



**Makwata & another v Republic (Criminal Appeal (Application)
E107 of 2023) [2024] KECA 134 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 134 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL (APPLICATION) E107 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 9, 2024**

BETWEEN

SHULA SONGA MAKWATA 1ST APPELLANT

TONY ASITWA MAKWATA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Kakamega,
(Musyoka, J.) dated 1st August, 2023 in HCCRA. No. E045 & E046 of 2021)*

RULING

1. The applicants herein were arraigned, tried and convicted in Mumias Senior Principal Magistrate's Court Criminal Case No. 675 of 209 of four counts as follows:
 - a. Count I: forgery contrary to section 345 as read with section 349 of the [Penal Code](#);
 - b. Count II: Obtaining registration by false pretences contrary to section 320 of the Penal Code;
 - c. Count III: Making a document without authority contrary to section 357(a) of the Penal Code;
 - d. Count IV: Intermeddling with the property of a deceased person contrary to section 45(1) as read with section 45(2)(a) of the [Law of Succession Act](#).
2. The record available to us does not indicate the sentence imposed for each count but it is clear that the longest sentence imposed is imprisonment for four (4) years. All the sentences were to run concurrently.



3. The applicants were dissatisfied with the conviction and sentenced and appealed to the High Court vide Kakamega High Court Criminal Appeals No. 45 & 46 of 2021. The appeals were consolidated and heard together.
4. On 1st August, 2023, the High Court (Musyoka, J.) delivered a judgment in which it partly allowed the appeals and partly affirmed the subordinate court's decision. In the judgment, the learned Judge quashed the convictions on Counts I and II and set aside the respective sentences but affirmed the convictions and sentences with respect to Counts III and IV. The sentence affirmed for Count III is imprisonment for four (4) years; while that for Count IV is imprisonment for six (6) months. The sentences are to run concurrently.
5. The applicants are, again, dissatisfied with the judgment of the High Court and have timeously lodged an appeal to this Court. In the application presently before the Court, the applicants request to be admitted to bail pending the hearing and disposition of their appeal.
6. Through their lawyers, the applicants filed a supporting affidavit and written submissions in support of the application. Their counsel, Mr. Kulundu, also appeared on video-conference and orally highlighted the submissions.
7. The application was vehemently opposed by the prosecution. Mr. Okango filed written submissions in opposition and appeared to orally highlight them.
8. In short, the applicants seek bail pending appeal on three points as follows:
 - a. First, they argue that the filed appeal has very high chances of success. They think that the fact that they succeeded on counts I and II at the High Court yet all the charges were predicated upon the same set of facts is an assured indication that they will succeed in persuading this Court to quash the convictions on the other two counts as well. They argue that there is a glaring contradiction about the origin of the document that is the subject matter of Count III: PW1 stated that he found the document (a death certificate) on file with Mumias Sugar Company while PW7, the investigating officer, told the court that he summoned the 1st applicant who came with the impugned document. The applicants believe that the contradiction is material and warrants their acquittal.
 - b. Second, the applicants argue that the Court should take note of the fact that the appeal is likely to take long to be decided and that, as a result, they are likely to serve all or substantially all of their sentence. They point out that they were sentenced to six months imprisonment on count IV – and they have almost served the entirety of it.
 - c. Third, the applicants state that there are special circumstances in this case. The special circumstances are that, both are sick: the 1st applicant suffers from diabetes and hypertension that is not controlled in prison, while the 2nd applicant suffers from pulmonary tuberculosis. They attached various medical reports from some clinicians in Mumias in support of this contention.
9. The applicants relied on a number of authorities on the question of bail pending appeal. They include *Shah v Republic* [1986] eKLR; *Motichand v R* [1972] eKLR; *Ragbbar Singh Lamba v R* [1958] 1 EA 337.
10. Mr. Okango, learned state counsel, opposed the application on the first and third points raised by applicants – but conceded it on the second point: that the appeal would likely be rendered nugatory because the applicants are likely to serve their term in prison before their appeals are determined.



