



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onsongo v Republic (Criminal Appeal E017 of 2021)  
[2023] KECA 336 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 336 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL E017 OF 2021  
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA  
MARCH 17, 2023**

**BETWEEN**

**HENRY MOKUA ONSONGO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An application from the decision of the High Court of Kenya at Nairobi  
(Nzioka, J.) dated 13th July 2021 in Nairobi HCCRA. No. E004 of 2020)*

**RULING**

1. Henry Mokuia Onsongo, the applicant before us, was tried and convicted by Hon Gandani, in the Chief Magistrate's Court Criminal Case No. 966 of 2015.
2. The applicant was charged with two counts of possession of wildlife trophy contrary to section 95 as read with section 105 of the *Wildlife Conservation and Management Act*, and dealing in wildlife trophy contrary to section 84(1) as read with section 92 and section 105 of the *Wildlife Conservation and Management Act*. The applicant pleaded not guilty to the counts and the case proceeded to a full hearing. At the conclusion thereof, the trial court found the applicant guilty and convicted him accordingly. The trial court then sentenced the applicant to serve four years' imprisonment on both counts. The sentences were to run concurrently.
3. Aggrieved by the conviction and sentence of the trial court, the applicant filed an appeal in the High Court which upon hearing was dismissed. However, the court enhanced the sentence on counts 1 and 2 to five (5) years to run concurrently.
4. The applicant still not satisfied with the findings of the first appellate court, has expressed his desire to appeal to this court by filing a notice of appeal dated July 16, 2021. The applicant has thereafter filed the notice of motion under consideration pursuant to rule 5(2)(a) of this court's rules seeking bail pending the hearing and determination of his intended appeal. It is based on the grounds that



- the applicant's intended appeal is arguable and that if successful, will be rendered nugatory unless the applicant is granted bail.
5. It is further supported by the affidavit of Kibagendi Assa Nyakundi, advocate. He has deposed that there were various points of law that would evoke substantial arguments rendering the intended appeal arguable and which will in the end overturn the conclusions reached by the courts below. Some of the grounds to be argued are that the prosecution case was contradictory and inconsistent; the first appellate court failed in its statutory duty to re-evaluate the evidence tendered in the trial court and reach its own independent conclusions; and, that the prosecution case was not proved to the required standard.
  6. On exceptional and unusual circumstances, it was submitted that one of the sons of the applicant could not handle the trauma following the imprisonment of his father, collapsed and died. Further, that the applicant had already served one year in prison and if he is not granted bail soon, he would have served a substantial part thereof by the time the intended appeal is heard and determined, thereby rendering a successful appeal nugatory.
  7. The thrust of the respondent's response was that the application had not met the threshold for the grant of the prayer sought. The intended appeal was not arguable nor will it be rendered nugatory. There were also no exceptional circumstances. The death of the applicant's son whilst he was in custody was not an exceptional circumstances nor is the claim that the applicant will have served a substantial part of the sentence by the time the intended appeal is heard and determined suffice.
  8. The application was canvassed by way of written submissions with limited oral highlights. At the hearing, Mr Michuki, learned counsel appeared for the applicant while Miss Ngalyuka, learned Prosecution Counsel represented the State. Both reiterated and expounded their respective submissions and we need not therefore rehash.
  9. The principles for granting bail pending appeal were set out in the case of *Jivraj Shah vs Republic* [1986] eKLR in terms that the grant of bail pending appeal, is discretionary; there should exist exceptional or unusual circumstances upon which this Court can fairly conclude that it is in the interest of justice to grant bail; whether the appeal has overwhelming chances of success and, whether there is a likelihood of the appellant having served a substantial part of the sentence by the time the appeal is heard and determined are also some of the considerations.
  10. In *Dominic Karanja vs Republic* (1986) KLR 612, this Court stated, *inter alia*, that:
    - (a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;
    - b. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;
    - b. A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;
  11. We have considered the application and the rival submissions. Using the yard stick above, and having looked at the draft memorandum of appeal annexed on the application, we think that the intended appeal may be arguable.
  12. On exceptional and unusual circumstances, the appellant states that while in custody, one of his sons as a result of shock, collapsed and died. We doubt that this can be a ground to allow the application.



The son could have died as a result of any other cause. In any case, the applicant's release will not undo what has already happened.

13. The applicant has without evidence asserted that the intended appeal might take some time to be heard. We may point out that this court has put in place robust mechanisms to deal with back log which are already bearing fruits. Soon backlog will be a thing of the past. There has been an upscale in hearing matters in this court as can be evidenced by the applicant's own application. Accordingly, the applicant will not have served a substantial part of the sentence by the time his intended appeal is heard and determined.
14. We are satisfied that the application has not met the threshold required. That being our take of the application, it fails and is hereby dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A K MURGOR**

.....

**JUDGE OF APPEAL**

**G W NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

