



**Ngugi v Republic (Criminal Appeal E003 of 2023)
[2024] KEHC 5079 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL E003 OF 2023
FN MUCHEMI, J
MAY 2, 2024**

BETWEEN

EDWARD SAMUEL NGUGI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

Brief facts

1. The application for determination is dated 14th November 2023 brought under Section 357 of the [Criminal Procedure Code](#) and seeks for orders for release on bail pending the hearing and determination of the appeal.
2. The applicant was charged in Criminal Case No. 2586 of 2017 at the Chief Magistrate’s Court at Thika with Count I Making a false document contrary to section 357(a) of the [Penal Code](#); Count II Forgery contrary to Section 349 of the [Penal Code](#); Count III Conspiracy to defraud contrary to section 317 of the [Penal Code](#); Count IV Making a false document contrary to Section 357(a) of the [Penal Code](#) and Count V Obtaining land registration by false pretence contrary to Section 320 of the [Penal Code](#). The applicant was convicted and sentenced as follows; on Count I a fine of Kshs. 200,000/- in default to serve two (2) years imprisonment; Count II a fine of Kshs. 100,000/- in default to serve one (1) year imprisonment; Count III a fine of Kshs. 100,000/- in default to serve one (1) year imprisonment; Count IV a fine of Kshs. 200,000/- in default to serve two (2) years imprisonment and Count V a fine of Kshs. 50,000/- in default to serve six (6) months imprisonment. The sentence was to run concurrently.
3. The applicant deposes that he filed an appeal against conviction and sentence and that the appeal has a very high chance of success. The appellant argues that although he was convicted, no evidence was produced in court to show that he had forged any document. Furthermore, the applicant contends that no Document Examiner’s report was availed to indicate that the signatures on the transfer documents belonged to him and the prosecution did not produce any title deed was issued in his name.



4. The applicant states that the learned magistrate attempted to shift the burden of proof to him by indicating that he did not offer any defence against the allegations of made by the prosecution. The applicant further states that prosecution ought to have proved its case even in his silence, which was not the case herein. The applicant contends that he is at risk of contracting covid 19 while in custody as he suffers from hypertension and diabetes which conditions predispose one to get severe diseases with likelihood of death.
5. The respondent in its Replying Affidavit sworn on 21st March 2024 deposed that the intended appeal has no chances of success due to the overwhelming evidence against the appellant. Furthermore, the respondent states that no injustice shall be visited to the applicant because he is serving a sentence which meted on him by the trial court after being properly convicted. Moreover, the respondent argues that the applicant, having been convicted of the offence, the presumption of innocence has already been dispensed with and thus he cannot be treated as a beneficiary of the constitutional right to bond unless he satisfies all the requirements of bail pending appeal. The respondent further states that the applicant has not explained his claim that he is likely to serve a substantial part of the sentence in the event the appeal succeeds nor has the applicant demonstrated any exceptional circumstances to warrant the court's discretion to grant bail pending appeal.
6. The respondent argues that currently the law and practice favour quick determination of matters without unreasonable delay and thus the applicant is unlikely to serve a substantial part of the sentence before the appeal is heard and determined.
7. Parties put in written submissions however the applicant failed to file his submissions despite been given seven (7) days to do so.

The Respondent's Submissions

8. The respondent relies on Section 357(1) of the Criminal Procedure Code and the case of *Jivraj Shah vs Republic* [1986] eKLR and submits that the applicant has not met the required threshold for an application for bail pending appeal. Further, the respondent relies on the case of *Somo vs Republic* [1972] EA 476 and submits that the appeal does not have overwhelming chances of success as the evidence shows that the applicant was properly convicted. The respondent further submits that the applicant has failed to demonstrate that he shall serve a substantial part of the sentence if the appeal is likely to succeed.
9. The respondent relies on the case of *R vs Kanji* [1946] 22 KLR and submits that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.
10. Relying on the case of *Chimambhai vs Republic* [1971] EA 343, the respondent contends that currently, the law and practice favour quick dispensation of matters without an unreasonable delay. The respondent argues that the applicant failed to discharge the burden of proof that he is likely to serve a substantial part of the sentence before the appeal is heard which in turn could be successful hence leading to prejudice.

The Law

Whether the applicant has met the threshold for granting bail pending appeal.

11. Section 357(1) of the *Criminal Procedure Code* provides for the granting of bail pending appeal, it states that:-



After 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.

12. The principles for granting bond pending appeal were reiterated in the case of *Jivraj Shah vs Republic* [1986] KLR 605 which laid down the principles as follows:-
 - a. 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.
 - b. 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.
 - c. 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.
13. It is trite law that in considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration the following factors.

Does the appeal have overwhelming chances of success?

14. The applicant argues that the appeal has a high probability of success as he was convicted based on suspicion and circumstantial evidence.
15. In the application herein, only the ruling on sentence of the trial court was availed but not the proceedings and judgement. This denied this court a chance to interrogate the decision of the trial court. I have carefully examined the grounds of appeal and without seeing the trial court's judgment, I am unable to assess the arguability of the appeal. It is not possible to agree with the accused's argument that his appeal has high chances of success.

Is there a possibility of delay in hearing and determining the Appeal?

16. The applicant was sentenced on 16/10/2023 to pay a fine of Kshs. 200,000/- in default to serve two (2) years imprisonment on Count I; a fine of Kshs. 100,000/- in default to serve one (1) year imprisonment on Count II; a fine of Kshs. 100,000/- in default to serve one (1) year imprisonment on Count III; a fine of Kshs. 200,000/- in default to serve two (2) years imprisonment on Count IV and a fine of Kshs. 50,000/- in default to serve six (6) months imprisonment on Count V. The sentence was to run concurrently. Thus it is highly unlikely that he shall have served a substantial part of the sentence before the appeal is heard. The court diary is accommodative of appeals that are for hearing. Hearing dates are available. As such, I am of the view that the applicant in the present circumstances is not likely to serve a substantial part of his sentence before the appeal is heard and determined.

Demonstration of exceptional or unusual circumstances

17. In *Dominic Karanja vs Republic* [1986] KLR 612 the Court of Appeal held:-



- a. The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;
 - b. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute exceptional circumstances where there existed medical facilities for prisoners;
 - c. A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;
18. Similarly in *Peter Hinga Ngotho vs Republic* [2015]eKLR it was held that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.
 19. In the instant case, the applicant argued that he risks contracting covid 19 while in custody as he suffers from hypertension and diabetes both of which predispose him to get severe diseases and death. The applicant failed to annex any medical record to support his allegations. Even assuming that the applicant suffers from diabetes, there is adequate treatment in prison and always good preventive measure of Covid or any other disease. In my view this is not a good ground for granting bail pending appeal. Neither is such a condition an exceptional circumstance.
 20. Relying on the above cited cases, it is my considered view that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.
 21. I therefore find that the application dated 14th November 2023 lacks merit and it is hereby dismissed.
 22. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED THIS 2ND DAY OF MAY 2024 AT THIKA.

F. MUCHEMI

JUDGE

