Mugure v Republic (Criminal Application E008 of 2024)
[2025] KECA 1012 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KECA 1012 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPLICATION E008 OF 2024

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

APRIL 4, 2025

BETWEEN

MAJOR PETER MWAURA MUGURE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for bail/bond pending hearing and determination of the appeal against the Ruling of the High Court at Nyeri (M. Muya, J.) delivered on 25th January, 2024 in H.C.C.C. No. 18 of 2019)

RULING

1. The Notice of Motion application is dated 9th February 2024 and has been brought under Articles 22(9), 29(a) & (f), 49 (1)(h) and 5O of the *Constitution*, 2O1O as read together with Rules 1 (2)(f) and 5 (2)(a) and 61 of the *Court of Appeal Rules*, 2022. The applicant seeks the following orders:

    1. Moot

    2. That the Honourable Court be pleased to admit the Applicant to bail/bond on reasonable terms pending the hearing and determination of the instant application.

    3. That the Honourable Court be pleased to admit the Applicant to bail/bond on reasonable terms pending hearing and determination of the instant appeal.

    4. That in consequent to and or in alternative to prayer (2) above, the Hon. Court be pleased to expedite the hearing and determination of the instant appeal by the Applicant seeking grant of bail/bond.

    5. That in alternative to prayer (2) above, and or grant of prayer (2) above, this Hon. Court be pleased to order the transfer of the Applicant from civil custody at the Nyeri maximum security prison remand center immediately into military custody to be emplaced under open arrest in

accordance with applicable military laws pending the hearing and determination on the instant appeal seeking admission to bail.

6. Any other order(s) that this Hon. Court shall deem fit and just to issue.

2. The grounds for the application are on the face of the Motion and in the supporting affidavit sworn by Major Peter Mwaura Mugure, the applicant. The applicant is facing a murder trial before the High Court at Nyeri. His application before us hinges on three orders, two of them in the alternative. The main order sought is for admission to reasonable bail terms; alternatively, an expedited hearing of his appeal; and in further alternative, an order for his immediate transfer into military custody to be emplaced under open arrest in accordance with military laws - pending hearing and determination of the instant appeal.

3. In support of his application to be admitted to reasonable bail terms pending the substantive hearing of his appeal on bail, the applicant urges that:

   a. He is a Kenyan citizen entitled to his constitutional right to bail pursuant to Article 49 (1)(h) Kenya *Constitution* 2010.

   b. He filed a bail application on or around Dec 2019, which application was declined primarily on grounds of allegations of witness interference and blames his previous advocate's failure to file an affidavit to controvert the said allegations;

   c. Not being a legal person versed with criminal law procedures, he was unable to oversight his legal representative; he urges that it is highly prejudicial to visit the sins of the counsel on a litigant.

   d. Despite terminating legal services and subsequently filing an affidavit controverting all those allegations all subsequent attempts to have the denial of bail reviewed have proven futile.

   e. He is not a flight risk and/or will not abscond trial. Further, this Hon. Court is at liberty to impose any reasonable conditions/terms subject to the grant of bail as the Court deems fit.

   f. Since 25 witnesses have already testified in his murder trial, and only 3 remain, the circumstances have manifestly changed.

4. In support of his prayer for an expedited hearing of his appeal he states:

   a. That his appeal is not frivolous;

   b. No prejudice will be suffered by the other parties in the case

5. In regards to an order for his immediate transfer into military custody to be emplaced under open arrest in accordance to military laws, the applicant urges that:

   a. He has at all material times pertinent to the criminal trial been a military personnel subject to the *Kenya Defence Forces Act* No. 25 of 2Ol2 (revised 2018) (hereinafter KDFA) by dint of Section 4(a) & (g) thereof.

   b. The alleged offence of murder alleged against a person subject to the KDFA is a military service offence by dint of Part VI KDFA and in particular Section 133(1)(a) thereof.

   c. The trial court in the impugned ruling misapprehended the *KDFA* by categorically stating that the alleged charge of murder against the Applicant/Appellant is not a service offence and hence the provisions of the *KDFA* were not applicable to the Applicant/Appellant. Part VI *KDFA* and in particular Section 133 (1)(a) categorizes the offence of murder and all other

conventional criminal offences to be part of service offences under the general category of civil offences.

