



**Osman & another v Republic (Criminal Appeal E033 of 2024)  
[2024] KEHC 12139 (KLR) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12139 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E033 OF 2024  
JN ONYIEGO, J  
OCTOBER 8, 2024**

**BETWEEN**

**BISHARA OSMAN ..... 1<sup>ST</sup> APPLICANT**

**ABDI ADAN HAJI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicants herein were jointly charged with two counts. The second applicant was separately charged with an alternative count in respect to count two.
2. In respect to count 1, they were charged with the offence of Malicious damage to crops c/s 324 of the penal code. Particulars were that on 14-12-2023 at Khumbi Location within Wajir South in Wajir County, they damaged cultivated crops of Amina Hillow valued at kes 1,414,500/=
3. In regards to count two, they were charged with stealing contrary to Section 268 (1) as read with Section 275 of the penal code. Particulars were that on 14-12-2023 at Khumbi Location within Wajir South in Wajir County they stole a generator valued at 60,000 the property of Amina Hillo.
4. Having pleaded not guilty, the matter proceeded to full trial. Upon conclusion of the trial, the applicants were found guilty and consequently convicted of both counts. In respect to count 1, they were sentenced to serve 5 years imprisonment each. As to count two, they were sentenced to serve 1year imprisonment each. The court however gave a rider by directing the applicants to jointly pay the complainant a cumulative sum of kshs1,414,500/= in line with section 24(g) of the penal code. The court further directed that, the applicants were at liberty to pay the said amount in which case they will be set free.



5. Aggrieved by both the conviction and sentence, they filed a petition of appeal dated 3<sup>rd</sup> September 2024. Concurrently filed with the petition is a notice of motion of even date seeking their release on bail pending hearing of the application and thereafter pending hearing and determination of the appeal herein. In the alternative, they sought stay and or suspension of the execution of sentence.
6. In response, the respondent filed grounds of opposition stating that; the application lacks merit; the intended appeal has no high chances of success; the applicants have not demonstrated any exceptional circumstances to warrant release on bail; bail is discretionary and that they have established the possibility that they would have served substantially the sentence meted out.
7. During the hearing, both counsel submitted orally. Mr. Bosire for the applicants submitted that; the appeal has high chances of success; the applicants were convicted on defective charges; the applicants are not a flight risk; the complainant did not prove the plot number where the crops were destroyed hence no proof of land ownership; the purported generator was not found in possession of any of the applicants; one Roble in whose possession the generator in question was found was not called as a witness.
8. On his part, Mr. Okemwa basically reiterated their grounds of opposition.
9. I have considered the application herein and the grounds of opposition thereof. Unlike bail pending trial, bail pending appeal has its own distinct parameters for consideration besides the general grounds for release of an accused person pending trial. For an applicant to be released on bail pending appeal, he is duty bound to prove that the appeal has high chances of success; there exist special or exceptional circumstances to warrant such release and; that if not released on bail and the appeal disposal delays, he would have substantially served the impugned sentence or simply served the full term.
10. In the case of *Dominic Karanja v Republic* (1986) eKLR it was held that;“
  - (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 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.”
9. Similar position was held in the case of *Charles Owanga Oluoch v The DPP* [2015] eKLR where it was held thus;
 

“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 consideration 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 *JivRaji Shah v R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

  - “(1) The principle 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 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.”

11. In the instant case, the applicants are claiming that the prosecution failed to call critical witnesses thus exposing its case. They also argued that ownership of the plot where the crops were destroyed was not established and that the charge was defective. It is true the shamba in question is in dispute between the complainant and the applicants. The ownership of the allegedly destroyed crops is also disputed. These are critical issues that will require critical evaluation on appeal thus making the appeal arguable. However, It will be prejudicial for this court to deal with the merits of the case at this stage.
12. As regards the existence of special or exceptional circumstances, none was specified hence this court cannot imagine one.
13. On the issue whether the applicants are likely to serve a substantial part of the sentence, the court is duty bound to assess the extent of the sentence. The applicants were sentenced to serve 5 years in respect of count one and 1year in respect to count two. The court did not specify whether they were to run concurrently or consecutively. Assuming the applicants were to continue serving their sentence, they will be entitled to remission. In that case, the applicant will be expected to serve 8 months in respect of count two.
14. Having been sentenced on 28-08-24, they are already on their second month. Although the appeal has been admitted, the earliest the appeal may be heard is December 2024. Judgment can then be expected by end of January 2025 considering the element of December vacation. All things remaining constant, by the time the judgment is delivered, the applicants would have served over 5 months out of the possible 8 months. Assuming that the appeal succeeds, they would have substantially served the sentence in respect of the second count. To that extent, the applicants have established the third ground that there is a possibility of serving substantially part of the sentence in respect to count two. Even on that ground alone, the applicants have met the grounds for release on bail pending appeal.
15. Under Article 50(2)(q) of the *constitution*, a convict is entitled to appeal or seek review before a higher court upon conviction. This is a right which cannot be suffocated on flimsy ground. The court of appeal in the case of *Republic v Danson Mgunya*(2016)e KLR held thus;  

“...one of the attributes of a fair trial under the constitution is the right of an accused person who has been convicted of a criminal offence to appeal or apply for review of the conviction to a higher court as prescribe by law”
16. In view of the above analysis of the grounds advanced for release of the applicants on bail pending appeal, I am convinced and satisfied that the applicants have met the criteria for release on bail pending appeal.



17. Having held as above, it is my finding that the application herein is merited and the same is allowed with orders that, the applicants may be released on a bond of 500, 000/= with one surety of similar amount each or in the alternative deposit a cash bail of Kshs 200,000/= each.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8<sup>TH</sup> DAY OF OCTOBER 2024**

**J. N. ONYIEGO**

**JUDGE**

