



REPUBLIC OF KENYA



**Maina v Republic (Criminal Appeal E242 of 2022)  
[2023] KEHC 17921 (KLR) (Crim) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17921 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E242 OF 2022**

**DR KAVEDZA, J**

**MAY 3, 2023**

**BETWEEN**

**JOB LUKALE MAINA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for bail pending appeal of the judgment,  
conviction and sentence of Hon. Agnes Wabito- PM delivered on 15th  
December, 2022 in Langata Barracks Court Martial Case No. 29 of 2021)*

**RULING**

1. The applicant was charged with three (3) counts of committing a civil offence contrary to section 133(1)(b) of the *Kenya Defence Forces Act*, that is to say, obtaining by false pretence contrary to section 313 of the *penal code* and an additional count of desertion contrary to section 74(1)(a) as read together with section 74(2)(e) and 74(3)(b) of the *Kenya Defence Forces Act*. They were a total of four counts. After hearing the case, the court Martial acquitted the applicant in respect of count one. He was found guilty in counts II and III and sentenced to serve 2 ½ years' imprisonment in each of the counts and one (1) year in count IV. The sentence was ordered to run consecutively.
2. Being dissatisfied with the decision, he filed his petition of appeal dated December 22, 2022.
3. Additionally, he filed an application seeking his release on bail pending hearing of the appeal. He also sought orders of the court to stay execution of the sentence imposed by the court martial pending hearing of the appeal.
4. The application is premised on the grounds set out in the affidavit dated January 17, 2023 which is sworn by Mr. Stanley Kang'ahi, an advocate having conduct of this case on behalf of the applicant.



5. The grounds in support of the application are as follows. The appeal has good grounds and presents an arguable case. The court martial failed to appreciate the evidence before it and hence arrived at a wrong decision. The applicant is likely to serve the whole or substantial portion of his said prison term before his appeal is heard and determined.
6. Additionally, the appeal has overwhelming chances of success. The applicant is a breadwinner on whom his family and children depend on.

### **The Applicant's Written Submissions**

7. Mr. Kang'ahi, learned counsel for the applicant submitted that one of the offences which the appellant was charged with and convicted for to wit obtaining by false pretence contrary to section 313 of the penal code carries a maximum sentence of three (3) years imprisonment. It was his submission that however the court did not take into account the 510 days that the appellant had spent in the military guard room.
8. Furthermore, the learned counsel was of the view that counts II and III were committed in the same transaction having occurred on April 26, 2021 and between 16<sup>th</sup> March and April 30, 2021 respectively. He submitted that in the circumstance, the court ought to have meted a concurrent sentence of three (3) years on each count as opposed to a cumulative and consecutive sentence of six (6) years for all counts. It was further his submission that if indeed the said 510 days were taken into consideration it would render the proposed sentence in excess of three (3) years as provided by law. It was his view therefore that the appeal has a high chance of success.

### **The Respondent's Written Submissions**

9. Ms. Oduor had no objection to the application on ground that the court having directed that the sentences run consecutively means that the applicant will serve 6 years imprisonment which is illegal in light of section 313 of the penal code. It was her submission that the sentence was illegal and urged the court to allow the application.

### **Issues for determination**

10. I have considered the application and the rival submissions by the parties. As a result, I find that the issue for determination that arises is whether the applicant has met the threshold for the grant of bail pending the hearing and determination of his appeal.

### **Analysis and determination**

11. The provision of law that applies to bail pending appeal is section 357 of the *criminal procedure code* (Cap 75) Laws of Kenya, 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;"
12. The principles applicable in considering whether to grant bail pending an appeal are set out in the case of *Jivrah Shah v Republic* (1986) KLR 605, where the court laid down the following principles:



- (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.”
13. The rationale for considering the chances of appeal were set out in *Somo v Republic* (1972) EA 480, where the court observed as follows:
- “There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word "overwhelming" deliberately for what I believe to be a good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”
14. Has the applicant demonstrated overwhelming chances of the appeal being successful? I have painstakingly gone through the grounds of appeal raised by the applicant. Primarily, the applicant argues that he was erroneously sentenced to serve a consecutive sentence of 2 ½ years’ imprisonment on both counts II and III as opposed to a concurrent sentence. It is the applicant’s submissions that the said decision has an overwhelming chance of success on appeal bearing in mind that the offences relate to similar transactions.
15. The court is called upon at this stage to evaluate the evidence and make a finding as to whether, on the basis of the alleged error, the appeal has overwhelming chances of success, hence result to an acquittal. The law with respect to whether a court should impose a concurrent or a consecutive sentence has crystallized. I therefore find the issue raised by the appellant arguable. I am however not convinced that the appeal has overwhelming chances of success.
16. As to the issue of whether or not the appellant willfully deserted service, it shall be canvassed at the main hearing.
17. Secondly, it has been submitted that the time the appellant spent in custody during the trial period was not taken into consideration during the imposition of the sentence. This is not true. I have perused the lower court record and it clearly indicates that the magistrate directed that the sentence imposed includes the period the appellant had spent in custody before the conclusion of the case.
18. It was argued by the applicant’s counsel that there are exceptional circumstances warranting grant of bail pending appeal on the ground that he is the breadwinner on whom his family and children depend



on. Indeed, I do note from the record that the applicant was a Kenya Defence Forces Officer (KDF) but was dismissed from service on December 15, 2022 upon conviction and sentence. To my mind, I do not find this to be an exceptional circumstance. Exceptional circumstance should be something much more than dismissal from service, for instance, terminal illness of the applicant or a very close family member, or disability of the applicant which would make him unable to survive in prison. I find no merit in this argument.

19. Finally, is the question whether the appeal will be rendered nugatory if the orders sought herein are not granted? The applicant was sentenced to serve six (6) years imprisonment and has been in custody since August 22, 2021. He has served one (1) year and eight (8) months, and has a remainder of about four (4) years and three (3) months. If at all the appeal succeeds, and the court finds that the trial Magistrate erred by imposing a consecutive sentence, the sentence will be reduced to 2 ½ years as opposed to 6 years. I take judicial notice of the fact that criminal trials take relatively long to be determined. I therefore find merit in this ground and concur with the applicant that the appeal is likely to be rendered nugatory. It is thus in the interest of justice that this case be fast tracked. The prosecution is therefore directed to file a response to the appeal for the appeal to be heard and concluded within two (2) months from the date hereof.
20. From the foregoing, I find that the application lacks merit and is hereby dismissed. Mention on May 26, 2023 for directions.
21. It is so ordered.

**RULING READ, DELIVERED AND DATED THIS 3<sup>RD</sup> DAY OF MAY 2023.**

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**D. KAVEDZA**

**JUDGE**

**In the presence of:**

