



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthoni & another v Republic (Criminal Appeal E038 of 2024 & E039 of 2022  
(Consolidated)) [2024] KEHC 15140 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL E038 OF 2024 & E039 OF 2022 (CONSOLIDATED)  
AK NDUNG’U, J  
NOVEMBER 19, 2024**

**BETWEEN**

**ALICE NYAMBURA MUTHONI ..... 1<sup>ST</sup> APPELLANT**

**PILLY WAIRIMU MACHARIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Aggrieved by the conviction and sentence in a judgment delivered on 11<sup>th</sup> October, 2024 by Hon. E. Ngigi SPM in Rumuruti Cr. Case No. E037 of 2023 the Appellants filed a petition of appeal dated 16<sup>th</sup> October, 2024. The appeal is based on the following grounds;
  - i. That the learned trial magistrate erred in law and in fact in convicting the Appellants when the prosecution did not prove their case to the required standards thereby occasioning the Appellants a miscarriage of justice.
  - ii. That the learned trial magistrate erred in law and in fact in convicting the Appellants where the essential ingredients of the charge of stealing by agent had not been proved by the prosecution.
  - iii. That the learned trial magistrate erred in law and in fact by drawing adverse inference against the Appellant thus shifting the burden of proof contrary to the law of evidence.
  - iv. That the learned trial magistrate erred in law and in fact in failing to consider the defence evidence and submissions.
  - v. That the judgment is not well reasoned and it is based on guess work and speculations.
  - vi. That the learned trial magistrate erred in law and in fact in basing his judgment on inconsistent, incredible and contradictory evidence of the prosecution witnesses.



- vii. That the learned trial magistrate erred in law and in fact in basing his judgment on assumption and suspicion thus arriving at a finding which was contrary to evidence on record.
  - viii. That the learned trial magistrate erred in law and in fact in meting an excessive sentence and failing to be guided b the judiciary sentencing policy guidelines.
2. They then both filed separate applications (since consolidated) vide chamber summons dated 17<sup>th</sup> October, 2024 seeking for orders;
    - a. Spent.
    - b. That the Appellants be released on bail or bond pending the hearing and determination of the appeal herein.
    - c. That the Appellant be at liberty to apply for such further or other orders and/or directions as this honourable court may order fit and just to grant and the honourable court makes such further orders it deems appropriate in the circumstances.
  3. The applications are supported by the Applicants' affidavits where it is deponed that Appellants were on the 11<sup>th</sup> October, 2024 convicted and sentenced to serve 3 ½ years imprisonment. That they have appealed against the said conviction and sentence and the appeal has high chances of success.
  4. Further that they religiously attended court for over 3 years when the matter was pending in court and they have no intentions of absconding if released on bail.
  5. The 1<sup>st</sup> Appellant depones that she is an orphan and a mother of 3 children aged 9years, 4 years and 5 months respectively who are in need of her care.
  6. The 2<sup>nd</sup> Appellant depones that she is an orphan and a mother of 2 children aged 13 and 5 years who need her care as she is the sole bread winner.
  7. It is stated that the Appellants are sisters and the complainant in the matter is their grandmother who made the false accusation against them after her return from the USA.
  8. That prior to their conviction, they were small scale business women in Rumuruti Town and their permanent residence is at Rumuruti -Location village and they are not a flight risk.
  9. The Appellants aver that they have applied for certified copies of the proceedings and judgment but they might take long to be typed and supplied thus rendering this application necessary as they might end up serving the entire or substantial part of the sentence before the appeal is heard and determined.
  10. The Appellants filed joint submissions in support of bond pending appeal dated 4<sup>th</sup> November, 2024 and stated that they rely on the grounds set out on the face of the applications, the supporting affidavits sworn on 17<sup>th</sup> October, 2024.
  11. The Appellants lodged this appeal after being aggrieved by the conviction and sentence and that the appeal has high chances of success but unfortunately, they were unable to attach copies of proceedings as the same are yet to be supplied.
  12. That the 1<sup>st</sup> Applicant's youngest child who suffers from Asthma is with her in prison. That they did not deserve a custodial sentence and this would have been established had the trial court called for a pre-sentence report before sentencing them.
  13. The appellants are likely to suffer a substantial term of their sentence as proceedings might take long to be supplied. The appeal is yet to be admitted for hearing.



