



**Tinega & another v Republic (Criminal Appeal E024 of 2022)
[2023] KEHC 3208 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E024 OF 2022
WA OKWANY, J
APRIL 13, 2023**

BETWEEN

BENJAMIN ORANG’O TINEGA 1ST APPELLANT

STEPHEN JOSEPH RIOBA 2ND APPELLANT

AND

THE REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. W. C. Waswa – SRM
Nyamira dated and delivered on the 30th day of November 2022 in the
original Nyamira Chief Magistrate’s Court Criminal Case No. 913 of 2020)*

RULING

1. The Appellants/Applicants were charged with four counts as follows:
 - i. Cutting down standing trees contrary to Section 334 (c) of the [Penal Code](#).
 - ii. Stealing contrary to Section 268 (1) and (2) as read with Section 275 of the [Penal Code](#).
 - iii. Creating a disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the [Penal Code](#).
 - iv. Obtaining money by false pretences contrary to Section 313 of the [Penal Code](#).
2. At the close of the trial, the Lower Court found that the case against the Appellants had been proved in respect to counts one and two thereof. The 1st Appellant was also convicted on count four. The Appellants were subsequently sentenced thereby precipitating the filing of the instant appeal and the application for bail/bond pending the hearing of the Appeal.



3. The application is supported by the 1st Applicant's affidavit and is premised on the grounds that: -
 - a. The appeal has overwhelming chances of success.
 - b. The appeal discloses a prima facie case with high chances of success.
 - c. It is in the interest of justice that the Appellants be admitted to bail.
 - d. The Appellants shall abide with whatever terms the court will set for bail.
 - e. The Appellants are law abiding and will abide with the terms as they did in the trial court.
4. At the hearing of the application, Mr Orina, Learned Counsel for the Applicants reiterated the grounds set out on the face of the application and submitted that the sentences meted out on the Applicants exceed the sentence provided for in the statute and the *Criminal Procedure Code*. It was submitted that the prosecution's case did not meet the threshold of proof required in criminal cases and that the entire proceedings were conducted as a civil case and concluded as a criminal case.
5. Mr Chirchir, for the State opposed the application and submitted that the principle consideration in an application for bail/bond pending appeal is the proof that there exists exceptional circumstances to warrant the granting of the bail and that the appeal is likely to succeed on a substantial point of law.
6. Mr Chirchir maintained that sickness is not one of the exceptional circumstances that can compel the court to grant bail pending the appeal.
7. I have considered the application and the parties' respective submissions. Bond/bail pending appeal is provided for under 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."
8. The principles governing the granting bond pending an appeal were explained in the case of *Jivraj Shah v Republic* [1986] eKLR 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 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 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."



9. In the case of *Chimambhai v Republic* 1971 EA 343 Harris J. made another observation in such an application when he said;

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....”
10. While Article 49 of *the Constitution of Kenya* grants an accused person facing a criminal charge the right to bond because he is presumed to be innocent till proved guilty, no such right exists where an accused person is already convicted.
11. In the above cited cases, the courts also held that anticipated delay in the hearing of the appeal, together with other factors may be grounds for grant of bail pending appeal.
12. In *Dominic Karanja v Republic* [1986] KLR 612, the Court of Appeal stated:
 - (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;
 - (b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;
 - (c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;
 - (d)
13. It is instructive to note that the Appellants herein, having been convicted and currently under sentence of imprisonment, lack the element of presumption of innocence that is ordinarily one of the primary considerations when granting bond pending trial. In this regard, it can be said that bond pending an appeal is not an automatic right of an Appellant.
14. On whether the appeal has overwhelming chances of success, the Bail and Bond policy guidelines provide that the burden is on the convicted person to demonstrate that the appeal has an overwhelming chance of success. In the instant case, the record of appeal had not been filed as at the time that the application was heard and hence I cannot tell, with certainty, whether the appeal has overwhelming chances of success. A perusal of the Lower Court’s judgment however reveals that the trial Magistrate considered the law and evidence in arriving at the decision to convict the Appellant.
15. On whether there is a possibility of delay in hearing and determining the Appeal, I note that the impugned judgment was delivered on November 30, 2022 and the instant appeal and application filed in January 2023. I note that the Lower Court proceedings have been typed and counsel for the Applicants indicated that he was in the process of filing the record of appeal. I find that there is no possibility of a delay in the hearing and determination of the appeal.



16. Turning to the issue of whether there are exceptional or unusual circumstances to warrant the granting of bond pending appeal, I find that the Appellants have not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal. I am guided by the decision in *Dominic Karanja v Republic* [1986] KLR 612 it was held that the previous good character of the Applicant and the hardships, if any, facing his family were not exceptional or unusual circumstances.
17. Similarly, in *Peter Hinga Ngoto v Republic* [2015] eKLR it was held that the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an Applicant to bail pending appeal.
18. I further find that the issue of whether the Appellants complied with the bail conditions granted before conviction, is not a condition for granting bond pending appeal as it does not constitute exceptional or unusual circumstance.
19. The principles espoused in the above decisions also reveal that the granting of bail pending appeal is at the discretion of the court which discretion must be exercised judicially.
20. I have carefully examined the grounds of appeal raised by the applicant. The applicant states that appeal herein has a high probability of success especially when one considers the legality of the sentences meted out on the Appellants. I am however of the view that the issue of whether or not the conviction and sentences are lawful can only be deliberated upon after hearing the appeal.
21. In a nutshell and having regard to the findings and observations that I have made in this ruling, I find that the instant application does not meet the threshold set for the granting of orders for bail pending appeal. The application is therefore disallowed.
22. In view of the fact that counsel for the Appellants indicated that he has already prepared the record of appeal, I direct that the said record be filed immediately so that the Appellants can benefit from an expedited hearing of the Appeal. In this regard I direct that the appeal be fixed for hearing on priority basis.
23. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS ON THIS 13TH DAY OF APRIL 2023.

W. A. OKWANY

JUDGE

