



REPUBLIC OF KENYA



**KENYA LAW**  
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**Marete v Republic (Criminal Appeal E229 of 2022)  
[2023] KEHC 18714 (KLR) (Crim) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18714 (KLR)

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

**CRIMINAL  
CRIMINAL APPEAL E229 OF 2022**

**LN MUTENDE, J**

**JUNE 19, 2023**

**BETWEEN**

**JOSHUA KIOGORA MARETE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Joshua Kiogora Marete, the appellant/applicant through an application dated 7<sup>th</sup> December, 2022 filed herein by Bench & Co. Advocates seeks bail pending hearing and determination of the appeal. Secondly, he seeks suspension of the sentence imposed in Milimani Chief Magistrate's Court Cr. Case No. 1232 of 2019 pending the hearing and determination of the appeal.
2. The application is based on grounds that the trial court presided over by Hon. Gilbert Shikwe - PM convicted the applicant for the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code and sentenced him to a fine of Ksh 500,000/- on all counts and in the alternative, in default of payment of the fine, to serve two (2) years imprisonment.
3. That the applicant has an arguable appeal and overwhelming chances of success. That the appellant is fifty-four (54) years old, in ill-health, suffering from arthritis which requires urgent operation; he is not a flight risk; and, that his children in school are under the threat of having their education disrupted as he is the sole breadwinner of his family.
4. In an affidavit in support of the application, the applicant deposes that he is unable to raise the fine amount imposed due to his economic situation, his children who depend on him are in Primary, Secondary and University. That he is not a flight risk as he was out on bond during trial which took three (3) years and six (6) months but he did not abscond.



5. The Respondent filed grounds of opposition stating that the applicant had not demonstrated any special or unusual circumstances to warrant grant of bail pending appeal. That prison has good facility to take care of the applicant's illness and that the applicant was properly convicted as the prosecution discharged its burden beyond reasonable doubt.
6. The application was canvassed through written submissions. The appellant reiterated what is stated in the body of the application and urged that he is entitled to a just and fair trial as enshrined in Article 50 of the *Constitution* and also Article 49 (1) (h) of *the Constitution*. He cites the case of *R vs. Joktan Mayende & 3 Others* (2012) eKLR, where the court stated that:

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by *the Constitution*.”
7. The Respondent through Ms. Joyce Adhiambo learned Principal Prosecution Counsel urged that the principles upon which the court can grant bail pending appeal are established thus:
  - i. Existence of exceptional or unusual circumstances to warrant grant of bail.
  - ii. Likelihood of overwhelming chances of success of the appeal
8. That the appellant did not attach any documents to support his narrative of having children who depend on him and the alleged illness. That the appellant had not demonstrated any exceptional circumstances that warrant release on bail.
9. On the question of likelihood of success of the appeal, it is urged that evidence adduced was cogent such that it proved the case beyond doubt.
10. I have duly considered rival submissions. Principles of granting bail pending appeal and suspension of execution of sentence that are judiciously discretionary, are espoused in Section 357 of the *Criminal Procedure Code* that provides thus:
  - (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: Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.
  - (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.



11. Mr. Bench, learned Counsel for the appellant/applicant argues that the appellant is entitled to a just and fair trial as enshrined in Article 49(1) (h) of the Constitution that provides thus:

(1) An arrested person has the right--  
To be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. Fair hearing.

50.

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

12. As clearly stated by the Constitution Article 49(1) (h) and Article 50 of the Constitution alluded to are in respect of an accused person who is yet to undergo trial who is presumed innocent. At an appellate stage the court deals with an offender who has been convicted where different principles apply as the person is already convicted; and, in the instant case sentence is being served. (*Vide - Masrani vs. R.* (1960) EA 321).

13. Courts have considered what should be considered despite the court being seized of the discretion to grant bail at an appellate stage. In the case of *Dominic Karanja vs. Republic* (1986) KLR 612 the court stated that:

“(i) The most important issue was that if the Appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

ii. 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.

iii. 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.

iv. ....”

14. In the case of *Mutua vs. R* (1988) KLR 497 the Court of Appeal stated 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.”

15. It was the responsibility of the applicant to demonstrate that the appeal proffered herein has an overwhelming chance of succeeding. The only annexure to the application is a copy of the judgment of the trial court. There is no copy of the charge sheet and sentence meted out. The judgment would



suggest that the conviction was proper. Whether or not the sentence was legal by law would have been interrogated had a copy of the sentence and committal warrant been availed. The possibility of success of the appeal has therefore not been demonstrated.

16. On the issue of existence of unusual or exceptional circumstance, on the question of the appellant suffering from arthritis, it has not been alleged that the condition if any as it has not been established, cannot be addressed by the Prison Medical Faculty.
17. Hardship of a family in case it arises, has cannot be considered as an exceptional circumstance. The question of the applicant having not absconded during trial would not be a consideration for release on bail at an appellate stage.
18. The upshot of the above is that the applicant has not satisfied this court of existence of reasons to grant him bail and in the result suspend execution of the sentence meted out by the trial court. Consequently, the application fails and is dismissed.
19. It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 19<sup>TH</sup> DAY OF JUNE 2023.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Mr. Bench for Appellant/Applicant

Ms. Joy Adhiambo for ODPP

Court Assistant - Mutai