11. Mr. Okango is of the opinion that the appeal filed raises no arguable points and “has no legs to stand on”. He also disputed that the medical situation of the applicants would warrant their release on bail pending appeal. He points out that the conditions indicated are eminently manageable in prison. He argued that prison facilities are well equipped to manage the claimed health conditions.
12. However, Mr. Okango concedes that the appeal may be rendered nugatory on account of the fact that the applicants might have served a substantial portion of their sentence before a determination of their appeal.
13. Our case law has firmly established that bail pending appeal is not an entitlement. Instead, it is generally a matter of the Court’s discretion upon an appellant demonstrating to the Court existence of certain exceptional circumstances. There is no constitutional requirement to grant bail pending appeal. Article 49(i)(h) of the [Constitution](#) creates an entitlement to bail pending a charge or trial unless there are compelling reasons not to grant one. By its very terms, that section talks of bail to be granted before conviction and is an instance of the veritable legal principle that a person is presumed innocent until proven guilty. That presumption, however, dissipates upon a valid conviction. At that point, a different presumption kicks in: the presumption of the validity of the conviction and sentence imposed. As the Court of Appeal said in [Isaac Tulicha Guyo v Republic](#) (Crim App No 16 of 2010:

“The Court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by the [Constitution](#) and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong. It is not, therefore, surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances.”

14. Consequently, our jurisprudence has established the legal principles which should govern the granting of bail pending appeal. The Court of Appeal succinctly restated those principles in the case of [Dominic Karanja v Republic](#) [1986] KLR 612 thus:

“That the most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant consideration would be whether there were exceptional or unusual circumstances.”

15. The Court of Appeal restated these principles in [Jivraj Shah v Republic](#) [1986] KLR 605 which the applicant’s counsel cited in the following words:

“The Principal consideration in an application for bail pending appeal is the, existence of exceptional on unusual circumstances upon which the Court of Appeal 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist....The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which discloses 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.”



16. Hence, even after Jivraj, the test remains the same: the question here is whether the applicants herein have satisfied the test for grant of bail pending appeal. First, have the applicants demonstrated that their appeal has overwhelming chances of success or are there circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed? While we are perfectly willing to accept that the appeal preferred by the applicants is eminently arguable, we are unable to say at this stage that it has overwhelming chances of success.
17. For the applicants to succeed, then, they needed to demonstrate that there are special circumstances to warrant the exceptional relief of bail pending appeal. They attempted to do this by arguing, first, that this appeal is likely to take too long to determine and that they might thereby end up serving a substantial part of their sentence before its disposition; and second, that they are unwell.
18. We will first deal with the medical grounds. As various cases have held, ill health without more is not sufficient reason to warrant release of a convicted applicant on bail pending appeal. One would have to demonstrate that either the ailment is serious enough to be of the kind that it cannot be managed in prison; or that it is life- threatening and humanitarian considerations militate release on bail pending appeal. Neither condition has been satisfied here. First, we note that the documents filed are from outside doctors yet the applicants have been in the prison system for a while. A medical report by medical personnel in the prison system might have had a higher probative value. In any event, the documents filed show that the applicants suffer from diabetes, hypertension and pulmonary tuberculosis. There is absolutely no basis for concluding that these conditions cannot be easily handled by the medical personnel in the prison system.
19. We finally turn to the argument that the appeal will likely be rendered nugatory if bail pending appeal is not granted. It is true that where an applicant demonstrates that he is likely to serve the whole of her sentence or a substantial portion of it, that would likely constitute unusual and exceptional circumstances warranting the grant of bail pending appeal. Here, the applicants were sentenced to two terms of four years and six months imprisonment. The two terms are to run concurrently. It is true that, given the state of our docket, if the appeal takes its place in the queue of pending appeals, the applicants are likely to serve a substantial portion of their sentence.
20. The possibility that an appellant may serve a substantial portion of the sentence before his appeal is heard can be addressed in one of two ways: the Court can grant bail pending appeal; or the Court can expedite the hearing of the appeal. In the present case, we have opted for the second course. Consequently, we hereby order that the appeal be heard on a priority basis. We, therefore, direct the Deputy Registrar to list the appeal for hearing during the current term. This directive will sufficiently address the applicants' apprehensions regarding this aspect of their appeal.
21. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI



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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

