



**Muthoni v Republic (Criminal Application E034 of 2022)  
[2023] KECA 762 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KECA 762 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPLICATION E034 OF 2022  
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA  
JUNE 22, 2023**

**BETWEEN**

**JOHN KINYANJUI MUTHONI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment delivered in Kiambu (Kasango, J.) on 2nd November, 2022 in Criminal appeal No. E090 of 2021)*

**RULING**

1. The applicant, John Kinyanjui Muthoni has brought this Notice of Motion dated December 2, 2022 premised under Articles 27 (1) (2), 49 (I) (a), 50 (1) 2, (a) (g) (k) (4) of the Constitution of Kenya 2010, and section 357 (1) of the Criminal Procedure Code seeking orders that this Court; (a) admit the applicant to suitable bail/bond terms preferably cash bail pending the hearing and determination of this appeal; and (b) issue any other orders that are deemed necessary and just to grant.
2. The applicant's motion brought on the grounds on its face, where substantive of the grounds is that he was charged in Thika Chief Magistrate's Court, Criminal Case No 2313 of 2019 with 6 counts of offences to wit; in Count I and II for forgery contrary to section 351 of the Penal Code; Counts III and IV for uttering false documents contrary to section 353 of the Penal Code; Count V for obtaining registration of title to land contrary to section 320 of the Penal Code and Count VI for conspiracy to defraud contrary to section 317 of the same Code.
3. The trial court convicted him on two counts of forgery contrary to section 351 of the Penal Code, on two counts of uttering a false document contrary to section 353 of the Penal Code; on one count of the offence of obtaining registration of title of land contrary to section 320 of the Penal Code and was sentenced to five (5) years imprisonment on each count to run concurrently.



4. The applicant was dissatisfied with the trial court's decision for the reason that no evidence was adduced in respect of the charges and more particularly, no forensic document examiner's report was ever made available to the trial court. As a consequence, he preferred an appeal to the High Court at Kiambu Criminal Appeal No, E090 of 2022, and in a judgment delivered on November 2, 2022 the learned judge ordered that:
  - a. The conviction of Joseph Kinyanjui Muthoni on Count one and Count two are hereby quashed and the sentence on those counts are hereby set aside.
  - b. The conviction of Joseph Kinyanjui Muthoni on Count three, count four and Count five are hereby upheld.
  - c. The sentence on Count three and Count four are upheld as ordered by the trial court.
  - d. The sentence on Count five is hereby set aside and is substituted with sentence of 6 months' imprisonment.
  - e. The sentence of the trial court on Counts three and four and the sentence on Count five shall run concurrently from the date of sentencing by the trial court.
5. However, still dissatisfied with the judgment of the High Court, the applicant filed an application for review, but the learned judge marked it as not urgent, when it came up for hearing. The applicant asserted that the court was not keen to review the judgment, hence this application and the appeal to this Court.
6. The motion was supported by the affidavit of the applicant sworn on December 2, 2022 in which he reiterated the grounds set out in the motion. It was further deponed that he had reason to believe that he is being framed, but pending appeal, he be admitted to reasonable bail/bond terms preferably cash bail; that his appeal was arguable with great chances of success, and in the interest of justice, the orders sought be granted to forestall a travesty of justice.
7. In their submissions counsel for the applicant, Ms Prof Kiama Wangai & Co Advocates submitted that the applicant had filed an appeal that the applicant was not a flight risk, and had always attended court when required; that he had already served one year in jail and is ready to abide by all the conditions set by this Court.
8. Ms Matiru learned prosecution counsel for the respondent submitted that there were no overwhelming chances of success of the appeal.
9. The brief background of the case is that the complainant, Paul Kinyoi Churu, was a shareholder of land buying company, Juja Farm. He held share certificate No 669. He was issued in 1999 with land title Ruiru East/Juja East/976 (the subject land), which represented his shareholding in the land buying company. In 2015, he received information that some people had been sighted on the subject land. On carrying out a search at land registry in Thika, he found that the subject land had been transferred to the applicant pursuant to Succession Cause Thika Chief Magistrates Court No 60 of 2013. He also ascertained that the transfer of the subject land was made to one Joseph in the succession cause whereupon, the applicant presented to the Lands Registrar false grant of letters of administration and false certificate of confirmation of grant where he purported to be the son and sole beneficiary of the complainant whom he misrepresented had died.



10. The court’s discretion to release a convicted person on bail pending the determination of the appeal is provided under rule 5(2) (a) of this Courts rules as hereunder;
- “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 notice of appeal has been given in accordance with Rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.”
11. In the exercise of such discretion, it is necessary to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him or her by Article 49 of the *Constitution*. In such applications, the burden is upon the convicted person to show that the conviction was wrong and the sentence is illegal, and further, it must be demonstrated that rare and exceptional circumstances exist that warrant the grant of bail.
12. In the case of *Jivraj Shah v Republic* [1986] eKLR, this Court outlined the factors to be considered in an application for bail pending appeal. There it was stated 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.”
13. And in the case of *Dominic Karanja v Republic* [1986] KLR 612, this Court emphasised 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;
  - c. 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;”
14. Adopting the factors set out in the above cited authorities to the circumstances of this case, as to whether there are chances of success of the appeal, the applicant contends that he ought not to have been convicted in the Chief Magistrate's Court, since no evidence was adduced in respect of the charges, since no forensic document examiner’s report was produced in the trial court. If indeed this be the case, and having regard to the circumstances, we are not prepared to find that the appeal has no chances of success.



15. But having said that, our interrogation of the motion to ascertain whether exceptional circumstances exist does not reveal that, the applicant advanced any exceptional and unusual circumstances facing him that would compel this Court to consider granting bail. Without any exceptional circumstances having been demonstrated, we have no basis on which to grant bail pending appeal as sought.
16. Furthermore, though the applicant stated that he faithfully attended the trial court hearings without fail whilst on bail, and will abide by any conditions that may be imposed by this Court, but as seen above, this is not a sufficient basis for this Court to release him on bail pending appeal. This is particularly because, it is not lost on us that the application for bail before this Court arises under very different circumstances from those that pertained in the trial court. In so far as the instant application is concerned, there no longer exists a presumption of innocence, since the applicant has already been convicted, unlike in the case of a bail application before the trial court.
17. Additionally, when we consider the period of sentence and whether the appeal is likely to be heard before he has served a substantial part of his sentence, given the period left to serve, we are not satisfied that such situation will arise. This is because, the applicant has only served one year out of two concurrent sentences of 5 years and a sentence of 6 months.
18. Accordingly, the applicant having failed to satisfy the threshold conditions for the grant of bail under rule 5 (2) (a) of this Court's rules, the Notice of Motion dated December 2, 2022 is dismissed. We make no orders as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.**

**A K MURGOR**

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**JUDGE OF APPEAL**

**S ole KANTAI**

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**JUDGE OF APPEAL**

**M GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

