



**Njagi v Republic (Miscellaneous Criminal Application
E034 of 2022) [2023] KEHC 3226 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CRIMINAL APPLICATION E034 OF 2022**

RM MWONGO, J

APRIL 18, 2023

BETWEEN

AYUB MWANGI NJAGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant's application is for bail pending appeal. He was convicted in the lower court on December 7, 2022, for conspiracy to defraud and stealing contrary to sections 317 and 275, respectively, of the *Penal Code*. He was sentenced to three years imprisonment for each count to run concurrently. He has filed an appeal in this court. Prior to conviction, the applicant was out on bail, and urges that he be admitted to bail as the appeal may consume his entire sentence term.
2. In addition, the applicant deposed to a 10 paragraph supporting affidavit of which the following are the main averments:
 - 1) That I was convicted in criminal case no. E155 of 2022 and sentenced to an imprisonment of 3 years on December 7, 2022.
 - 2) That I have lodged an appeal against the conviction and sentence before this honourable court.
 - 3) That the honourable magistrate failed to consider vital issues and facts during the trial before convicting me.
 - 4) That I had been admitted to a bond in the trial court and I did not abscond attendance.
 - 5) That I shall attend court as and whenever I am required to do so by this honourable court.
 - 6) That I pray to be admitted to bail pending appeal and I will readily comply with all terms and conditions as may be set by this honourable court.



3. The State's position is that it would be guided by the Probation report subject to reasonable bail terms being set.
4. The Court ordered a Probation Officer's Pre-bail report which was availed on March 22, 2023. In essence, it is a positive report, and recommends that the "applicant be granted lenient bond terms as the court may deem fit".
5. At the hearing, parties made oral submissions. The applicant argued that he had been out on a bond of Kshs 100,000 with one surety of similar amount; that the same bond terms can suffice in the High Court; that the applicant will abide by any court directions, and that the Probation report favoured lenient bond terms.
6. The state's only objection was to the amount of bail, arguing that Kshs 100,000/- was too low. as the applicant is a convict serving sentence. He urges that the amount be enhanced.

Issue

7. The only issue is whether the applicant should be granted bail/bond pending appeal and determination of the appeal herein.

Analysis and Determination

8. Article 49(1)(h) of the [Constitution](#) provides that: -

“ An accused person has the right ...

- (h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

This provision does not aid a convict, as in this case.

9. The applicable provision is section 357 of the [Criminal Procedure Code](#) which 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:

10. In the case of [Charles Owanga Aluoch v Director of Public Prosecutions](#) [2015] eKLR it was held that:

“ 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. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah v R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

“(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.

- (2) If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued



and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

- (3) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

11. It is clear that in order to succeed, the court must be satisfied that there are exceptional circumstances, and that there is likelihood of success of the appeal. It must also take into account the term of the sentence meted.
12. It is clear that the hearing of the appeal, unless fast-tracked above other similar matters, may take a substantial amount of time, to the extent that the applicant may complete his three-year sentence before the appeal concludes. I have also perused the draft petition of appeal availed by the applicant, the lower court file, proceedings and judgment. Whilst I do not wish to get into the merits of the appeal, I would note that the record shows that the applicant was not represented by counsel in the lower court.
13. I have perused the Pre-bail report and note that the victim was willing to forgive the applicant if restitution was made; and that the applicant was not able to benefit from revision by the High Court as he had already lodged the appeal. The applicant may also wish to explore restitution.
14. In the present circumstances, since the state does not oppose bail pending appeal, I would exercise my discretion to allow bail on the following terms:
 - a. The applicant is granted a cash bail of Kshs 200,000/- and he shall also avail a bond security of similar amount to be verified by the DR;
 - b. The applicant shall also report to the Police Station nearest his home Kagumo Police Station on the last day of each month until the conclusion of his appeal.
 - c. The OCS or other Officer in charge of the Police station shall maintain a record of the applicant’s appearances at the police station and such record may be called for by this court at any time.
15. Orders accordingly

DATED AT KERUGOYA THIS 18TH DAY OF APRIL, 2023

.....

R. MWONGO

JUDGE

Delivered in the presence of:

1. Munene for the Applicant
2. Mamba for the state

3. Court Assistant

