



**Rwagi v Republic (Criminal Appeal E053 of 2023)  
[2024] KEHC 2818 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2818 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E053 OF 2023  
RM MWONGO, J  
MARCH 14, 2024**

**BETWEEN**

**PETER MURIUKI RWAGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was convicted on 22.11.2013 in the lower court for the offence of obtaining money by false pretences. He was sentenced to imprisonment for 18 months. By this application, the applicant seeks to be released on bond and a surety pending appeal. He is a pastor and also a business man working within Kirinyaga County.
2. Amongst his grounds for his application are that unless he is released on bail pending appeal, he will lose his business; that he is the sole bread winner and even if he is subsequently acquitted on appeal, he will have suffered irreparable loss.
3. He further asserts that having been sentenced to 18 months imprisonment, and with the 1/3 remission of sentences allowed in Kenya Prisons, it means he would serve 12 months in prison. To this, he adds that the case backlog pressure in court means that he is likely to serve his sentence or a substantial part of it. Thus, even if he is subsequently acquitted of the charge on appeal, he will have suffered irreparable loss.
4. Finally, he asserts that he was on bond during his trial in the lower court and never breached the bond conditions nor did he miss any attendance in court.
5. He further says that he is disabled and he cannot hear well; and that he has extremely good grounds of appeal.



6. The respondent filed a replying affidavit with the following major averments:
  - i. That pending appeal, the applicant be released on bail.
  - ii. That owing to the pressure of numerous hearings, the appellant is likely to serve his sentence or substantial part thereof, and as such, if he is subsequently acquitted of the charge on appeal, he will suffer irreparable loss.
7. Whilst these averments appear to support the appellant's application, in its submissions the state urges that that the issue that the applicants appeal has high chances of success is one that will be canvassed on appeal as the prosecution had proved all the ingredients of the offence.
8. On the issue of applicant's medical condition, the state argues that it is for him to demonstrate with evidence, his disability and that the same cannot be attended to in prison facilities.
9. As for whether there is possibility of delay in hearing and determination of the appeal, the respondent asserts that the courts have currently up scaled work and the possibility of the appeal taking long to be heard is not great.
10. This court has considered the Applicant's Chamber Summons Application dated 23<sup>rd</sup> November, 2023 brought under Certificate of Urgency, the Replying Affidavit dated 5<sup>th</sup> December, 2023 and submissions by the parties.
11. In the case of Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR, it was held that: -

“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. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of Jiv Raji Shah vs. R [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

“(1) The principle 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.”
12. The Applicant has complied with Sec 357 (1) of the Criminal Procedure Code by filing an appeal on 23<sup>rd</sup> November, 2023.
13. On the issue of exceptional circumstances, the applicant deposed that he was convicted for obtaining money by false pretenses and sentenced to 18 months imprisonment. That with the 1/3 remission



of sentences in Kenya prisons, it means he would serve 12 months in prison. The applicant deposed that he is a pastor and also a business man working within Kirinyaga County. He will lose his business considering he is the sole bread winner. Even if he is subsequently acquitted on appeal, he argues, he will have suffered irreparable loss.

14. Further, the applicant deposed that he is disabled and cannot hear well. However, he did not avail any evidence of his disability or medical condition. As argued by the respondent it was for the applicant to avail evidence of a medical condition, and that any such condition cannot be treated whilst he is in prison. The exceptional circumstances referred to in *In Jivrai Shah v Rep (Supra)* must be demonstrated by an applicant.
15. In my view it is not an exceptional circumstance that the applicant may serve more than 1/3 of his 18-month sentence before the appeal is heard and determined.
16. In *Hisham Shally v Republic [2022] eKLR Ong'injo, J* pointed out an example of an exceptional circumstance when he said:

“This court has perused the record of appeal and in consideration on the issue that the Applicant is a school going student and having produced proof of the same in the lower court that he is almost sitting for his final exams, this court finds that to be an exceptional circumstance and, in that consideration, grants the application to allow him to study and sit for KCSE pending the hearing and determination of the appeal.”

17. The applicant's assertion that, essentially, he was of good behaviour and complied with bond conditions in the lower court, is not in itself, a good ground for grant of bail pending appeal.
18. In *Peter Hinga Ngotho vs Republic [2015] eKLR* it was held that;

“The fact that the Applicant did not breach the bail condition in the lower Court, is not an exceptional circumstance to warrant a decision to admit an Applicant to Bail Pending Appeal.”

### **Conclusion and Disposition**

19. Ultimately, in light of all the foregoing, I am not satisfied that the applicant has made out a persuasive case for bail pending appeal. He has not met the legal threshold required for his release on bail pending appeal.
20. Accordingly, the applicant's application fails and is hereby dismissed.
21. Orders accordingly.

**DATED AT KERUGOYA THIS 14TH DAY OF MARCH, 2024**

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**R MWONGO**

**JUDGE**

Delivered in the presence of:

1. Applicant in Person
2. Makura - holding brief for Gori for Applicant/Appellant
3. Maari - for State



#### 4. Murage, Court Assistant

