



**Juma v Republic (Criminal Application E023 of 2023)
[2023] KECA 1138 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1138 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E023 OF 2023
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
SEPTEMBER 22, 2023**

BETWEEN

ABDULRAHMAN IMRAAN JUMA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application under rule 5(2) (a) of the Court of Appeal Rules for bail pending appeal from the Ruling and Orders of High Court of Kenya at Nairobi (Ogembo, J.) dated 28th November, 2022 in HC. CR.A. E165 of 2022)

RULING

1. In a ruling delivered by this Court on May 12, 2023 we granted an application by the applicant, Abdulrahman Imraan Juma, for stay of execution pending appeal after finding that he had satisfied the requirements grant of such an order. The applicant has now approached us on the Motion on notice said to be brought under rule 5(2) (a) of the [Court of Appeal Rules](#) for bail pending appeal from the ruling and orders of Ogembo, J delivered on November 28, 2022 in Nairobi High Court Criminal Appeal No E165 of 2022. In grounds in support of the Motion and in a supporting affidavit of the applicant it is said amongst other things that the applicant was arraigned before the Magistrates court at Milimani in Miscellaneous Criminal Application No E4167 of 2021 following issuance of warrants of arrest against him on account of an order by the Director of Public Prosecutions (DPP) given in exercise of powers under Section 5 (1) of the [Extradition \(Contiguous and Foreign Countries\) Act](#) Cap 76 Laws of Kenya; that the DPP sought an order to extradite the applicant to the United States of America (USA) for purposes of being charged with named offences before the USA courts California; the Magistrate delivered a ruling dated September 23, 2022 wherein he allowed repatriation of the applicant from Kenya to USA to face charges in court; the applicant appealed against that ruling and order in High Court Criminal Appeal No E165 of 2022 on various grounds and he also filed an application for stay of execution of the Magistrates orders; the High Court in a ruling delivered on



November 28, 2022 determined the application as if it was a revision application and dismissed the whole appeal. The applicant was aggrieved by that ruling and filed a Notice of Appeal in this Court to appeal against that ruling and, as we have seen, he moved to this Court and obtained an order staying the High Court ruling pending an appeal to this Court. It is said that it is in the interest of justice that the applicant be granted bail pending hearing and determination of the intended appeal. The applicant says that there are exceptional and unusual circumstances warranting his admission to bail which he lists as: a police station is not a facility contemplated by law to hold in custody an individual for a long time; the applicant is neither a remandee nor a convict capable of being held in custody in a prison facility and, without prejudice, in the event that the applicant is extradited, charged and convicted in the requesting country it is not certain whether the foreign court will take into consideration the period spent in police custody while sentencing. The applicant says that he is not a flight risk since the orders of stay of execution of the extradition orders issued by this Court protect him "... within the country and it would thus be detrimental on his part if he leave the court's jurisdiction." The applicant says in addition that he is currently held at Gigiri Police Station where he has been since September 28, 2020 when he was taken before the Magistrate at Milimani Courts; that he is ailing and there are no proper arrangements in police stations to enable him access medical attention and care; that he will suffer prejudice if the orders sought are not granted.

2. In a replying affidavit by Njoki Kihara, Principal Prosecution Counsel at the Office of Director of Public Prosecution she deposes that on April 29, 2021 the Grand Jury of the United States District Court for the Central District of California returned an indictment against the applicant and 4 others already convicted in the USA for named offences; extradition proceedings were commenced at the Magistrates Court in Kenya by DPP; that the offences the applicant was indicted are extraditable offences; that the applicant was denied bond but the Magistrate allowed him to apply for the same at the High Court which (High Court) granted him bond pending determination of Milimani Criminal Application No E4167 of 2021; that the Magistrate allowed extradition proceedings and ordered that the applicant be held at Gigiri Police Station; the applicant moved to the High Court as we have already seen but that he did not apply for bond either at the High Court or in this Court when we heard the application for stay pending appeal. The deponent further says that the applicant is not entitled to bond and has made various applications before the lower courts which the deponent says were frivolous applications. She says at paragraphs 19-24 (inclusive) of the replying affidavit:
 19. That the applicant who is a fugitive criminal has a Valid Kenyan passport No AK009xx and the surrender of his passport to this Honourable court is not a guarantee that he will not abscond court or leave the jurisdiction of this court given the fact that Kenya has various porous borders as such he can easily escape.
 20. That the applicant herein is deemed a flight risk given the fact that he is aware of the existing Extradition order against him that has not been set aside by this Honourable court.
 21. That in response to paragraph 15 of the applicant's supporting affidavit, the applicant has never brought it to the attention of this honourable court his alleged medical condition, and that no material evidence was ever placed before the High Court and the Court of Appeal in support of his alleged medical condition during the hearing of the respective applications and if such is the case then the Respondent can always make arrangements with Gigiri Police Station to see how best he can be assisted. A skimming of the medical note does not present any exceptional or unusual circumstance.



