



REPUBLIC OF KENYA



**Kashuru v Republic (Criminal Appeal E020 of 2024)
[2024] KEHC 14742 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL E020 OF 2024
FN MUCHEMI, J
NOVEMBER 21, 2024**

BETWEEN

FARIDAH NAIYANOI KASHURU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination dated 6th June 2024 seeks for orders for release on bail pending the hearing and determination of the appeal.
2. The applicant was charged in Criminal Case No. E515 of 2024 Chief Magistrate’s Court at Thika with the offence of stealing by servant contrary to Section 281 of the Penal Code. The applicant pleaded guilty to the offence and was sentenced to three and a half (3 ½)years imprisonment.
3. The applicant states that she was arrested on 21st December 2023 on allegations of stealing by servant, Kshs. 3,641,351/- the property of Alladin World Brands contrary to Section 281 of the Penal Code. The applicant states that she had earlier been summoned on the material day to Thika DCI police headquarters without being provided any information as to the nature of the summons.
4. The applicant states that the complainant is her former employer whom she worked for until August 2023 after which she resigned and left. Prior to her resignation, the applicant states that she realized that other employees were also resigning due to poor working conditions.
5. The applicant states that she was first arraigned in court on 15th February 2024 and later remanded at Thika Women’s remand prison after being unable to raise the bail or bond of Kshs. 4,000,000/- to secure her release pending trial. The applicant further states that she has been locked up since her



arraignment which has impacted her health and well being significantly. The applicant states that her bail was reviewed on 8th May 2024 and lowered it to Kshs. 2,000,000/-.

6. The applicant argues that due to the long time she has been locked up, she has been desperate of getting released from prison and therefore followed advise from prison officers and pleaded guilty to the charge in hope of being forgiven and released.
7. The applicant states that during her incarceration and trial she did not have an opportunity to have legal representation and therefore did not know the seriousness of the charges levelled against her.
8. The applicant states that she has suffered physically and psychologically during her entire incarceration. The applicant prays that her conviction and sentence be set aside and she be given an opportunity to be heard and defend herself.
9. The respondent filed a Replying Affidavit on 17th July 2024 to the effect that the intended appeal has no chances of success due to the overwhelming evidence against the appellant. Furthermore, the respondent argues that the applicant has to discharge the burden of proof that the appeal has high chances of success as unlike bail pending trial, bail pending appeal is not a constitutional right. There is a presumption that the applicant was lawfully convicted unless the contrary is proved.
10. Furthermore, the respondent states that the applicant has not discharged the burden that she shall serve a substantial part of the sentence in the event the appeal succeeds nor has the applicant demonstrated any exceptional circumstances to warrant the court's discretion to grant bail pending appeal.
11. The respondent argues that currently the law and practice favour quick determination of matters without unreasonable delay and thus the applicant is unlikely to serve a substantial part of the sentence before the appeal is heard and determined.
12. The respondent states that the applicant's custodial sentence cannot be set aside before the hearing and determination of her appeal as there is a presumption that she was lawfully convicted unless the contrary is proved.
13. Parties put in written submissions.

The Applicant's Submissions

14. The applicant relies on Article 49(1)(h) of *the Constitution* and the cases of Ademba vs Republic (1983) eKLR; Arvind Patel vs Uganda S.C. Cr. Appeal No. 1 of 2003; Dominic Karanja vs Republic (1986) eKLR and Charles Owanga Oluoch vs DPP [2015] eKLR and submits that she has demonstrated exceptional circumstances to warrant grant of bail pending appeal as she has shown that there will be a delay in the hearing of the appeal and that her appeal has high chances of success. The applicant submits that she was misadvised on taking a plea of guilty by the officers believing that it would guarantee her leniency and a non-custodial sentence. The applicant argues that the misinformation significantly impacted her ability to make an informed decision regarding her plea leading to a miscarriage of justice. The applicant further argues that she did not understand the consequences of her plea and thus her right to a fair trial was compromised.
15. The applicant submits that by the time the appeal is fully heard and determined she will have served the majority of her sentence. The applicant urges the court to exercise its discretion in her favour and grant her bail pending the outcome of the appeal.



The Respondent's Submissions.

16. The respondent relies on Section 357(1) of the Criminal Procedure Code and the case of Jivraj Shah vs Republic [1986] eKLR and submits that the applicant has not met the required threshold for an application for bail pending appeal. Further, the respondent relies on the case of Somo vs Republic [1972] EA 476 and submits that the appeal does not have overwhelming chances of success as the evidence shows that the applicant was properly convicted. The respondent further submits that the applicant has failed to demonstrate that she shall serve a substantial part of the sentence if the appeal is likely to succeed.
17. The respondent relies on the case of R vs Kanji [1946] 22 KLR and submits that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.
18. Relying on the case of Chimambhai vs Republic [1971] EA 343, the respondent contends that currently, the law and practice favour quick dispensation of matters without an unreasonable delay. The respondent argues that the applicant failed to discharge the burden of proof that she is likely to serve a substantial part of the sentence before the appeal is heard which in turn could be successful hence leading to prejudice.

The Law

Whether the applicant has met the threshold for granting bail pending appeal.

19. Section 357(1) of the Criminal Procedure Code provides for the granting of bail pending appeal, it states that:-

After 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.
20. The principles for granting bond pending appeal were reiterated in the case of Jivraj Shah vs Republic [1986] KLR 605 which laid down the principles as follows:-
 - a. 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.
 - b. 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.
 - c. 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.
21. It is trite law that in considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration the following factors.



Does the appeal have overwhelming chances of success?

22. The applicant argues that the appeal has a high probability of success as she was convicted on her plea of guilty yet she was misadvised by the prison officers to plead guilty in order to get a non-custodial sentence.
23. I have carefully perused and examined the trial court proceedings and judgment. I have further examined the grounds of appeal and without pre-empting the appeal, that the said grounds do not disclose the existence of an appeal with an overwhelming chance of success. This does not mean that the appeal is not arguable. The appellant will still have her day in court to argue her appeal.

Is there a possibility of delay in hearing and determining the Appeal?

24. The applicant was sentenced on 27th May 2024 to serve three and a half (3 ½) years imprisonment. Thus it is highly unlikely that she shall have served a substantial part of the sentence before the appeal is heard. The court diary is accommodative of appeals whereas hearing dates are available. As such, I am of the view that the applicant will not serve a substantial part of her sentence before the appeal is heard and determined.

Demonstration of exceptional or unusual circumstances

25. In *Dominic Karanja vs Republic* [1986] KLR 612 the Court of Appeal held:-
 - 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 exceptional or unusual factors. Ill health per se would also not constitute exceptional circumstances 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;
26. Similarly in *Peter Hinga Ngotho vs Republic* [2015]eKLR it was held that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.
27. In the instant case, the applicant argued that she did not have an opportunity to have legal representation and therefore did not know the seriousness of the charges and that during the entire duration of her incarceration she has suffered physically and psychologically.
28. All the foregoing considered, it is my view that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal. The averments of the applicant that he has suffered both physically and psychologically, do not constitute any unusual or exceptional circumstances.
29. I therefore find that the application dated 6th June 2024 lacks merit and is hereby dismissed.
30. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF NOVEMBER 2024.

F. MUCHEMI



JUDGE

