



**Murathimi v Republic (Criminal Appeal E160 of 2024)  
[2024] KEHC 16697 (KLR) (Crim) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16697 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E160 OF 2024  
AM MUTETI, J  
NOVEMBER 18, 2024**

**BETWEEN**

**ERIC KAGONDU MURATHIMI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant seeks bail pending appeal by way of a chamber summons dated 28<sup>th</sup> October 2024. The applicant argues that his appeal has overwhelming chances of success and that there exists exceptional circumstances in the matter that would warrant his admission to bail pending appeal.
2. The application is brought under the provisions of Section 357 of the *Criminal Procedure Code* as read together with Article 50 of the *Constitution* of Kenya.
3. The applicant has urged the court to find that the issue of mens rea in the commission of the alleged offence will be central in this court reviewing the totality of the evidence to ascertain whether the prosecution discharged the burden of proof in that regard.
4. The appellant applicant maintains that he was servicing a loan thus if this court were to look at that evidence as it relates to the offence of stealing then the court would find that the charge of stealing could not be sustained.
5. The argument by the applicant raises the issue arguability of the appeal and points to its overwhelming chances of success.
6. I have independently scrutinized the judgment and the learned Honorable magistrate makes mention of the question of repayment and default in repayment of a loan. The issue raised by the applicant is thus a live issue for determination in this appeal.



7. This court is therefore satisfied that the appeal has overwhelming chances of success. As to the existence of exceptional circumstances this court finds that considering that the judgment of the lower court is already typed it is not true that the applicant is likely to serve a substantial part of the sentence before the proceedings are ready for the appeal to be set down for hearing.
8. Taking into account that the applicant is serving a 7 years jail term, the appeal would not delay inordinately given that only six witnesses testified in the matter thus typing of proceedings would not take unreasonably long to delay the processing of the appeal. The ground on exceptional circumstances based on that ground thus fails.
9. The prosecution has not opposed the application and the prosecution counsel stunned this court when she was unable to respond to the applicant's submissions on the overwhelming chances of success of the appeal.
10. It stood out clearly that counsel for the prosecution never took time to study her file and prepare for the application. The prosecution counsel should be reminded that her role in these proceedings is so crucial that she should not expect the court to do that which is expected of the prosecutor.
11. Prosecution is such a serious responsibility that counsel must remember under Article 157 (11) of the Constitution the duty placed upon her office is that of a minister of justice who must be prepared in the discharge of duty to protect the interests of the administration of justice.
12. It can't be that counsel simply appears and asks the court to place the appellant on bail with stringent terms.
13. Bail pending appeal is quite different from bail pending trial. It is serious business and prosecution counsel must perform their duty to assist the court in dispensing justice. The role of counsel for the prosecution in bail pending appeal applications is absolutely noble in that it is the counsel's duty to inform the court whether or not they support the conviction and sentence by the lower court and if not, why.
14. The public solely entrusts the duty to bring offenders to justice to the prosecutor thus throughout the prosecution of a matter the prosecutor must remember that having initiated the prosecution and secured a conviction, the state should diligently attend to the appeal arising therefrom. The victims of crime have a legitimate expectation that their interests will be safeguarded by the prosecution. However, the prosecutor must as well remember that they do not act as counsel for the complainant. See Berger vs United States, 295 US 78 (1935). The US Supreme court stated;- "the prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.
15. It is out of this duty that the prosecutor in a bail pending appeal must come out and say why they think an appeal has overwhelming chances of success or not. The duty cannot be left to the counsel for the appellant and the court.
16. In conclusion the court agrees with the applicant that the appeal has overwhelming chances of success and admits the appellant to a cash bail of Ksh. 500,000 or in the alternative a bond of Ksh. 1,000,000 plus one surety of similar amount.
17. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2024.**



**A. M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kiptoo

Ms Musau holding brief Mulupi for the Appellant

Mutinda holding brief Karanja for the Respondent