22. That the application seeks to merely curtail the mandate of the Respondent as set out in the Constitution by attempting to circumvent a foreseeable extradition process against him without any justifiable reasons as he has failed to demonstrate how the Respondent has acted ultra vires.
 23. That this application is capricious, a legal misadventure, and an abuse of the court process intending to delay the prosecution of the intended appeal which to date has not been filed and served upon the respondent.
 24. That it is our humble prayer that given the nature of this matter it is imperative that the fugitive criminal be subjected to detention pending the hearing and determination of the intended appeal.'
3. It is said that the applicant has not demonstrated any unusual or exceptional circumstances to warrant him to be granted bail/bond and that the intended appeal has no overwhelming chance of success; that the applicant will not suffer any prejudice if he is denied bail.
 4. In written submissions the applicant lays out the background which we have visited. He says that the principles to be satisfied in an application under rule 5 (2)(a) of the Court of Appeal rules are: whether the appeal has overwhelming chances of success. He cites the cases of Ademba v Republic [1983] KLR 442; Somo v Republic [1972] EA 476 and Mutua v Republic [1988] KLR 497 in support of that proposition. Secondly, whether there are exceptional or unusual circumstances to warrant exercise of courts discretion into releasing an applicant on bail – the cases of Ragbbir Singh Lamba v Republic [1958] EA 37; Jivraj Shah v Republic [1986] eKLR; Somo v Republic (supra) and Mutua v Republic (supra) are cited in support of that proposition. The applicant gives a third principle to be satisfied in an application of this nature – whether there is a high probability of the sentence being served before the appeal is heard – the case of Chimabhai v Republic [1971] EA 343 is cited in that respect.
 5. The applicant submits that his intended appeal is not just arguable, he says that the chances of the appeal succeeding are overwhelming because according to him the High Court considered the stay application as if it was a revision and there is the question whether extradition proceedings can be addressed through written submissions without a trial. He cites the decision of the Supreme Court in Petition No 14 of 2020 Director of Public Prosecution v Okemo & 4 others where that Court held that an applicant should not undergo a process that would amount to a miscarriage of justice. The applicant further submits that there is a second issue which is whether the offence in respect of which the extradition proceedings ensued could be prosecuted in Kenya and the procedure to be adopted in instituting the proceedings. He submits that the DPP did not produce a request for extradition before the lower courts. It is submitted that there exist exceptional and unusual circumstances warranting admission of the applicant to bail because he is detained at Gigiri Police Station which is not a facility contemplated by law to hold in custody an individual for long and that the applicant is neither a remandee nor a convict capable of being held in custody in a prison facility. Further, that the applicant is not a flight risk since the orders of stay of the extradition orders issued by this Court protect him within the country and it will be detrimental for him if he left the Court's jurisdiction. On the limb of substantial service of a sentence the applicant submits that there is no sentence to be served as what is in issue is his intended extradition to a foreign country to undergo trial. He says that if he is extradited and tried in a foreign country the court in that country may not consider the period he has served in custody in Kenya.
 6. The respondent filed written submissions to oppose the application where it says that the Bail and Bond Policy Guidelines provide that the burden is on the convicted person to demonstrate that there is