d. The trial court in the impugned ruling stated that a committal order from the Applicant's/ Appellant's commanding officer was not required as the Applicant/Appellant is in civil custody. Section 146 *KDFA* mandatorily requires a written committal order and a sworn affidavit from the Applicant's/Appellant's commanding officer prior to his remand in civil custody.

e. The trial court in that impugned ruling stated that the *KDFA* is silent on whether an accused person can continue under close custody upon commencement of criminal trial, in excess of.42 days. Section 140(4) *KDFA* expressly stipulates that at any given time an accused person subject to the *KDFA* shall not be placed in close custody in excess of.42 days in the aggregate.

f. The Applicant/Appellant has been in close custody for over 1400 days and counting. These, among other pertinent issues featured prominently in the aforesaid constitutional petition before the High Court of Kenya at Nyeri.

g. Based on the aforementioned prejudicial findings of the trial Court, the trial Court has since recused itself from the constitutional petition.

6. The application is opposed. Jennifer Kaniu, a Prosecution Counsel in the Office of the Director of Public Prosecutions has sworn a replying affidavit dated 24th June 2024. She deposes in part as follows:

a. That the instant Application arises from the proceedings before the High Court of Nyeri in Republic v Peter Mwaura Mugure HCCRC I8 of 2019 in which the Appellant/ Applicant is charged with the offence of murder vide the charge sheet dated 9th December 2019.

b. The charges against the Appellant/Applicant resulted from investigations conducted jointly with the Directorate of Criminal investigations (hereinafter referred to as DCI) and the Kenya Defense Forces (hereinafter referred to as KDF) whose officers are prosecution witnesses before the trial court.

c. The murder trial has proceeded and is at an advanced stage with over twenty witnesses having testified and three remaining, with one part-heard witness awaiting cross-examination by the defence counsel. The defence has raised a plethora of applications relating to bail and bond before the trial Court with the same being unsuccessful before different judicial officers as highlighted below:

    a. Ruling of February 2020 by Hon Justice J. Ngaah

    b. Ruling of June 2021 by Hon. Lady Justice F. Michemi

    c. Ruling of 6th May 2022 by Hon. Justice D. Njagi

    d. Ruling of March 2023 by Hon Justice M. Muya

    e. Ruling of 21st September 2023 by Hon Justice M. Muya

    f. Ruling of 20th January 2024 by Hon Justice M. Muya

    g. Ruling of 2Oh March 2024 by Hon Justice Muya (annexed hereto and marked as lKI to JK7).

d. That the trial court has both the original and constitutional jurisdiction under Article 165 of the *Constitution* of Kenya, and that the trial court in denying the Appellant bail/bond was guided by:

   a. The Judiciary bail and bond policy guidelines;

   b. The nature and amount of evidence on record;

   c. The stage at which the trial is at the time of the review application;

   d. The number of witnesses remaining to testily, only three (3).

e. That the Appellant/Applicant seeks to introduce in his application issues on jurisdiction under paragraphs 10, 11, 12, 13, 14 and 15 of the Certificate of Urgency which are substantive issues raised through Constitutional Petition E002 of 2024 pending hearing and determination before the High Court of Kenya at Nyeri.

f. That the issue of jurisdiction ought to be struck off in the hearing and determination of this instant Application for want of prosecution.

g. That while the issue of bail is a constitutional right under Article 49 (I)(h) of the *Constitution* of Kenya, the same is not an absolute right. That the Appellant/Applicant has not demonstrated any new, peculiar, exceptional or change of circumstances to warrant a review of denial of bail and bond terms.

h. That the Appellant/ Applicant cannot purport to raise any further objections in respect to the issue of bail and bond before this Court, having failed to do so multiple times before the trial Court.

i. That among the last witnesses to the prosecution case include the Safaricom Liaison officer and the DCI investigating officer who hold key evidence linking the Appellant/ Applicant to the offence of murder and the state is apprehensive that he is a flight risk.

7. The application was heard through the Court's virtual platform on the 30th October 2024. Present for the applicant was Mr. Gori, learned counsel and learned Prosecution Counsel Mr. Naulikha for the State. Each counsel relied on their submissions which they briefly highlighted before us.

8. Mr. Gori submitted that there were three issues for determination namely:

   i. Should this Hon. Court grant bail to the applicant herein pending determination of the substantive interlocutory appeal on bail? If so, on what terms?

   ii. If bail is not grantable pending the hearing and determination of the substantive interlocutory appeal on bail, which is the legal, lawful and proper place of remanding the applicant herein?

   iii. What orders and/or directions should this Hon. Court issue?

9. We have considered this application, the replying affidavit by the State and the submissions by counsel. We noted that the applicant is clear that he has filed an appeal against the rulings on bail applications by the Judges of the High Court, although without specifying the particulars of those appeals. Ms. Jennifer Kaniu in her replying affidavit has set out the various Judges' rulings to the various applications made between 2020 and 2024, which were all declined. In all, seven applications for release on bail pending the hearing were heard by different High Court Judges, including the trial Judge.

10. Mr. Gori submitted that the applicant herein has been in close custody and in a civil prison since 15th November, 2019 contrary to the express provisions of Section 140(4) *KDFA* without any written committal order form from his commanding officer as expected under Section 146 *KDFA*. Counsel challenged the ruling of the High Court urging that it casually asserted that the offence of murder is not a service offence and that the provisions of the *KDFA* the applicant was relying on do not apply to his case.

11. Counsel urged that Article 49 (1)(h) of the *Constitution* of Kenya, 2010 guarantees an accused person the right to bail/bond and on reasonable terms subject to the existence of compelling reasons. He urged us to peruse the impugned ruling of the High Court for any compelling reasons put forward therein for the continued denial of bail/bond to the applicant and find there was none. Mr. Gori implored us to grant bail/bond to the applicant pending the determination of the interlocutory bail Appeal which he urged was arguable and has high chances of success.

12. In regard to the order sought for expedited hearing of his pending appeal against denial of bail, we found no relevant submission touching on this prayer.

13. Regarding the applicant's trial as a civilian before the High Court, Mr. Gori has submitted that the applicant is a Kenya defence forces military personnel, a person subject to the *Kenya Defence Forces Act* no. 25 of 2012 (revised 2018) who is presently on trial before the High Court for the alleged offence of murder contrary to the expectations of the *Constitution*, the *KDFA* and judicial precedents set by the High Court and the Court of Appeal which mandatorily stipulate that conventional criminal offences alleged against persons subject to *KDFA* are to be tried by the Court Martial as the court of first instance as provided for by Article 169 of the *Constitution* and in particular section 133 (1)(a) *KDFA*. Counsel urged that the ongoing murder trial before the High Court trial was illegal, unlawful and unconstitutional. He urged that the applicant has applied bail a 5 times, with the last such ruling delivered on or around 25th January 2024 forming the basis of this instant application and a related interlocutory appeal.

14. Mr. Naulikha relied on the replying affidavit by the State and his written submissions. It was his view that the application was a fishing expedition going by the sheer number of similar applications by the applicant before the High Court, all which he urged were rightfully dismissed. He also submitted that the trial was at the tail end with only three witnesses pending to be heard, and that the case had a hearing date. He asked us to find that the application lacks merit and should be dismissed.

15. The application is brought under rule 5 (2)(a) and rule 61 of this Court's rules. The applicant is not clear whether he is arguing an application for bail, or arguing an interlocutory application for bail pending the hearing of the substantive appeal against rulings denying the applicant bail. The applicant mentions that he has lodged several appeals before this Court, including those challenging denial of bail.

16. The applicant has not attached or annexed any notice of appeal to support his application for bail. Even though not necessarily fatal, it is also noted that he did not attach any ruling or record of the superior court to enable us understand the basis upon which his application is made.

17. The power of this Court under rule 5 (2)(a) of this *Court's Rules* are clear and well settled. Rule 5 (2)(a) provides:

> " 5.

(2) subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court, may –

a. In any criminal proceedings, where a notice of appeal has been given under rule 59, order that the appellant he released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal."

18. Going by the wording of that rule that the jurisdiction of this Court can only be invoked where the applicant has filed a notice of appeal. Furthermore, an applicant can invoke the *Constitution* and appeal to the Court of Appeal, having filed a notice of appeal. This is the clear provision under Article 164(3) of the *Constitution* which states as follows: -

" The Court of Appeal has jurisdiction to hear appeals from: -

a. The High Court; and

b. Any other court or tribunal as presented by an Act of Parliament."

19. This Court differently constituted in *Feisal Mohamed Ali Alias Feisal Shahbal v . Republic* [2015] eKLR, dealing with the competence of an application filed without a notice of appeal had this to say:

" Rule 61 of the *Court of Appeal Rules* makes provision for the filing of a notice of appeal in criminal matters and states as follows:

"61.

(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in sextuplicate with the registrar of the superior court at the place where the decision against which it is desired to appeal was given, within fourteen days of the date of that decision, and the notice of appeal shall institute the appeal.

2. Every notice of appeal shall-

a. state shortly the nature of the acquittal, conviction, sentence or finding against which it is desired to appeal; and

b. contain the address at which any documents connected with the appeal may be served on the appellant."

It is by lodging a notice of appeal that a party evinces intention to invoke the appellate jurisdiction of the Court under Article 164(3) of the *Constitution*. A person who has duly lodged a notice of appeal is an intended appellant and a duly lodged notice of appeal constitutes an intended appeal. By dint of rule 2 of the Court of Appeal Rules, "appeal" in relation to appeals to the Court, includes an intended appeal. It is for the above reason that rule 5(1) provides that a sentence of death cannot be carried

out before expiry of the time for lodging the notice of appeal, or where the notice of appeal has been lodged, before the appeal is heard and determined. On similar terms, under rule 5(2) (a), before a party can apply to this Court to be released on bail pending appeal or for suspension of execution of any warrant of distress pending appeal, such party must have filed a notice of appeal. As regards civil matters, rule 5(2)(b) similarly requires a party who moves this Court for stay of execution of an order of the High Court, for an injunction or for an order staying further proceedings in the High Court, to have first lodged a notice of appeal.

It is trite therefore that the device of the notice of appeal invokes the appellate jurisdiction of this Court. That is the case whether the appeal or intended appeal is civil or criminal. In Joseph Limo & 86 Others V. Ann Merz, C. A. No. 295 of 1998 this Court emphasized that it is the notice of appeal, which initiates an appeal. Indeed, in terms of Rule 59(1) of the Court of Appeal Rules, "...the notice of appeal shall institute the appeal." Further, in Safaricom Ltd. V. Ocean View Beach Hotel Ltd. & 3 Others, CA NO 325 of 2009, Omollo, JA observed that where there is no appeal or intention to appeal as manifested by a lodged notice of appeal, the Court has no basis for meddling in the decision of the High Court.

The lodging of a notice of appeal is not an irrelevant or ritualistic formality. Beyond initiating the appeal, it also serves to notify the prospective respondent that the intended appellant has opted to escalate the legal battle to the appellate court, and to afford that party a fair opportunity to start preparing for the appeal, including mobilizing resources that may be required to defend or articulate its position...

'The Supreme Court cited with approval the judgment of the Supreme Court of Nigeria in Ocheja Emmanuel Dangana V Hon. Attai Aidoko Alo Usman & Others, SC 480/2011 and SC 11/2012 (Consolidated) where Bode Rhodes-Vivour, JSC stated:

> " A court is competent, that is to say, it has jurisdiction when–
>
> 1. It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and
>
> 2. the subject matter of the case is within its jurisdiction, and no feature in the

case...prevents the court from exercising its jurisdiction; and

3. the case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction" (emphasis added)."

The Court thus concluded

> "Having carefully considered the respondent's preliminary objection, we are satisfied that in the absence of a notice of appeal lodged in terms of Rule 59, the applicant's motion on notice filed on 3rd November 2015 is fatally incompetent and this Court cannot entertain the same. Accordingly, the motion is struck out with no orders on costs.'"

20. We have carefully considered the application and submissions of counsel. We are satisfied that in the absence of a notice of appeal lodged in terms of rule 61 of the Court of Appeal Rules, the notice of motion dated 9th February 2024 is fatally defective. Accordingly, we strike it out with no order as to costs.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF APRIL, 2025.

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARON

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR