



REPUBLIC OF KENYA



**Mugo & another v Republic (Criminal Appeal E021 of 2023)
[2024] KEHC 4344 (KLR) (16 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E021 OF 2023
DR KAVEDZA, J
APRIL 16, 2024**

BETWEEN

JOSEPH MACHARIA MUGO 1ST APPELLANT

ANNE AKEYO MUSANDA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an application for bail pending appeal from the conviction and sentence delivered by Hon. C.M Njagi (PM) on 24th August 2023 at JKIA Chief Magistrate's Court Criminal case no. 89 of 2019 Republic vs Joseph Macharia Mugo and Anne Akeyo Musanda)

RULING

1. The appellants were charged and convicted on two counts of offences of trafficking in narcotic drugs contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 4 of 1994. In count I, they were each sentenced to pay a fine of Kshs 2,301,840 in default to serve one (1) year imprisonment, in addition to an imprisonment term of two (2) years. In count II, they were each sentenced to pay a fine of Kshs 1,000,000 in default to serve 1-year imprisonment, in addition to serving an imprisonment term of one (1) year imprisonment.
2. Being aggrieved, they filed an appeal challenging their conviction and sentence. Simultaneously, they filed a chamber summons application seeking the release on bond pending appeal. The application is premised on the grounds on the face thereof which are reiterated in the supporting affidavit sworn by the applicant's advocate of a similar date. They are that, the appeal has overwhelming chances of success. The appellant will have served a substantial part of the sentence. She was admitted to bail before the trial court and did not abscond. She is not a flight risk. She undertakes to abide by the terms set by the court.



3. I have considered the application, the applicants' submissions, the petition of appeal on record, and the applicable law. The issue that arises for determination is whether the applicants have met the threshold for the grant of bail pending appeal.
4. The provision of law that applies to bond/bail pending appeal is section 357 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya which provides as follows:
 - (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:
5. The principles for granting bond pending an appeal were reiterated in the case of [Jivraj Shah v Republic](#) [1986] KLR 605 which laid down the principles 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 are that there is no difference between overwhelming chances of success and a set of circumstances that 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.”
6. In the case of [Chimambhai v Republic](#) 1971 EA 343 J. Harris made another observation in such an application when he said;
 - “The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....”
7. From the principles established in the Jivraj case above, the applicants have an obligation to demonstrate that there is a set of exceptional circumstances that would justify the grant of bail pending appeal by this Court. Further, the sentences or a substantial part thereof will have been served by the time the appeal is heard. It is not enough, as the applicants have done in this case, to state that an appeal has overwhelming chances of success.
8. Under Article 49 of the [Constitution](#) of Kenya, 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 a case where one is already convicted.



9. From the record, the applicants have filed a petition of appeal. I have carefully examined the grounds of appeal raised. Looking at the petition of the appeal, and the offences the applicants were convicted of, it hangs in the balance. Therefore, the chances of the appeal succeeding cannot be authoritatively stated to be overwhelming.
10. The appellants also argued that their appeal will likely be determined after the sentence is served. The applicants were each sentenced to a cumulative term of three years imprisonment. The apprehension, as I understood it, is that the appeal will take long to be heard. However, it is my view that it is possible to have this appeal heard and determined expeditiously and without delay.
11. In the instant case, I direct the proceedings to be fast-tracked and the record of appeal to be submitted within 30 days. The upshot of the above analysis is that the applicants have not demonstrated the existence of exceptional or unusual circumstances to warrant the grant of bail pending appeal. The application for bail pending appeal is dismissed.

It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 16TH DAY OF APRIL, 2024

D. KAVEDZA

JUDGE

In the presence of:

Mutuma for the respondent.

