



**Ali v Director of Public Prosecutions (Criminal Appeal
E074 of 2024) [2024] KEHC 9094 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9094 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E074 OF 2024**

**DK KEMEL, J
JULY 19, 2024**

BETWEEN

ABDULAHI ABDI ALI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

1. The Appellant/Applicant herein has filed an application dated 18.6.2024 pursuant to the provisions of section 123 and 357 of the Criminal Procedure Code as well as article 49 of the Constitution of Kenya. It seeks for an order that the Appellant be released on bond/bail pending the hearing and determination of the appeal.
2. The application is supported by grounds on the face thereof and by a supporting affidavit of the Appellant sworn on even date. The Appellant's gravamen is inter alia; that he was arraigned before Sirisia Law Courts over four offences wherein he was ordered to pay several fines and in default to serve imprisonment for various terms; that he has lodged this appeal challenging both conviction and sentence; that his appeal has an overwhelming chances of success as can be confirmed from the grounds in the Petition of Appeal; that he is asthmatic and requires urgent and specialized medical attention/ care which is not available at Bungoma GK Prison where he is currently serving the sentences; that he is a family man and reside within Mandera County and that he will honour the conditions to be imposed by this court; that the release on bail/ bond pending appeal is a basic constitutional right guaranteed under article 49 of the Constitution of Kenya 2010; that unless the orders are granted, the appeal herein is likely to be rendered an academic exercise since he will have served a huge portion of the sentence before the appeal is determined.
3. The application is opposed by the Respondent who filed a replying affidavit sworn by Corporal Ileri of Sirisia DCI who averred inter alia; that the Appellant has not demonstrated to the court that he has a fixed place of abode within reach of this court; that the Appellant has been convicted and therefore



- cannot invoke the provisions of article 50(2) (a) of the Constitution of Kenya; that the Appellant has not provided any proof of his medical status; that the applications is an after thought and meant to derail and delay the cause of justice and that the same should be struck out.
4. Learned Counsel for the respondent opted to rely on the contents of the respondents replying affidavit while counsel for the appellant filed submissions dated July 16, 2024.
 5. It was submitted by counsel for the appellant that the appellant is likely to serve part of the sentence imposed by the trial court before the appeal is heard and determined. It was also submitted that there are exceptional circumstances warranting the grant of the prayer sought. It was further submitted that the appeal has high chances of success. It was also submitted that the appellant has a fixed place of abode. Finally, it was submitted that the appellant has medical challenges due to asthma attacks and requires special medical attention.
 6. Learned Counsel pointed out that there are exceptional and unusual circumstances to be considered by the court. Reliance was placed in the case of Jivraj Shah v Republic (1966) KLR 605. Learned Counsel sought reliance on several other cases regarding the fact that the Appellant's plea was not unequivocal.
 7. I have given due consideration to the application, rival affidavits and submissions filed. I find the only issue for determination is whether the application has merit.
 8. A perusal of the record of appeal indicates that the appellant faced three counts two of which relate to being unlawfully present in Kenya and failure to register as a foreign national contrary to section 53 (1) (1) and 53 (2) as well as section 56 (2) and 56 (3) of the Kenya Citizenship and Immigration Act 2011. It is noted that the Appellant pleaded guilty to all the charges and was subsequently convicted on his own plea of guilty. Learned counsel for the Appellant has maintained that the plea was not unequivocal and hence the appeal has high chances of success. Indeed, one of the key factors in the grant of bail/ bond pending appeal is the fact that the appeal has high chances of success. The other factor is where there are exceptional and unusual circumstances.
 9. As regards the issue of the success of the appeal, learned counsel for the Appellant presented a copy of the record of the trial court and maintained that the plea was unequal on the ground that the language of interpretation was not indicated and further that the trial court failed to indicate whether the sentences were to run consecutively or concurrently. Whereas these are germane issues that go to the root of the determination of the appeal, the court notes that the appeal is yet to be set down for hearing and hence it might not be outright that the appeal will succeed but rather raise the question. "May or may not" as there might be other issues cropping up during the hearing of the appeal. At this stage, the court is not obliged to go deep into the appeal and analyze the same since there is an opportunity for the same during the hearing of the said appeal. Hence, i find it safe to say that at this stage, the appeal may or may not succeed.
 10. As regards the issue of exceptional or unusual circumstances, it has been submitted that the Appellant is likely to serve a substantial portion of the sentence before the appeal is determined. Further, it is the Appellant's contention that he has some medical problems such as asthma and that he is not likely to get proper treatment while at Bungoma GK Prison where he is currently serving his sentence.
 11. It is not in dispute that the Appellant has already been convicted and hence he does not enjoy the presumption of innocence and that the Appellant's right to appeal under article 50 (2) (q) of the Constitution is not a matter of course but that the court has the discretion to either grant or decline



the same. The Principles for grant of bail pending appeal were laid down in the case of Jivraj Shah v Republic (1966) KLR 605 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 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.
- (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. “

As noted above, the Appellant has already been convicted by a competent court and that he is currently serving sentence until the same is set aside. Hence, the presumption of innocence is no longer available to him. See the case of Mutua v Republic (1988) KLR 497.

The Appellant has hinged his application on the grounds that his appeal has high chances of success and that he ought to be granted bail pending appeal. In the case of Charles Ratemo Matumo v Republic (2021) eKLR Odunga J (as he then was) held as follows:-

“The mere fact that the Applicant believes that his appeal has high chances of success does not necessarily amount to exceptional circumstances since the appellants are jointly expected to lodge appeal where they believed that their appeals have chances of success. It requires more than such belief to satisfy that there are exceptional circumstances”.

12. The Appellant has averred that there are exceptional and unusual circumstances meriting for a grant of a bail pending appeal. He has raised the issue of his health condition. However, he has not availed the requisite medical documents to back that up. In any case, if the medical facilities at the GK Prison are not adequate, he could still be taken to the County Referral Hospital for intervention. Hence, that is not a factor for consideration.
13. The Appellant has also claimed that he is likely to serve a substantial portion of the sentence before the appeal is determined. Whereas this could be a valid reason, the practice nowadays in the courts is that once an appeal is lodged, there are administrative procedures such as calling for the lower court record and admitting the appeal within a short period before giving directions to the parties on the disposal of the appeal. The current mode of disposal of appeals is by way of written submissions which can be wrapped up by the parties within a short time and the matter concluded. In the present case, it is noted that the Appellant has already filed his record of appeal and as such what is remaining is only for the Deputy Registrar to call for the original record of the trial court and organize for admission of the appeal. Again, the Appellant has already filed his written submissions and hence the Respondent can be directed to present its submissions within a short period and the matter reserved for judgement. Under those circumstances, i do not see how the Appellant stands to serve sentence for a longer period.
14. Looking at the charge sheet, it is clear that the Appellant has been described as a non-citizen and hence the same is likely to pose great challenges regarding his ability to attend court for the hearing of the appeal. The order of the trial court is that upon completion of the sentence, the appellant is to be



repatriated to his country of origin. The Appellants country of origin is yet to be established. There is thus a likelihood that the Appellant might not turn up in court for his appeal. It would be appropriate to decline the prayer for bail pending appeal and direct the parties to fast track the hearing of the appeal.

15. In view of the foregoing observations, it is my finding that the Appellant's application dated June 18, 2024 lacks merit. The same is dismissed. The parties are hereby directed to set down the appeal for hearing on priority basis.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF JULY 2024

D Kemei

Judge

In the presence of :-

Abdulahi Abdi Ali Appellant /Applicant

Bw' Onchiri for Appellant/Applicant

Miss Kibet for Respondent

Kizito Court Assistant

