



**Wangoko v Republic (Criminal Martial Appeal E003 of 2024)
[2024] KEHC 9441 (KLR) (Crim) (2 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MARTIAL APPEAL E003 OF 2024
K KIMONDO, J
AUGUST 2, 2024**

BETWEEN

ALFRED ODONGO WANGOKO APPELLANT

AND

REPUBLIC RESPONDENT

(An application for bail pending appeal from the decision of G. Onsarigo, Judge- Advocate, delivered on 13th December 2023 in Court Martial Case 2 of 2023 sitting at Kahawa Garrison)

RULING

1. The appellant was convicted by the Court Martial sitting at Kahawa Barracks on six counts. Counts I and II related to loss of property contrary to section 96 (1) (b) as read together with 96 (2) of the [Kenya Defence Forces Act](#) 2012 (hereafter the Act).
2. Counts III to V were for stealing contrary to section 88 (1) (a) as read with 88 (2) of the [Act](#). Count VI related to conduct to the prejudice of good order and service discipline contrary to section 121 of the [Act](#).
3. On each of Counts I and II, he was sentenced to 10 months imprisonment while on Counts III to VI, he was imprisoned for 6 months on each count. The sentences were to run concurrently.
4. The appellant lodged a Notice of Appeal predicated upon section 187 (1) of the [Act](#) on 4th March 2024 against both the conviction and sentences.
5. Pending the hearing and determination of the appeal, the appellant has presented a chamber summons dated 8th March 2024 pleading for bail. It is supported by his deposition of even date.



6. The appellant contends that the appeal has overwhelming chances of success primarily on grounds that the evidence was unreliable, contradictory, uncorroborated or insufficient to found the charges. In particular, the self-loading pistol assigned to the appellant, and which was the subject matter of Count I had different registration particulars. It is contended that the firearm was not properly identified at the trial.
7. The custodial sentences are attacked for being punitive or draconian and for failing to take into consideration that the appellant was held in close arrest from 7th October 2022 to the date of sentencing on 16th February 2024 save for a period of 4 days. A further ground urged is that the appellant had already been surcharged for the lost pistol and ammunition in the course of the court martial proceedings.
8. On 31st July 2024, I heard brief oral submissions on the chamber summons. The appellant's learned counsel, Mr Orende, argued that the appeal has a high or reasonable chance of success; and, that unless the appellant is released, he will have served the whole or a substantial part of the sentence before the appeal is heard and determined.
9. Learned Prosecution Counsel, Ms. Awino, on the other hand, submitted that all the elements of the charges were proved beyond reasonable doubt; that the sentences handed down were well within the law; and, accordingly, the entire appeal is hopeless.
10. The legal parameters in an application of this nature were well stated by the Court of Appeal in [*Jivraj Shah v Republic*](#) [1986] KLR 605-

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. The decision is *Somo v Republic* [1972] EA 476 which was referred to by this court with approval in Criminal Application No. Nai 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.

11. I resist the temptation to comment about the merits of the appeal. It will be the duty of the first appellate court to re-evaluate the records and establish whether all the elements of the offences were proved beyond reasonable doubt; or, whether the punishment meted out was deserved. The less I say about it the better.
12. I can however safely state the following. The offences attracted a sentence of up to two years. On the face of it, the sentences were lawful. However, the appellant seems to have spent some part of his sentence under close arrest. I say that very carefully without making a final finding. I note that in the ruling on bail of 27th February 2023, he was ordered to be placed on open arrest.
13. There is thus an important point of law whether he was granted full credit for the time he claims he spent in remand custody. Again, I say that carefully, because at page 357 of 358 of the record, the learned Judge-Advocate stated that the period was taken into consideration.
14. I also find that there is an important matter of evidence or law surrounding the issue of restitution. Paraphrased, whether in the sentencing, the honourable members of the court martial took into consideration the fact that the appellant had been surcharged for the value of the lost self-loading pistol and ammunition.



15. I thus find, firstly, that the grounds of appeal are arguable, and that some of them raise substantial points of law or evidence. It bears repeating that this does not mean the appeal on conviction will succeed. Secondly, the appellant has been serving sentence since 16th February 2024. The appeal has not been admitted and is listed for directions on 26th September 2024. The High Court has proceeded on August Recess from 1st August 2024 until 15th September 2024. Assuming that the appellant earns his full remission, his earliest date of release would be in September 2024 or thereabouts.
16. I thus readily find that the sentence or a substantial part of it, will have been served by the time the appeal is heard. *Somo v Republic* [1972] EA 476. For all those reasons, I will exercise my discretion in favour of the appellant.
17. The appellant may be released upon executing a cognizance in the sum of Kshs 100,000 together with one surety of a similar sum. The appellant must appear at every mention or hearing of the appeal; in default of which the bond will be cancelled and the surety called to account.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of: -

Mr. Orende for the appellant instructed by Orende & Associates Advocates.

Ms. Awino for the respondent instructed by the office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

