



**Muthamia v Republic (Criminal Appeal E029 of 2024)  
[2024] KEHC 15649 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15649 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E029 OF 2024  
HM NYAGA, J  
DECEMBER 5, 2024**

**BETWEEN**

**DANIEL MUTHAMIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 18/04/2024 the Applicant has sought the following orders:-
  - a. That this Honourable Court be pleased to admit the Applicant to bail and bond terms pending hearing and determination of the instant appeal.
  - b. That in the alternative the Honourable Court be pleased to order stay and/or suspension of execution of sentence in Criminal Case No. 519 of 2017 pending hearing and determination of the instant appeal. That the bond terms be similar to the bond terms ordered at the trial court.
  - c. That this Honourable Court be pleased to make such other or better orders as it may deem just and expedient to grant.
2. In a nutshell it is the Applicant's case that he was charged in Maua Chief Magistrate's court Criminal Case No. 519 of 2017. That Judgment was delivered on 12<sup>th</sup> February, 2024 and he was convicted as follows:-
  - a. Count 1 – Fined Kshs. 5,000/- in default to serve 6 months imprisonment.
  - b. Count 2 – Fined Kshs. 50,000/- in default to serve one year imprisonment.
3. The Applicant states that he has preferred an appeal herein which has a high chance of success. He expresses fears that he may have served his sentence by the time the appeal is heard and determined.



4. The state through the Director of Public Prosecutions (DPP) opposed the Application. It is argued that the appeal does not have a high chance of success. That there are no exceptional circumstances that would entitle the Applicant to bond as sought. It is also argued that the Applicant has failed to take steps to prosecute the Appeal expeditiously. That the fact that Applicant did not abscond bond is not a sufficient ground to grant the orders sought.
5. Although parties were granted time to file submissions, I did not see any at the time of writing this ruling.

### **Analysis And Determination**

6. Section 357(1) of the Criminal Procedure Code (CPC) provides as follows:-

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.

7. In *Masrani Vs Republic* [1960] EA 321 it was held that:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

8. In *Charles Owanga Aluoch Vs Director of Public Prosecutions* [2015] eKLR where 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 Vs Republic* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:

- (1) Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.
- (2) It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.”

9. This position was restated in *Mutua Vs Republic* [1988] KLR 497, the Court of Appeal stated;

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.”



10. In *Jivraj Shah Vs Republic*[supra] cited by both sides, the Court of Appeal further held that:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo Vs Republic* [1972] E A 476 which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, *Daniel Dominic Karanja Vs Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”

11. It is therefore patent that there is different test applied in bail pending trial and bail pending Appeal. The court in determining an application for bail pending appeal, exercises its discretion judiciously and must establish, whether the appeal has overwhelming chances of success, whether there are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion and whether there is a high probability of the sentence being served before the appeal is heard.

12. What constitutes exceptional circumstances were dealt with in *Republic Vs Kanji* [1946] 22 KLR, where De Lestang, Ag.J (as he then was) held that;

“The appellant’s appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail.”

13. According to Trevelyan, J in *Somo Vs Republic* [1972] EA 476:

“...the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance....

Good character alone, can never be enough. There is nothing exceptional or unusual in having such a character.”

14. The rationale for considering the chances of success of the appeal was given in *Somo Vs Republic* (supra) at page 480 as follows:

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It



seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”

15. Similarly, In *Dominic Karanja Vs Republic* [1986] KLR 612 the Court of Appeal held: -

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors. See *Somo Vs Republic* [1972] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.”

16. Further in the case of BGM HC MISC CR APPEAL NO. 163 OF 2012 it was stated that;

... in determining whether the appeal has overwhelming chances of success, the court is not determining the appeal or confirming the success or otherwise of the appeal, but it is simply saying that, from the material before the court for purposes of the application for bail only, there are high or overwhelming chances of the appeal to be successful.

17. From the above decisions, it is clear the court should not at this stage dwell on the particular issues in dispute in the main appeal in order to avoid determining the appeal on the basis of the limited arguments offered for purposes of bail pending appeal or taking a stand on an issue without full scale arguments at the hearing of the appeal.

18. There are, of course instances where there is an issue that is so prominent that even at a stage like this the appellate court can safely conclude that the appeal has a high likelihood of success. A few illustrations that come to mind right away would be; where an appellant was convicted on a non-existent offence or repealed section of the law, or where there is undisputed material before the court that the appellant was a child, and this was not noted by the trial court.

19. In this case, I have considered the petition of appeal and meticulously perused the proceedings of the trial court together with the judgment thereof and I am satisfied there is are prominent issues that stand out to convince me that the appeal has an overwhelming chance of success.

20. In the matter at hand, the Applicant and the Complainant had a dispute over the parcel of land in question. Undeniably, there were proceedings before the Maua Court in ELC No. 29 of 2018. It also emerges that there are allegations that there is also another case pending in the High Court as the Judgment of the trial court. The status of that case is unknown and the trial court did not consider that issue.

21. The superior courts have continuously expressed adherence to the use of criminal proceedings to provide a solution to a civil matter. This is despite the fact that Section 193 A of the Criminal Procedure Code allows for concurrent criminal and civil proceedings.



22. This case was commenced in 2017. The determination by the Maua ELC Court was made in 2019. In convicting the appellant the trial court heavily relied upon the judgment delivered in the civil matter, yet the same had not been delivered by the time the applicant was charged in court. Thus, the said decision could not have been a basis for a conviction of the Applicant.
23. On this ground alone, I find that the Appeal has very high chances of success.
24. The sentences meted out were relatively short. The Applicant has served a longer proportion of the same. It is thus likely that the Applicant may fully serve a sentence, that stands a high chance of being quashed.
25. Consequently, I am inclined to allow the application. I don't see it fit to grant hefty bond terms which may negate the purposes of the bond pending appeal. I therefore we grant the Applicant on cash bail of Kshs. 10,000/- (Kenya Shillings Ten Thousand Only).
26. Further I give the following directions:-
  - a. The Applicant/Appellant to proceed to file and serve the Record of Appeal within the next 30 days.
  - b. The lower court record to be availed in court forthwith.
  - c. Mention date for directions on the appeal will be given shortly after the delivery of this ruling.

**H.M. NYAGA**

**JUDGE**

**DATED, SIGNED & DELIVERED IN OPEN COURT AT MERU THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024.**

**H.M. NYAGA**

**JUDGE**

In the presence of:

