



**Omondi v Republic (Criminal Appeal E010 of 2023)
[2023] KEHC 2004 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E010 OF 2023
WM MUSYOKA, J
MARCH 9, 2023**

BETWEEN

MOSES ONYANGO OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from sentence by Hon. EC Serem, Resident Magistrate,
in Busia SRMCTRC No E073 of 2023, of 3rd March 2023)*

JUDGMENT

1. The appellant, Moses Onyango Omondi, had been charged before the primary court, on 2 counts, of the offence of evading weighbridge, contrary to section 20(1)(a), as read with 21(1) of the [East African Community Vehicle Load Control Act, 2016](#), and of driving a motor vehicle on a public road without a certificate of inspection, contrary to section 17A(a)(b) of the [Traffic Act](#), cap 403, Laws of Kenya. He pleaded guilty to both counts, and was sentenced to pay fines in both, of *Kshs* 400, 000.00 and *Kshs* 20, 000.00, respectively, and in default to serve 1 year and 2 months imprisonment, respectively.
2. He proffered the instant appeal. He avers that the sentences are severe, and that he had paid *Kshs* 61, 000.00 upon rectification of the mistake.
3. What I am determining is his motion, dated March 6, 2023. He would like the sentence on the first count to be suspended, and that he be admitted to bond thereafter. The grounds are that he had already paid a fine of *Kshs* 61, 000.00, to the Kenya National Highways Authority, as mitigation for the alleged excess load, prior to being charged in court. He says that the fine was inordinately high.
4. The application is opposed, on grounds that the sentence imposed was commensurate with the offence committed. It is averred that the appellant pleaded not guilty, and the issue of presumption of his innocence does not arise, and chances of absconding increase. On the payment of *Kshs* 61, 315.00, it is averred that the same was not raised before the trial court on mitigation, and the offences he was tried



of were totally different from the issue for which he paid Kshs 61, 315.00. It is further averred that no cogent reasons have been advanced for suspension of sentence.

5. The application was argued orally before me on March 8, 2023.
6. Let me start by stating that bail/bond pending appeal is not a constitutional right, unlike bail/bond pending trial, for the person seeking bail/bond pending appeal is already a convict, and the presumption of innocence in the other case would not be available to him. Bail/bond pending appeal is provided for under section 357 of the Criminal Procedure Code, cap 75, Laws of Kenya. It is, undoubtedly, a right that accrues to the appellant herein, and I need not reproduce the provision verbatim in this ruling. It was stated by the Court of Appeal in Mutua v Republic (1988) KLR 497 (Platt, Apaloo, JJA & Masime, Ag JA) that:

“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 to set the applicant at liberty either from the point of view of his welfare or of the state unless there is real reason why the court should do so.”

7. Secondly, bail/bond pending appeal is not granted as a matter of course, merely because an appeal has been filed. A court faced with an application for bail pending appeal has to exercise discretion judicially upon considering various factors, which include whether the appeal has overwhelming chances of success (see Ademba v Republic (1983) KLR 442 (Potter, Kneller & Hancox, JJA), Somo v R (1972) EA 476 (Trevelyan, J) and Mutua v Republic (1988) KLR 497 (Platt, Apaloo, JJA & Masime, Ag JA)); whether there are exceptional or unusual circumstances to warrant exercise of discretion by the court in favour of the appellant (see Raghhbir Singh Lamba v R (1958) EA 337 (Spry, Ag J) and Kaguma v Republic (2004) 1 EA 68); and whether there is a high probability of sentence being served before the appeal is heard (see Chimabhai v Republic (No 2) (1971) EA 343 (Harris, J)). It was said, in Raghhbir Singh Lamba v R (1958) EA 337 (Spry, Ag J)), that the burden is on the appellant to show why he, a convict, should be released on bail pending appeal.
8. Having heard the parties, and perused the record, I am not satisfied that the appellant has discharged the burden of establishing to the court why he, a convict, ought to be released on bail/bond pending appeal. He has made no effort to demonstrate that his appeal has overwhelming chances of success, or that exceptional or unusual circumstances exist to warrant exercise of discretion to release him on bail/bond pending appeal. The only argument that I heard was that he had mitigated sentence when he paid Kshs 61, 315.00. However, that payment was a penalty for the excess load, and it was unrelated to driving along a panya route to evade a weighbridge.
9. It could be argued that the default sentence of 1 year could be rather short, and he may have served the full sentence by the time the appeal is heard and determined. I am not persuaded. The appellant would have adequate time to argue his appeal before then. In any case the principal sentence is a fine, which is refundable, if paid, and appeal is successful.
10. I do not find merit in the motion, dated March 6, 2023, and I hereby dismiss the same.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 9TH DAY OF MARCH 2023

W MUSYOKA

JUDGE

Mr Etyang, Court Assistant.



Mr Wycliffe Okutta, instructed by Ouma-Okutta & Associates, Advocates for the appellant.

Mrs Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

