



REPUBLIC OF KENYA



KENYA LAW
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**Muthoni v Republic (Criminal Appeal E089 of 2023)
[2024] KEHC 4347 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E089 OF 2023
AK NDUNG’U, J
APRIL 17, 2024**

BETWEEN

PURITY MUTHONI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from original convictions and sentence in Nanyuki
Cm Criminal Case No E1427 of 2023 – V Masivo, SRM)*

RULING

Ruling on Bail Pending Appeal

1. The Appellant, Purity Muthoni was convicted on her own plea of guilty for the offence of stealing by agent contrary to Section 283(b) of the [Penal Code](#) and was sentenced to three (3) years imprisonment and to pay the complainant a sum of Kshs.357,915/-.
2. She has appealed against conviction and sentence. Pending disposal of the appeal she filed a chamber summons application dated 06/11/2023 seeking for the following orders;
 - i. Spent.
 - ii. That the Appellant be released from custody forthwith pending hearing and determination of the appeal on such terms as this court shall deem fit and just.
 - iii. That the execution of the sentence and order that was imposed by the trial court be suspended pending the hearing of the appeal.
 - iv. That there be a stay of execution of the sentence/order made on 18/10/2023 convicting the Appellant pending hearing of the appeal.



3. The application is based on the grounds on the face thereof and supported by an affidavit sworn by the Appellant herein. In her supporting affidavit, she deponed that she did not understand the language of the court as she is illiterate as she does not understand Kiswahili or English and was shocked when the court informed her that she was convicted and sentenced. That she was advised by her advocate on record that her plea was not unequivocal as she did not understand the charges that were read in a language she did not understand hence, the appeal has high chances of success. Further, she is aged being over sixty- five years and sickly and needs to seek specialised treatment. That she has several children to take care of and the appeal is likely to take time before it is heard and determined and she shall have served the entire sentence before the appeal is determined. That she will not jump bail if the application is allowed.
4. In opposing the application, the Respondent’s counsel filed a replying affidavit dated 09/11/2023. The foundation of the opposition is on account that the application does not meet the legal threshold for the grant of the orders sought. That bail pending appeal is discretionary as the applicant has been found guilty and the principle of presumption of innocence no longer applies. It is urged that the Applicant has not demonstrated any peculiar and exceptional circumstances to warrant the grant of the orders sought and has not shown that the appeal has high chances of success and there is no likelihood that she will have served a substantial part of the sentence before the appeal is heard.
5. The application was canvassed by way of written submissions. On behalf of the Appellant, counsel argued that the trial court failed to adhere to the principles set in the case of *Adan v Republic* (1973) where the court held that the court taking plea of guilty must in its record show that the substance of the charge and every element constituting the offence had been explained to him in a language that he understands. That her plea of guilty was not unequivocal and therefore the appeal has high chances of success necessitating the grant of the orders sought. Further, the prison authorities lack necessary medical facilities to cater for her sickly condition and this can be treated as exceptional circumstance to order for her release. That the appeal poses substantial points of law and the Applicant will have served the sentence or substantial part of the sentence by the time the appeal is heard and determined and therefore, she has met conditions to qualify her for admission to bail pending appeal.
6. That the words ‘*ni ukweli*’ standing on their own did not constitute an unequivocal plea of guilty as was held in *Omar Guyo Omar v Republic* where the court held that “it has been said time and again that the pleas recorded in the courts such as ‘I admit’, ‘I accept it’, ‘I plead guilty’, it is true and so on cannot be considered as unequivocal plea.” That the Appellant should have been given an opportunity to deny or disputes or explain the facts or add any relevant facts.
7. The Respondent’s counsel on the other hand submitted that the principles for granting bail were set out in the case of *Jivraj Shah v Republic* (1986) KLR 605 which are existence of exceptional or unusual circumstances, that appeal is likely to be successful on account of substantial point of law and consideration of the particular circumstances and weight and relevance of the points to be argued. That granting of bail pending appeal is discretionally as provided under section 357 of the *Criminal Procedure Code* which discretion must be exercised judiciously and within the law as the court observed in *Kamote Mutua v Republic* (1988)eKLR.
8. As to whether the appeal has high chances of success, she argued that to succeed on this principle, one needs to highlight a substantial point of law to be argued in the appeal that is likely to be successful. That the Appellant has gone to the merit of the appeal and highlighted the grounds that she intends to raise on appeal but there is no ground that stands out that is likely to succeed even before the appeal is argued. Further, trial court proceedings have not been availed and therefore the court is not in a position to peruse the record to establish whether there is an arguable appeal with high chances of success. That



the trial court took the correct factors into consideration when accepting the Appellant's plea of guilty and therefore, the appeal does not have overwhelming chances of success.

9. That the Appellant has not demonstrated any unusual or exceptional circumstances to grant bail pending appeal as ill health is not considered as unusual circumstance nor the fact that she has children to look after nor that she will not jump bail. The fact that she requires specialized treatment is not supported by evidence and it is not demonstrated that she will not be able to receive required medical attention while in prison. Reliance was placed on the case of *Dominic Karanja v Republic* (1986) KLR 612. On whether the substantial part of the sentence would have been served, she submitted that the Appellant was sentenced to 3- years imprisonment on 18/10/2023 and therefore it cannot be said that she will have served a substantial part of the sentence since the appeal can be expedited.
10. 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...”
11. The *Bail and Bond Policy Guidelines* provides 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.
12. The court of appeal in *Epungure v Republic* (Criminal Appeal E015 of 2021) [2021] KECA 343 (KLR) while discussing 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.”



13. 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 Shab* 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.”
14. 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.
15. 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. 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.
16. The point of law raised is that plea was not unequivocal as the Appellant did not understand Kiswahili or English as she is illiterate. Her petition of appeal also challenges the plea taking process and nothing



more. The record shows that the charge was read over and explained to the applicant in Kiswahili/English whereupon she responded “*ni ukweli*”. The record further shows that consequences were explained to the Appellant but she maintained her plea. The facts were then stated by the court prosecutor and she responded by stating ‘*maelezo hayo ni ya ukweli*’. She was therefore convicted on her own plea of guilty and she was given a chance to mitigate which she stated;

“I used that money to pay school fees for my children. I am a peasant farmer hence poor. There was drought hence I had no money. I seek time to repay the entire sum. I have so far paid 20,000/-.”

17. If at all she did not understand Kiswahili as alleged by her counsel, how was she able to respond to the facts and admit the facts. How was she also able to mitigate?
18. As to whether there exist exceptional circumstances, it was stated that the Appellant is advanced in age and has several children in need of her care. That she is sick and need to seek specialized treatment. Those are not exceptional circumstances and useful guidance is derived from the decision in *Daniel Dominic Karanja* case (*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.
19. As to the third ground, the trial court’s proceedings are ready and the record of appeal can be prepared in a flash as the proceedings are not lengthy. The Appellant was sentenced on 18/10/2023. Am aware of the available dates for disposal of appeals in this court and it is a guarantee, barring any unforeseen exceptional circumstances, that the appeal herein will be heard and determined in under 3 months. It therefore follows that the Appellant would not have served a substantial part of her sentence.
20. From the foregoing, am not persuaded that the Applicant has established the legal threshold for the grant of bail pending appeal. The application before court fails and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF APRIL 2024.

A.K. NDUNG’U

JUDGE

