



**Mwaniki v Republic (Criminal Appeal E031 of 2024)
[2024] KEHC 14397 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E031 OF 2024
RM MWONGO, J
NOVEMBER 18, 2024**

BETWEEN

JOSEPH GACHOKI MWANIKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence by Hon. L.W. Kabaria (PM)
in Gichugu Criminal Case No. 407 of 2020 delivered on 19th August 2024)*

RULING

1. The accused was charged with the offence of cheating contrary to section 315 of the [Penal Code](#). It was alleged that by means of fraudulent trick he induced Ruth Kavindu Gitari to pay a sum of Ksh.310,000/= in pretense that he would sell her a parcel of land viz L.R Baragwe/Raimu/3494.
2. After a full hearing, he was convicted on 19th August 2024 and sentenced to serve one year in custody, without an option of a fine.
3. He has now filed this application dated 25th September 2024 seeking the following orders:
 1. Spent.
 2. The appellant/applicant be admitted to bail pending the hearing and determination of this appeal.
 3. The cash bail deposited in the trial court being Gichugu Criminal Case Number 407 of 2020 of Kshs. 200,000/= be utilized as the cash bail in this case upon admitting the appellant on bail pending appeal.



4. The application is supported by the grounds on the face of the application and the annexed Affidavit sworn by Joseph Gachoki Mwaniki, in which he has made the following major averments.
 1. That on 30th October, 2018, I entered into a written sale agreement with the complainant and her husband Moses C. Gitari over my property known as Baragwe/Raimu/3494 for agreed consideration of one million shillings and a deposit of Ksh. 300,000/= was paid on the date of the agreement.
 2. That at the time of entering into the sale agreement, the title of the land was charged to a financial institution, a fact I disclosed and was one of the terms of the agreement.
 3. That I didn't manage to obtain the discharge of charge in time, and a complaint was made to the police against me by the purchasers whereby I was arrested, charged and convicted of the offence of cheating contrary to Section 315 of the *Penal Code* in Gichugu Criminal Case Number 407 of 2020.
 4. That during the pendency of the criminal case at Gichugu Court, I had deposited a cash bail of Kshs. 200,000/=.
 5. That on 23rd August, 2024, I was sentenced to serve one year in custody without an option of a fine, despite the fact that the offence is a misdemeanour.
 6. That if I was in breach of the terms of the agreement, paragraph 9 thereof provided for remedy, and therefore the case was of a civil nature and not criminal at all.
 7. That considering the diary of this court, there are chances that I may serve the sentence before my appeal is heard and determined yet I strongly hold the view that the conviction and sentence were erroneous.
5. The state deposed to a Replying Affidavit with the following major averments:
 1. That the applicant moves this Court for Orders that the Applicant was convicted and sentenced for the offence of cheating contrary to Section 315 of the *Penal Code*.
 2. That the applicant is convicted and sentenced to serve [one year] in custody without an option of a fine.
 3. That the case was of a civil nature and not criminal since there were clear terms of sale agreement.
 4. That the appeal has good chance of success.
 5. That there is a likelihood that the appellant would have served the full term, considering the remission, by the time the appeal is heard and determined.
 6. The respondent also filed submissions. There are no submissions on record for the applicant.

Respondent's submissions

7. As to whether the Applicant/Appellant's case was of a civil and not criminal nature, the respondent submits that the Appellant/Applicant was charged with offence of cheating contrary to section 315 of



the [Penal Code](#). He was accordingly convicted and sentenced. Further Section 193 A of the [Criminal Procedure Code](#) provides that:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

8. The Appellant/Applicant has not demonstrated to this Honourable Court that the proceedings at the lower Court were in any way oppressive, vexatious, abusive or that they amounted to a breach of his fundamental rights and freedom to require this Court intervene.
9. As to whether the Applicant/Appellant was convicted and sentenced without an option of a fine, the respondent submits that Section 315 of the [Penal Code](#) does not provide for a fine. The section provides:

“Any person who by means of any fraudulent tricks or device obtains from any other person anything capable of being stolen, or induced any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person money or goods or any greater sum of money or greater quantity of goods than he would have been paid or delivered but for such trick or device, is guilty of a misdemeanor and is liable to imprisonment for three years”.

10. The respondent urges that this Court in exercise of the powers vested in it under section 362 of the [Criminal Procedure Code](#) should call for the records of the subordinate Court and satisfy itself as to whether Section 354(iii)(b) may be invoked to enhance the sentence. They rely on the case of [J.J.W vs Republic](#) [2013] eKLR on enhancement of sentence by the High Court where it was held:

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence”

11. As to whether the Applicant/Appellant would have served the sentence by the time the appeal is heard and determined the respondent submits that the lower Court proceedings have been typed and a record of appeal has been prepared and served; the issue of substantial amount of time to be served will not arise since the courts have in recent years up scaled work and the possibility of the appeal taking long to be heard should not arise.
12. On whether the applicant’s appeal has a high chance of success. The Respondent submits that the burden is on the Appellant/Applicant to demonstrate that there is indeed overwhelming chance of success as the trial Magistrate duly considered the evidence and the law in convicting the applicant.

Issues for Determination

13. The core issue for determination is whether the applicant should be granted bail/bond pending appeal.

Analysis and Determination

14. The provisions of Section 357 (1) of the [Criminal Procedure Code](#) provide for admission to bail pending appeal, in the following terms:

“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.”

15. Whilst Article 49(1)(h) of the Constitution provides that an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released, a similar position does not apply for a convicted person.
16. Article 50(2) (q) of the Constitution deals with the position for a convicted person and grants him a right to appeal or apply for review.
17. In the case of Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR it was held that:

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

- “(1) 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.
- (2) If it appears prima face 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.”

Appeal has overwhelming chance of success

18. The applicant was charged and convicted with the offence of cheating contrary to section 315 of the Penal code in Gichugu Criminal Case Number 407 of 2020. He was sentenced to serve 1 years’ imprisonment on 23rd August, 2024. He has filed an appeal and deposed that: in view of the court’s workload, he is apprehensive that he will serve a substantial part of the sentence by the time the appeal is heard and determined.
19. The respondent submits that the issue of substantial amount of time to be served will not arise since the courts have in recent years up scaled work and the possibility of the appeal taking long to be heard should not arise.
20. The applicant believe that he has an arguable appeal and it will not be concluded in time hence the need to be released on reasonable bail/bond terms. He argues that the criminal prosecution was not warranted as he was in fact engaging in a documented sale of land.



21. It may be argued that the assertion that the lower court case was a civil one connotes existence of exceptional circumstances since there were clear terms of sale in a written agreement. Further, in the event he was in breach of the said agreement, paragraph 9 provided a civil remedy.
22. The fact that he was sentenced to serve one year in custody without an option of a fine, despite the fact that the offence is a misdemeanour, suggests, in his view, that he has a fair chance of success on appeal.
23. Section 315 of the [Penal Code](#) provides that;

“Any person who by means of any fraudulent tricks or device obtains from any other person anything capable of being stolen, or induced any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person money or goods or any greater sum of money or greater quantity of goods than he would have been paid or delivered but for such trick or device, is guilty of a misdemeanor and is liable to imprisonment for three years”.
24. The Section does not expressly provide for option of a fine. The [Sentencing Policy Guidelines](#). Section 26 (3) of the [Penal Code](#) also provides as follows:
 - “3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment: Provided that –
 - (i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for.”
25. The applicant asserted that whilst proceeding in the trial court he did not breach the bail/bond conditions issued by the trial court. He had deposited cash bail of Kshs 200,000/=. Further, the applicant is apprehensive that he will serve a substantial part of the one-year sentence by the time the appeal is heard and determined.

Conclusion and Disposition

26. Taking the foregoing into account I am satisfied that this is a case where the applicant is entitled to be availed the opportunity to test the conviction by appealing. He will be better placed in preparing for appeal whilst on bond where he can avail documents of sale of the disputed parcel of land.
27. I hereby allow the applicant bail pending appeal on the following conditions:
 - a) The applicant may be released on bail of Kshs. 500,000/=. Of that amount, Kshs. 200,000/= may be cash bail.
 - b) The balance of Kshs.300,000/= may be secured by a bond and with a surety for that amount to be verified by the Deputy Registrar.
 - c) The applicant shall report at Kerugoya Police Station on the last day of each month commencing upon his release, and a record of such attendance shall be maintained by the officer-in-charge of the Police Station. Such record may be called for at any time by the court.
28. Orders accordingly.

DATED AT KERUGOYA THIS 18TH DAY OF NOVEMBER 2024

R. MWONGO

JUDGE



Delivered in the presence of:

Wambui holding brief for Kagio for Appellant

Mamba for the State

Murage, Court Assistant

