



REPUBLIC OF KENYA



KENYA LAW
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**Wasike v Republic (Criminal Appeal E001 of 2023)
[2023] KEHC 18683 (KLR) (Crim) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E001 OF 2023
DR KAVEDZA, J
JUNE 20, 2023**

BETWEEN

IBRAHIM JUMA WASIKE APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for bail pending appeal of the judgment,
conviction and sentence of Hon Agnes Wabito- PM delivered on 20th
January, 2023 in Langata Barracks Court Martial Case No. 26 of 2021)*

RULING

1. The applicant was charged with two (2) 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*. He was found guilty on both counts and sentenced to serve 2 years and 10 months in each count. The sentence was ordered to run consecutively.
2. Being dissatisfied with the decision, he filed his petition of appeal dated January 30, 2023. Additionally, he made an application seeking his release on bail pending hearing of the appeal.

The Applicant's Written Submissions

3. Mr Sichangi, learned counsel for the applicant submitted that the applicant's appeal has high chances of success. It was his submission that the appellant was erroneously convicted without any iota of evidence. He further argued that the sentence imposed by the trial court was manifestly harsh and urged that the court ought to have meted out a concurrent sentence as opposed to the consecutive sentence of nearly six (6) years. It was his contention that the trial court erred in failing to take into account that the offences the appellant was charged with arose from the same transaction. Lastly, he



was apprehensive that if the Honourable Court does not allow the application for bail, the applicant will serve a substantial term of his sentence by the time the appeal is determined.

The Respondent's Written Submissions

4. Ms Akunja opposed the application for bail vide grounds of opposition dated March 3, 2023. She averred that the application lacks merit and maintained that the applicant was properly convicted before the trial court. She further submitted that the applicant has not demonstrated any special or unusual circumstances to warrant him to be granted bail pending appeal. She urged that the application lacks merit and the same ought to be dismissed in its entirety.

Issues for determination

5. 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

6. 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;”

7. 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 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.”

8. 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."

9. Has the applicant demonstrated overwhelming chances of the appeal being successful? I have gone through the grounds of appeal raised by the applicant. Primarily, the applicant argues that he was wrongly convicted on uncorroborated testimonies. He further argues that he was erroneously sentenced to serve a consecutive sentence of 2 years and 10 months for both counts which in the circumstance was harsh and excessive as opposed to a concurrent sentence. It is the applicant's submission that the said decision has an overwhelming chance of success on appeal bearing in mind that the offences relate to a similar transaction.
10. 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.
11. As to the issue of whether or not the applicant was erroneously convicted on uncorroborated testimonies, the same shall be canvassed at the main hearing of the appeal.
12. Secondly, it has been submitted that the cumulative sentence of about six (6) years imposed on the applicant was manifestly harsh and superfluous considering that he also lost his job as a Major in the Defence Forces as well as his retirement benefits. With regard as to whether the sentence was excessive, section 313 of the Penal Code provides that any person who is found guilty for the offence of obtaining by false pretence shall be liable to imprisonment for three (3) years. The trial court found the applicant guilty for committing the said offence as charged on count I and II and sentenced him to serve a consecutive term of two years and ten months for both counts. On the face of it, I find that the sentence imposed against the applicant by the trial court was legal. I take judicial notice that the measure of what is an appropriate sentence in a given case is left to the discretion of the court. In as much as I find that the issue raised by the applicant to be arguable, I am not convinced that this ground has an overwhelming chance of success.
13. 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 a cumulative sentence of 5 years and 8 months with the same being reduced by 1 year and 93 days for the time spent in custody. The applicant therefore has a remainder of about 4 years.
14. 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 years and 10 months as opposed to 5 years and 8 months. 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.



15. Similarly, I find that there are no availed exceptional or unusual circumstances that would entitle the appellant to bail pending appeal.
16. From the foregoing, I find that the application lacks merit and is hereby dismissed.
17. The applicant to file his record of appeal within fourteen (14) days and not later than July 4, 2023. The State Counsel to file a response within 14 days upon service and not later than July 18, 2023. Mater be mentioned on July 18, 2023 for directions.
18. It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF JUNE 2023.

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D KAVEDZA

JUDGE

In the presence of:

Mr Otieno for the State.

Mr Sichangi for the Applicant.

Habiba/ Joy C/A

