



REPUBLIC OF KENYA



**Amek v Republic (Criminal Application E013 of 2023)
[2023] KECA 1011 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 1011 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E013 OF 2023
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
JULY 28, 2023**

BETWEEN

MAURICE ODIWUOR AMEK APPLICANT

AND

REPUBLIC RESPONDENT

(Application for bail pending appeal from the Judgment of the High Court of Kenya at Nairobi (E. N. Maina, J.) dated 15th December 2022 in ACEC APPEAL No. 4 of 2022 As Consolidated With ACEC APPEAL No. E005 of 2022)

RULING

1. The motion on notice is brought under rule 5(2)(a) of the [Court of Appeal Rules](#), section 357 of the [Criminal Procedure Code](#); articles 51 and 165 of the [Constitution](#) of Kenya and all other enabling provisions of the law. The applicant asks in the main that we order his release on bail/bond on such terms as the court may deem fit and just or in the alternative we release the applicant on a cash bail of Kshs 7,000,000 or a bond of similar amount being half of the total fine pending hearing and determination of the appeal. It is also prayed that we order a stay of execution of the sentence/order made on December 15, 2022 upholding the conviction of the applicant pending the hearing and determination of the appeal. The motion is supported by grounds on its face and the affidavit of the applicant Maurice Odiwuor Amek where it is stated amongst other things that the applicant was charged in the Chief Magistrates Court at Homa Bay as 3rd accused, alongside 6 others, with various offences under the [Anti-Corruption and Economic Crimes Act](#). All the accused persons were public officers working for Homa Bay County Assembly in various capacities; the applicant being the Senior Accounts Controller. The offences were said to have taken place between June 2016 and July 2017. The applicant was charged in count 1 with the offence of conspiracy to commit a corruption offence; count 4 was the offence of unlawful acquisition of public property; counts 8, 9 and 10 related to abuse



- of office while count 11 was fraudulent payment from public revenues for services not rendered and their collective actions were said to have caused the loss of Kshs 27.87 million in public funds.
2. The prosecution called 31 witnesses in support of its case and after close of the prosecution case, all 7 accused persons were placed on their defence. The applicant gave an unsworn statement. At the end of the trial, the trial court delivered judgment on June 14, 2014 wherein it convicted the 1st to 5th accused persons as charged and it acquitted the 6th and 7th accused persons.
 3. The applicant was sentenced to a fine of Kshs 500,000 or 3 months' imprisonment on count 1, a fine of Kshs 14.4 million or 6 years' imprisonment in default in count 4, a fine of Kshs 300,000 or 3 years' imprisonment in counts 8 to 11. The court directed that the sentences would run concurrently. The 1st to 5th accused persons (including the applicant) were also barred from holding public office for 10 years from the date of conviction.
 4. The applicant filed an appeal being Homa Bay HCCRA No 18 of 2022 which was consolidated with other appeals filed by his co-accused and the matter was transferred to Nairobi as ACEC Appeal No 4 of 2022. The Office of Director of Public Prosecutions (ODPP) filed ACEC appeal No E005 of 2022 aggrieved by the acquittal of the 6th accused and also aggrieved by the sentences citing that the punishment was not as prescribed in the Anti- Corruption and Economic Crimes Act (ACECA). The appeal by the ODPP was consolidated with the appeals by all the appellants. The High Court after considering the consolidated appeals, gave its judgment on December 15, 2022 where it held that the conviction of the 1st to 5th accused persons, as well as the acquittal of the 6th accused was proper. The court also found that the sentences handed to the applicant and his co-accused were within the law and ought not to be disturbed. The conviction and sentences were therefore upheld.
 5. The applicant is now before us with an application dated March 21, 2023 where he has sought the prayers we have stated.
 6. The applicant says that his appeal has overwhelming chances of success, that the prosecution case was not proved beyond reasonable doubt, that he has already served 9 months in jail and is apprehensive that he will serve a substantial part of his sentence if the application is not granted pending appeal; that being incarcerated will cause irreversible psychological damage if his appeal succeeds; that no prejudice will be occasioned to the ODPP if the application is granted and that the application should be granted in the interest of fairness and justice. The applicant also filed written submissions dated April 19, 2023 in support of his application. He submits that the case was based on inadmissible electronic evidence thus his appeal will succeed and that there exist exceptional circumstances in that he will likely have served his sentence by the time the appeal is determined, if bail is not granted. He also submits that the respondent has not filed any document in opposition to the application despite being served. This last assertion is not correct as there are written submissions by the respondent.
 7. The applicant, as per his memorandum of appeal dated March 15, 2023 intends to seek the quashing of his conviction on the grounds that the prosecution case was not proved beyond reasonable doubt, that the court did not analyze the appeal on each count that was challenged, that the court ignored his plausible defence and that the court ignored his mitigation.
 8. The respondent filed written submissions dated June 6, 2023. They oppose the application on the ground that the applicant has not cited any exceptional circumstances to warrant grant of bail pending appeal, which is given at the discretion of the court. The respondent also submits that the appeal has not been shown to have high chances of success and that there is no proof placed before the court that the applicant will serve a substantial part of the sentence before the appeal is heard.
 9. We have considered the record, the motion and submissions made.



10. This court has established principles to be considered in an application of this nature. The discretion of the court is unfettered and guided by legal principles. This is what the court stated in the case of *Somo v Republic* [1972] EA 476 on considerations to be reverted to in an application of this nature:

“Where he (applicant) is undergoing a custodial sentence he must demonstrate, if he wishes to anticipate the result of his appeal and secure his release 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 an overwhelming probability that it will succeed.”

11. In the case of *Daniel Dominic Karanja v Republic* [1986] eKLR, while considering an application for bail pending appeal, the court, *inter-alia*, stated that:

“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 v Republic* [1972] E A 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.”

12. Similarly, the court in *Jivraj Shah v Republic* [1986] eKLR while dealing with an application for bail pending appeal, held that:

“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 v 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 v 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.”

13. Having considered the application, the brief facts of the matter, the applicant’s intended arguments and the guiding principles cited above, this court is not convinced that there are any exceptional circumstances to warrant grant of bail pending appeal. We note that the Criminal Appeal Registry of this court at Nairobi is up to date on hearing and once the applicant files his appeal it will be heard without delay. The applicant has not met the threshold required in an application of this nature and the application dated March 21, 2023 is dismissed with no order as to costs

Dated and delivered at Nairobi this 28th day of July, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR



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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