an overwhelming chance of success. The respondent says that the applicant has not availed petition of appeal and the court has no benefit of perusing grounds to determine whether they disclose an arguable appeal. The respondent says that this Court had been wrongly approached in the application for stay of execution pending appeal. On the Okemo case (supra) the respondent submits that the issue there was whether it was the Attorney General or the DPP who should initiate and conduct extradition proceedings. The respondent submits that the applicant has not demonstrated any exceptional or unusual circumstances to warrant grant of bail as he is a fugitive criminal legally held at Gigiri Police Station pursuant to a Magistrates court order. On whether there is likelihood of the applicant servicing a substantial part of sentence the respondent submits that the applicant is not a convict but a fugitive criminal. In conclusion the respondent submits that pursuant to Article 49 (1) h. of the Constitution of Kenya, 2010 the right of an arrested person to be released on bail or bond is not an absolute right and can be limited where compelling reasons are provided. We are asked to dismiss the application.

7. The Motion came up for hearing before us July 31, 2023 when learned counsel Mr Duncan O’kubasu appeared for the applicant while learned counsel Mr Owiti teaming up with Miss Kihara and Miss Nduati appeared for the respondent. Both sides highlighted the submissions which we have set out in detail and it would not add any value to repeat them here.

8. In the ruling we delivered dated May 12, 2023 we found that:

... in the application that is before us, the applicant seeks a stay of execution of the decision of the High Court. In the memorandum of appeal annexed to the application, the applicant has set out several grounds in which he complains that the learned Judge treated the matter before him as a revision, whereas it was a substantive appeal; that further the Judge did not appreciate that the trial court adopted a procedure on submissions which was not legally tenable during trial and denied him of his rights to a fair trial which was in violation of his constitutional rights; that further, the Judge did not consider the contention that the extradition bundle did not even have the extradition request without which, the extradition proceedings were irregular; that the Judge misdirected himself in failing to have regard to the very clear and explicit provisions of Section 7 of the Extradition (Contiguous and Foreign Countries) Act, Cap 76 which sets out the proper procedures to be followed, but which were not adhered to.'

9. We found these to be arguable grounds and it is misleading for the respondent to say that there is no memorandum of appeal when there is a draft memorandum of appeal on record. We found in that ruling that the intended appeal was arguable and it would be rendered nugatory absent stay.

10. The applicant has applied for bail pending hearing and determination of an appeal. What is to be considered in an application of this nature has been the subject of judicial pronouncements for many years. In the case of Daniel Dominic Karanja v Republic [1986] eKLR it was held by this Court:

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] EA 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. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of illhealth arises. We are not to be taken to mean that ill-health per se would



constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.'

11. In *Jivraj Shah* (supra) it was held by this Court on the same issue:

There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view 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. 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.'

12. The applicant here is not a convict in the true sense of that word. He has not been tried or convicted by any court. He is the subject of extradition proceedings to be extradited to USA. We found in the ruling dated May 12, 2023 that the appeal before this Court is arguable and it would be rendered nugatory if stay was not granted. We allow the application.

13. The situation where the applicant, who is not a convict is held at the police station for an indefinite period pending hearing and determination of his appeal certainly falls within the 'exceptional and unusual circumstances.' The respondent confirms that the applicant had been granted bail by the High Court while awaiting proceedings before the Magistrates court. He did not abscond. He waited for those proceedings to be concluded. He has been held at the police station for a long time. Bail is a constitutional right which should only be denied if it is demonstrated and proved that an applicant should be denied bail.

14. As the applicant correctly says he is the subject of protection through the orders we gave on May 12, 2023 prohibiting his extradition to USA. The applicant says that he is ailing and there are no or any proper facilities to attend to him at the police station. It is not enough for the respondent to respond by saying that appropriate arrangements can be made for him to be attended. It has not been demonstrated that he is a flight risk. There is no reason to deny bail. In the premises we allow the application on the following terms:

- a. The applicant will execute a bond in the sum of Shs.2,000,000 plus one surety of the same amount to be approved by the Deputy Registrar of this Court.
- b. The applicant will deposit his passport with the Deputy Registrar of this Court.
- c. The applicant will report to Gigiri Police station once monthly until the appeal is determined or until further orders of this Court.
- d. The applicant will file his appeal within sixty (60) days.
- e. We make no order on costs.

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

ASIKE-MAKHANDIA



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JUDGE OF APPEAL
S. OLE KANTAI

.....
JUDGE OF APPEAL
M. GACHOKA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

