



**Matheka v Republic (Miscellaneous Criminal Application  
81 of 2022) [2023] KEHC 3271 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3271 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
MISCELLANEOUS CRIMINAL APPLICATION 81 OF 2022**

**TM MATHEKA, J**

**APRIL 19, 2023**

**BETWEEN**

**LEWIS KILONZO MATHEKA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. What is before me is the application dated August 10, 2022 brought under Sections 349, 356 and 357 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya seeking the following orders;
  - a. Spent.
  - b. Spent.
  - c. That pending the hearing and determination of the Applicant's intended appeal, the honorable Court be pleased to release the Applicant on favourable bail/bond terms.
  - d. Spent
2. The application is supported by the grounds on its face and the Affidavit sworn by the accused on the same day. Parties agreed to proceed with the application with respect to bail pending appeal and proceed with the hearing of the appeal.
3. The application was canvassed through written submissions. The State did not file any response to the application but filed written submissions.

**The Applicant's Submissions**

4. The issues for determination is Whether the applicant should be released on bail/bond pending the hearing and determination of the appeal.



5. The applicant relies on [\*Charles Owanga Aluoch -vs- Director of Public Prosecutions \(2015\) eKLR\*](#) where it was held that;
  6. The right to bail is provided under Article 49(1) of the [\*Constitution\*](#) but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application.
  7. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case [\*Jivraji Shah -vs- R \(1986\) KLR 605\*](#), the principal considerations for granting bail pending appeal were stated as follows:
    - (1) Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
    - (2) It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, then, a condition of granting bail will exist.
    - (3) Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.
6. As to whether the appeal has overwhelming chances of success, he submits that the trial magistrate erred by holding a conviction and sentence yet there were inconsistencies and glaring gaps in the prosecution evidence. He submits that from the face value of the draft petition, there exists a prima facie arguable case with high chances of success. Further, he submits that he lacked legal representation at trial and as such, the Court should have exercised caution to ensure that he was not wrongfully convicted and sentenced.
7. He submits that the exceptional circumstance in this case is that the conviction is untenable and the sentence unlawful. He contends that he will have served a substantial part of the sentence by the time the appeal is heard. He relies on the holding of De Lestang, Ag.J (as he then was), cited in the case of [\*Joshua Kiarie Njuguna -vs- R \(2021\) eKLR\*](#), that;

' The appellant's appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admit to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail.'
8. He submits that his conduct during the trial is on record. That he attended Court religiously despite being out on bond thus there is no risk that he will violate the terms of bail/bond if granted. He contends that the application is unopposed and the prosecution has not demonstrated that he will abscond.



### **Submissions by the State**

9. The Prosecution Counsel, Nyakibia M Mburu, submits that the State has conceded the prayer seeking extension of time in the interests of justice.
10. With regard to bail pending appeal, she submits that upon conviction, the presumption of innocence falls and the convict is no longer entitled to bond as a right. She however agrees that the honorable Court may exercise its discretion in granting bail pending appeal. She submits that this Court has not been furnished with any extraneous circumstances that would call it to exercise its discretion. She has urged this Court to disallow the application for bail and fast track the intended appeal instead.
11. Having looked at the application, exhibited documents and the respective submissions, the only issue for determination is whether the applicant should be granted bail pending appeal.

### **Analysis**

12. The basis of bail pending appeal is section 357 of the Criminal Procedure Code which provides that;  

' (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 order appealed against shall be suspended pending the hearing of his appeal.'
13. In this case, the accused was convicted for the offence of grievous harm and sentenced to serve three years in prison. Contrary to the applicant's submissions, there is nothing illegal about that sentence.
14. Secondly, the applicant was sentenced on April 7, 2022 and this essentially means that he has already served one year out of the three years' sentence. It is therefore probable that by the time this appeal is heard and determined, he will have served a substantial part of the sentence.
15. It is on the basis of the above that that he may be released on bail of Ksh 100,000 with one surety pending the appeal.
16. I direct that PACs do supply the court with a pre bail report within 14 days hereof.

**DATED, SIGNED AND DELIVERED THIS 19TH APRIL 2023**

.....

**MUMBUA T MATHEKA**

**JUDGE**

Ms. Kellen Present for the appellant

Appellant Present in Court

**Mention on 3<sup>rd</sup> of May 2023 for the Pre bail report**