14. The Appellant's children are in need of care and protection and if released on bond, the Appellants shall attend court without fail. That exceptional circumstances arise in this case to warrant the court to exercise its discretion in favour of the Appellants and allow the applications.
15. The state is yet to supply the Appellants with their grounds of opposition thus deeming the application unopposed.
16. Reliance was placed on the case of [Joseph Kimwea Maina vs Republic Nyeri HCCA No. E039 of 2021](#) where the court held as follows;

“The Applicant was however sentenced to serve a consecutive sentence of 6 years imprisonment without an option of fine. It is an arguable point of appeal whether the sentence ought to have run consecutively or concurrently. It is also an arguable point of appeal whether the Applicant should have been given an option of fine.

The Applicant was sentenced on 22<sup>nd</sup> October, 2021. I have perused the record and noted that the proceedings and judgment have been typed but the record of appeal has not been prepared. Three months have now lapsed since when the Applicant was sentenced and yet the record of appeal is not ready. It is thus likely that the hearing of this appeal will be delayed and the Applicant will serve a substantial part of his sentence before the appeal is heard and determined. This, coupled with the finding eluded to above that there are arguable points to the appeal on the severity of the sentence, is sufficient reason for this court to grant the Applicant bond pending appeal.”

17. Pauline Ruguru Kithumbu vs Republic (2019) eKLR, the court held;

“It was further submitted that another exceptional circumstance was that the Applicant was a mother to (4) minors, one who was barely 1 ½ years when the Applicant was sentenced and had to stop breastfeeding. The Applicant has attached the relevant birth certificate and an application of birth notification to this end. The Respondent herein has also not offered sufficient reasons to show that the Applicant will abscond if granted bail. The fact that the Applicant was a mother of young children who were of tender years ought to have been considered during sentencing to explore the possibility of a non-custodial sentence.

I hold the view that being a mother of young children who all depend on the Applicant on to be an exceptional circumstance for the court this application.”

18. The Appellants pray for the applications to be allowed and for the court to consider an option of a cash bail noting that the Appellants are siblings and orphans and they might get a challenge procuring sureties to stand for them.
19. There was no response to the application.
20. Section 357 (1) of the Criminal Procedure Code which provides for admission to bail or suspension of sentence pending appeal reads: -

“(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.

21. The main consideration in an application seeking bail pending appeal were best articulated in *Simon Mwangi Kirika v Republic* citing *Jivraj Shah v Republic*
  - I. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.
  - II. 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.
  - III. 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.
22. At page 27 paragraph 4.30, The Bail and Bond Policy Guidelines provide that with respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.
23. At the stage of an application for bail pending appeal, it is noteworthy that such an Applicant has lost the presumption of innocence guaranteed by *the constitution* given that the person is already convicted by a court of competent jurisdiction.
24. It is now trite law that for an application for bail pending appeal to succeed, an applicant must demonstrate that the appeal has a reasonable prospect of success of the appeal. The less probable the chances of success becomes an obvious incentive towards a convict absconding.
25. In *Dominic Karanja v Republic* (1986) KLR 612, the Court of Appeal stated, inter alia;
  - “(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 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;



(d) .....

26. From a reading of the court of appeal decision in *Dominic Karanja vs Republic* (supra), it is obvious that the personal circumstances of an applicant are secondary in determination of an application for bail pending appeal. Were the contrary to be true, such a parameter would be very subjective as invariably almost everyone imprisoned after a trial would have personal circumstances that they would hang onto; Dependant family, ill health, disruption of education, loss of employment etc. In my view, any difficulty situation a convict finds themselves in would be fertile ground for mitigation before the trial court and it is only when such mitigation is not considered that an appellate court would, in an application for bail pending appeal, consider that the appeal on sentence has chances of success and thereby allow bail pending appeal.
27. This court is disadvantaged in that the record of the lower court was not supplied to the court and therefore, I have no basis upon which to weigh the possibility of success of the appeal. The mere fact that the Applicants are orphans with children and that they are of good character and did not abscond the trial does not, on its own, warrant the grant bail pending appeal. And while I empathize with the child said to be 5 months old finding itself in prison, I find that no exceptional or unusual circumstances exist to warrant the grant of bail pending appeal.
28. With the result that the consolidated application fails and is dismissed. In the circumstances of this case, however, I direct the Deputy Registrar of this court to fast track this appeal by ensuring a timeous typing and preparation of the record of appeal to facilitate an expedited hearing of the appeal. This ruling be served on the Deputy registrar for necessary action.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2024**

**A.K. NDUNG’U**

**JUDGE**

