bail before conviction. He stated that the Appellants have a fixed place of abode and have strong family ties which would diminish the flight risk in this case. That the Appellants rights were compromised by the learned trial magistrate's misinterpretation of the evidence.
9. Further, the court in *Chimabhai v Republic* [1971] EA 343 stated that the good character of the Appellant together with an anticipated delay in hearing the appeal might constitute an exceptional circumstance. That the 4<sup>th</sup> Appellant is 71 years old and suffering from epilepsy, hypertension and diabetes mellitus and his medical condition is deteriorating. Further, the appeal is likely to take time to be heard.



10. In rejoinder, it is submitted for the Respondent that bail pending appeal is discretionally as provided under Section 357 of the Criminal Procedure Code and that discretion must be exercised judiciously and within the law as was observed in *Kamote Mutua v Republic* [1988]eKLR where the court opined that in such an application as this one, it is not wise to intervene either from the point of view of the welfare of the Appellant or the State, unless there is a real reason why the court should hold that an applicant should not be deprived of his liberty. Further, the principles of granting bail were set out in *Jivraj Shah v republic* [1986] KLR 605 which are existence of exceptional or unusual circumstances, appeal has chances of success and substantial part of the sentence would have been served.
11. As to whether the appeal has high chances of success, she submitted that the burden is on the convicted person to demonstrate that there is an overwhelming chance of success. That the standard was expounded in *Jivraj Case* (supra) that ...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. Further in *Somo v R* [1972]EA 476 the court stated that the applicant must show that there is overwhelming probability that it will succeed. Therefore, the applicant ought to highlight a substantial point of law to be argued. In the instant application however, the Appellants have gone into the merit of the appeal and have not highlighted any substantial point of law that they intend to raise during the appeal. Further, the charges were proved to the required standard and the conviction was proper and therefore, the pending appeal does not have an overwhelming chance of success.
12. It is urged that the Appellants did not demonstrate existence of unusual or exceptional circumstances. The fact that the 4<sup>th</sup> Appellant is ailing, the assertion that the Appellants are of good character and that they complied with their bail conditions during trial do not qualify as unusual or exceptional circumstances as was held in *Dominic Karanja v Republic* [1986] KLR 612. As to the third ground that substantial part of the sentence will have been served, she stated that the Appellants were sentenced to 7 years on 24/07/2023 and therefore it cannot be said that they will have served a substantial part of their sentence by the time the appeal is heard and determined. The record of appeal is ready therefore the appeal can be expedited.
13. 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...”
14. 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.
15. 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.”

16. 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.”

17. 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."

18. 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.
19. 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.
20. The Appellant's application, the submissions before this court and the attached petition of appeal does not raise a point of law. The Appellant's counsel in his submissions concentrated on the merit of appeal and attacked the evidence that was produced before the trial court. As correctly pointed out by learned prosecution counsel, the Appellants' attack on the trial court's finding revolves around the evidence tendered and not on any point of law.
21. It is therefore my view that the counsel has not placed anything before this court that demonstrates that there is any substantial point of law that will be argued at the appeal and neither is there demonstration that the appeal has overwhelming chances of success that would justify the Appellant's release on bail pending appeal.
22. As to whether there exist exceptional circumstances, the Appellants' counsel submitted that the Supreme Court of Uganda in *Arvid Patel Case (supra)* stated that unusual and exceptional circumstances include the character of the offender, whether the applicant is a first offender, whether the offence is personal violence, the appeal must not be frivolous and has reasonable chances of success, the substantial delay in determination of the appeal and whether he complied with conditions of bail before conviction. He argued that the Appellants have a fixed place of abode and have strong family ties which would diminish the flight risk in this case.
23. Further, that the court in *Chimabhai (supra)* stated that the good character of the Appellant together with an anticipated delay in hearing the appeal might constitute an exceptional circumstance. That the 4<sup>th</sup> Appellant is 71 years old and suffering from epilepsy, hypertension and diabetes mellitus and his medical condition is deteriorating. Further, the appeal is likely to take time to be heard.
24. The Respondent's counsel on the other hand quoted the case of *Daniel Dominic Karanja (supra)*, where the court stated that availability of sureties, ill health, suffering of a convict's family were not grounds for the granting of bail pending appeal. However, the anticipated delays in hearing an appeal, the length of the sentence, whether or not the applicant had pleaded guilty and/or admitted the offence and option of a non-custodial sentence were factors that an appellate court could take into account when considering an application for bail pending appeal.
25. On the question of any anticipated delay in the hearing of the appeal, I note that the record of appeal is ready. The Appellants' counsel filed the same together with the instant application. It therefore means that what is remaining is admission of appeal and afterward the appeal will be given a hearing date. The Appellants were sentenced on 24/07/2023 and I take judicial notice of the fact that the diary of this court allows for the disposal of the appeal in under 3 months from now. It therefore follows that the Appellants would not have served a substantial part of their sentences.
26. From the foregoing and for reasons stated, the application before court lacks merit and is dismissed.



**DATED SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH 2024**  
**A.K. NDUNG’U**  
**JUDGE**

