



**Busena v Republic (Criminal Appeal E243 of 2022)
[2023] KEHC 2351 (KLR) (Crim) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E243 OF 2022
LN MUTENDE, J
MARCH 20, 2023**

BETWEEN

RONALD BUSENA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Through an application dated 17th January, 2023, the applicant seeks to be admitted on bail pending hearing of his appeal. Further, he prays for suspension of the sentence imposed pending determination of the appeal.
2. The appellant was charged with two counts of committing a civil offence contrary to section 133 (1) (b) of the *Kenya Defence Forces Act*, the offence being Obtaining by False Pretence contrary to Section 313 of the *Penal Code*. Following full trial, the applicant was convicted and sentenced to serve 2 years, 10 months imprisonment on each count, sentences that were ordered to run consecutively.
3. The application is supported by an affidavit deposed by Mr. Stanley Kang'ahi, learned counsel for the applicant who deposes that the appeal has good chances of success and presents an arguable case; the Judge-Advocate failed to appreciate and /or analyse the evidence before her and arrived at a wrong decision; and, that the applicant is likely to serve the whole or a substantial part of the prison term before his appeal is heard and determined.
4. The Respondent opposed the application on grounds that the appeal is neither arguable nor does it have any chances of succeeding. That the applicant has not established existence of exceptional circumstances to warrant grant of bail pending appeal; and, that it has not been demonstrated that the applicant will have served a substantial portion of his sentence before the appeal is heard and determined.



5. The application was disposed through written submissions. The applicant submits that the most important consideration is whether there are overwhelming chances of success of the appeal. That the Judge-Advocate in this case erred in law and fact by handing down a consecutive sentence in counts 1 and 2. That the applicant was given the maximum sentence and imposition of a two years, ten months sentence was illegal in the circumstances. Further, that the applicant spent 548 days in the military guard room and that if the period is considered the sentence would be excess of 3 years as provided by law, a period that was not a pre-sentence consideration.
6. Additionally, that the charge sheet did not disclose an offence and both counts did not mention or indicate the fact of falsity or believe in its truth having been known to the applicant.
7. The respondent resounded the principles that bail pending appeal is not a constitutional right, that the applicant having been convicted by a competent court has no benefit of the presumption of innocence. That granting of bail is discretionary under Section 357 (1) of the *Criminal Procedure Code*.
8. That the conviction was solid and proper and all ingredients of the offence were proved to the required standard. That the prosecution led evidence to the effect that the applicant made false representation to PW1 and PW2 that he would get them jobs. That he was aware that the representation was false and had intention of defrauding the complainants to transfer the money to him.
9. That the sentence was legal since Section 313 of the Penal Code provides for a maximum term of 3 years but the court meted out 2 years and ten months for each of the two main counts.
10. That the court also took into account the time spent in custody during trial and did not err in ordering that the sentences run consecutively. That the transactions in the two counts were independent and committed on different days and the offences were completely independent of each other.
11. That the applicant did not demonstrate any unusual or exceptional circumstances to warrant granting of bail; the applicant has 4 years remaining and cannot be said to have served a substantial part of his sentence by the time the appeal is heard and determined.
12. I have duly considered rival submissions. As correctly pointed out, the applicant having been convicted of an offence does not benefit from the presumption of innocence and rights accrued under Article 49 and 50 of the *Constitution*.
13. In the case of *Masrani v R* [1060] EA 321, it was held that:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.” Also see *Somo v Republic* [1972] EA.
14. Section 357 of the Criminal Procedure Code which is in respect of admission to bail or suspension of sentence pending appeal 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;



15. In the case of *Mutua vs R* [1988] KLR 497 the Court of Appeal stated thus:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”
16. In the case of *Jivraj Shah v Republic* [1986] eKLR the Court of Appeal stated 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. The decision in *Somo v Republic* [1972] EA 476”
17. In the case of *Dominic Karanja v Republic* [1986] KLR 612, the Court of Appeal stated inter alia:

“(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...”
18. The applicant herein was adjudged guilty by a competent Court Martial and he has already proffered an appeal. In granting bail pending appeal the court exercises discretion based on fairness. This should be done judiciously. The duty is upon the applicant to satisfy this court that circumstances exist that call for his release on bail pending appeal.
19. This court must consider the prospect of success of the appeal. At this stage, the court is precluded from delving into the merits of the appeal as this would pre-empt the expected decision. But, a perusal of the record of the court martial, summing up by the Judge-Advocate, the appeal, the possibility of success may be inconsiderable.
20. The next issue is therefore whether some exceptional circumstances exist that warrant the applicant being granted bail pending hearing and determination of the appeal. Ideally, exceptional circumstances would be something out of the ordinary. It is urged that prior to conviction and sentence the applicant was confined in custody for a duration of 548 days. According to the Judge /Advocate, the duration spent in custody was taken into consideration but is something to be interrogated as it was not explicit.
21. The trial commenced in December,2021 and concluded in December,2022. So far, the applicant has been incarcerated for a cumulative period of about two (2) years. The provision of law he is alleged to have contravened provides for a maximum sentence of three (3) years. As to whether the sentences should run consecutively is a question to be determined on appeal.
22. Taking the above summatively, there is a possibility of the substantial part of the sentence being served before the appeal is heard and determined. This would render the appeal on sentence nugatory.
23. For reasons given, I find the application having merit. Accordingly, I grant the applicant a cash bail of Kenya Shillings One Hundred and Fifty Thousand (Ksh. 150,000/-). Upon deposit of the sum, the sentence meted out shall be stayed.



24. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY
THROUGH MICROSOFT TEAMS AT NAIROBI,
THIS 20TH DAY OF MARCH, 2023.**

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Kangahi for Appellant

Mr, Mutuma for DPP

Court Assistant - Mutai

