



REPUBLIC OF KENYA



**Matsaki & 2 others v Republic (Criminal Appeal E111 of 2023)
[2024] KEHC 8290 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E111 OF 2023
M THANDE, J
JULY 12, 2024**

BETWEEN

MWAMUMBA MATIFU MATSAKI 1ST APPELLANT

KASENA DANIEL MASAKI 2ND APPELLANT

STEPHEN KAZUNGU MWIRI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. By an application dated 8.12.23, the Appellants seek that they be admitted to reasonable bond terms pending the hearing and determination of the Appeal herein. The record shows that they were charged with and convicted of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. Upon conviction, the Appellants were sentenced to 40 years imprisonment. Aggrieved by the decision of the trial court, the Appellant filed the instant appeal against the conviction.
2. The Appellants in their identical affidavits sworn on even date state that their appeal raises arguable grounds and has good chances of success. Further that the trial court had released them on bond of Kshs. 500,000/= each with 1 surety of a similar sum and they religiously attended all court appearances. They also co-operated with the court and prosecution since being charged on 2.5.23 until they were sentenced on 27.11.23. They added that it is in the interests of justice they be admitted to bond/bail pending hearing and determination of their appeal.
3. The application is opposed by the Respondent, vide a replying affidavit sworn on 14.3.24 by Joseph Mwangi, prosecution counsel. He averred that following the Appellants' conviction which they admit, they lost the right to presumption of innocence as guaranteed by Article 49(1)(h) of the *Constitution*. That notwithstanding that they attended court religiously during trial, which is the only ground



they rely on, they are now convicts and should be treated as such. It was further averred that having been sentenced to 40 years imprisonment each there are high chances of the Appellants absconding if released on bond. Lastly that no peculiar or special circumstances have been demonstrated to warrant the orders sought. He urged that the Application be dismissed.

4. I have considered the submissions filed by the Appellants as well as the authorities cited. The Respondent opted to rely on the replying affidavit and did not file any submissions.
5. The law empowers this Court to consider and if persuaded, grant bail pending appeal. Section 357 of the *Criminal Procedure Code* makes provision for admission to bail or suspension of sentence pending appeal. Subsection (1) provides as follows:

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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

6. In the case of *Jivraj Shab v Republic* [1986] eKLR, the Court of Appeal articulated the principles to consider in an application for admission to bail pending appeal as follows:

There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.

7. Flowing from the foregoing, it is evident that the factors to be considered in the application herein are whether there exists any exceptional or unusual circumstances upon which the Court can fairly conclude that it is in the interests of justice to grant bail. The Court will also consider if from the totality of the circumstances that the appeal prima facie has high chances of success. Further that the sentence or substantial part of it will have been served by the time the appeal is heard.
8. The Appellants have not alluded to the existence of any unusual and exceptional circumstances to warrant the grant of their application. Additionally, nothing has been placed before the Court to persuade it that the interests of justice will be served by granting bail/bond to the Appellants.
9. As regards the merit of the appeal, the onus is on the Appellants to demonstrate the high probability of success of the appeal. While the Appellants asserted that their appeal raises arguable grounds and has high chances of success, they did demonstrate to the Court in what way or manner the appeal had a high probability or chances of success.



10. Further, upon conviction, the Appellants were on 27.11.23 sentenced to 40 years imprisonment. Clearly, they will not have served their sentence or substantial part of it by the time the appeal is heard and determined.
11. In a bid to persuade the Court to grant them bail/bond, the Appellants averred that they were faithful in attending all court sessions during trial. This claim is not disputed. However, this was before conviction and sentence. Having been convicted and sentenced to 40 years imprisonment, the circumstances obtaining now are clearly different.
12. The critical difference between bail pending trial and bail pending appeal is that a person seeking bail/bond pending appeal lacks the presumption of innocence that is guaranteed under Article 50(2)(a) of the *Constitution*. Such person is already convicted and perhaps serving sentence, as in the case before me. A court must consider the prospects of success of an appeal as well as the risk of the appellant absconding and strike a balance.
13. In the case of *Chimambhai v Republic* 1971 EA 343 the court (Harris, J) observed:

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 case.
14. While the possibility of the conviction herein being erroneous cannot be ruled out, the risk of the Appellants as convicted persons absconding, is very real. The Appellants did not address the Court on this aspect of absconding that was raised by the Respondent and did not controvert the claim. As such, the possibility of them absconding when on bail pending the appeal, is increased. They have not placed any evidence to satisfy the Court that they will attend court should they be granted bond.
15. In the end and in view of the foregoing, I find that the Appellants have not shown why justice requires that they should be granted bail/bond pending appeal. In the premises, the Application dated 8.12.23 is declined.

DATED AND DELIVERED IN MALINDI THIS 12TH DAY OF JULY 2024

M. THANDE

JUDGE

