



REPUBLIC OF KENYA



**Rotich & another v Republic (Criminal Appeal E037 & E035 of 2024  
(Consolidated)) [2024] KEHC 12235 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12235 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E037 & E035 OF 2024 (CONSOLIDATED)**

**RN NYAKUNDI, J  
OCTOBER 11, 2024**

**BETWEEN**

**VINCENT KIPLAGAT ROTICH ..... 1<sup>ST</sup> APPLICANT**

**ROSE CHEBOI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Representation:**

M/s Mwaka & Co. Advocates

M/s Martim & Co. Advocates

Mr. Mark Mugun for the state

1. I have consolidated the two causes for they are seeking the same orders before this court. The applicants were charged, tried and convicted for the offence of conspiracy contrary to section 393 of the [Penal Code](#) and forgery contrary to section 345 as read with 349 of the Penal Code. The trial court considered that charges and returned a verdict of guilty for both the applicants and imposed a sentence of three years.
2. The applicants have approached this court under various provisions of the law including Art. 49, 25, 50 and 159(2)(d) and Sections 347 and 357 of the [Criminal Procedure Code](#). The applicants are all seeking to be admitted to bail/bond pending the determination of the appeal in which they believe they have chances of success.
3. Vincent Kiplagat Rotich supported his application on grounds that during the trial at the subordinate court he was granted a bond of Kshs. 4,000,000/= and he attended court diligently and never absconded the terms of his bond. That title no. LR No. Uasin Gishu/Kimumu/7002 which is valued



at Kshs. 5,000,000/=. He stated that in the event he fails to attend court whenever required to do so, land parcel in the title can be disposed of and the proceed thereof be used to settle the fines herein as the value of the said land is sufficient to settle the court fines that the applicant has been ordered by his trial court to pay.

4. In support of his application, Vincent Kiplagat Rotich filed submissions dated 16<sup>th</sup> September, 2024 urging the court to grant him bond/bail pending appeal and cited the following decisions:
  - a. [\*Jivraj Shah v Republic\*](#) (1986) KLR 605
  - b. [\*Chimambhai v Republic\*](#) (1971) EA 343
  - c. [\*Dominic Karanja\*](#) (1986) KLR 612
5. Rose Cheboi on the other had averred that she is apprehensive that she may serve out her sentence before her appeal is heard and determined due to the long term it takes to hear and dispose of the same. That she has overwhelming chances of success and that she undertakes to avail herself in court and/or turns up for her trial when required to do so.

### Decision

6. I have taken time to go through the record and appreciate the circumstances surrounding the case. I have equally considered the application for bail/bond pending appeal together with the attendant submissions. The only issue that comes out for determination is whether the applicants have advanced good cause to warrant them being granted bail/bond pending appeal.
7. 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 as stipulated in the above article but incidentally, there is no mention as to the right to bail pending appeal leaving the mechanism to the provisions of Section 357 of the [\*Criminal Procedure Code\*](#). Rightly so for the [\*Constitution\*](#) not to prescribe right to bail pending appeal for Art. 49(1)(h) stems from the doctrine of presumption of innocence of an accused person. That is an accused person has a right to be presumed innocent until proved guilty by a competent court. This is why at this stage of the proceedings on appeal the applicant is no longer wholly shielded by the right on the presumption of innocence under Art. 50(2)(a) of the [\*Constitution\*](#). A conviction by a constitutional organ established under Art. 50(1) of the Constitution to adjudicate criminal cases, must be taken very seriously the right to bail notwithstanding. That is why the applicant bears a higher burden of proof to satisfy the court that he/she deserves to be granted bail pending appeal. This compelling and substantial circumstances must be contained in his or her pleadings.
8. For the Applicant, it is submitted that the consideration for the grant of bail pending appeal is founded in the principles set out in [\*Ademba v Republic\*](#) 1983 eKLR where the Court of Appeal held that;

“.....bail pending appeal may only be granted if there are exceptional or unusual circumstances... the likelihood of success in the Appeal is a factor taken into consideration in granting bail pending appeal is a factor taken into consideration in granting bail pending appeal...”
9. Further in the case of [\*Dominic Karanja v Republic\*](#) (1986) eKLR the court 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.”

10. Let me point out that Bond or bail pending Appeal is provided for under Section 357 of the Criminal Procedure Code (CPC). It provides;

“ 357. Admission to bail or suspension of sentence pending appeal,

- (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.
- (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.”

11. It is therefore evident that this court has the powers to grant bail/bond pending appeal. The principles for the grant or denial of bond/bail pending Appeal were also set out in *JivRaji Shah versus R* (1966) KLR 605, *Ademba versus Republic* 1983 eKLR and *Dominic Karanja versus Republic* (1986) eKLR.

12. Thus the considerations for the court to grant or deny bail pending appeal are;

- a. That the Appeal has overwhelming chances of success.
- b. The previous good character of the Applicant
- c. The existence of exceptional or unusual circumstances.
- d. The sentence or substantial part of it will have been served by the time the Appeal is heard.
- e. The appeal is not frivolous and has a reasonable possibility of success.



13. I have perused through the Memorandum of appeal as filed by the applicants and I have to be cautious at this stage not to try and determine the appeal. It must be remembered that during the trial, the Applicants were presumed to be innocent. Right now they have been convicted by the Court of competent jurisdiction. I have also taken note of the fact that the record is ready and set for this court to properly determine the appeal in the shortest time possible and therefore, I am of the opinion that this is an Appeal that can be heard and determined within a short period, which as a result will not prejudice the rights of the appellants. It is not necessary that all the outlined above conditions should be present in every case before a court can exercise discretion to grant or decline bail pending appeal. A combination of two or more criteria may be sufficient and each case must be considered on its own facts and circumstances
14. In conclusion, I am not satisfied that the applicants have placed sufficient evidential material to demonstrate exceptional circumstances or unusual reasons for this court to exercise discretion in their favor for an order for bail pending appeal. A panoramic view of the record does not even show that the intended appeal raises an important point of law as to the legality of the conviction of the applicants or that the sentence is manifestly contestable or unknown in law or the period so imposed against the applicant is likely to be served or substantial part of it before the appeal is heard and determined. This court therefore finds no merit in the application and the same is dismissed. In this respect, the following orders shall abide;
- a. That the Applicants are hereby directed to prepare and file the record of appeal within 14 days from today's hearing for admission and directions.
  - b. That the Deputy Registrar of the High Court be and is hereby directed to facilitate the preparation of the typed proceedings for onward transmission to the applicants and the respondent.
  - c. That a status conference be held on the 8<sup>th</sup> of November, 2024 to schedule the hearing of the Appeal.
  - d. It is so ordered

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11<sup>TH</sup> DAY OF OCTOBER 2024**

.....

**R. NYAKUNDI**

**JUDGE**

In the presence of:

Mr. Martim, Advocate for the 1<sup>st</sup> Appellant.

