



REPUBLIC OF KENYA



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**Waluke v Republic (Criminal Application E026 of 2022) [2022] KECA 1267 (KLR)
(18 November 2022) (Ruling) (with dissent - S ole Kantai, JA)**

Neutral citation: [2022] KECA 1267 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E026 OF 2022
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA
NOVEMBER 18, 2022**

BETWEEN

JOHN KOYI WALUKE APPLICANT

AND

REPUBLIC RESPONDENT

*(Application for bail pending appeal from a Judgment of the High Court at Nairobi
(E. Maina, J.) dated 6th October, 2022 in HC Anti-Corruption Appeal. No. 07 of 2020)*

RULING

1. On October 6, 2022, the High Court (E Maina, J), delivered a judgment in which it dismissed an appeal that had been lodged by John Koyi Waluke, ('applicant'), against his conviction and sentence in Milimani Anti-Corruption Chief Magistrate's Court ACC No 31 of 18.
2. In the trial court, the appellant had been charged alongside one, Grace Sarapay Wakhungu being the 1st accused, the applicant being the 2nd accused and Erad Supplies and General Contracts Limited as the 3rd accused. They faced five counts which included uttering false documents contrary to section 353 as read with section 349 of the *Penal Code*, perjury contrary to section 108(1) as read with section 110 of the Penal Code, fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* 2003, fraudulent acquisition of public property contrary to section 45(1)(a) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* 2003, and lastly, fraudulent acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of the *Anti-Corruption and Economic Crimes Act* 2003.
3. The applicant and the co-accused were after full trial found guilty on June 25, 2020 and sentenced as follows:

Count 1 - 1st accused fined Kshs 100,000/- in default to serve one (1) year imprisonment. The applicant was however acquitted of this count.



Count 2 – 1st accused fined Kshs 100,000/- in default serve one (1) year imprisonment, counts 3, 4 and 5 under section 48(1)(a)-

- i. 1st accused fined Kshs 500,000/- in default serve 3 years' imprisonment.
- ii. 2nd accused fined Kshs 500,000/- in default serve 3 years' imprisonment.
- iii. 3rd accused fined Kshs 500,000/- to be paid by the 1st and 2nd accused persons in default to serve 3 years' imprisonment.

On count 3, 4 and 5 under section 48(2)(a) being double the amount lost by NCPB-

- i. 1st accused fined Kshs 594,175,125 in default serve 7 years' imprisonment.
- ii. 2nd accused fined Kshs 594,175,125 in default serve 7 years' imprisonment.
- iii. 3rd accused fined Kshs 594,175,125 and that, the 1st and 2nd accused persons each to pay in default each of them to serve 7 years' imprisonment.

On count 4 - under section 48(1)(a)-

- i. 1st accused fined Kshs 500,000/- in default 3 years' imprisonment.
- ii. 2nd accused fined Kshs 500,000/- in default 3 years' imprisonment.
- iii. 3rd accused fined Kshs 500,000/- and that the 1st and 2nd accused each to pay in default each to serve 3 years' imprisonment.

On count 4 - under section 48(2) (a) a mandatory fine two times the amount of loss suffered by the complainant NCPB amounting to Kshs 13,364,671.40 (X2)-

- i. 1st accused – fined Kshs 26,729,342.80 in default 7 years' imprisonment.
- ii. 2nd accused fined Kshs 26,729,342.80 in default 7 years' imprisonment.
- iii. 3rd accused – fined Kshs. 26,729,342 to be paid by the 1st and 2nd accused each in default each of the accused to serve 7 years' imprisonment.

On count 5 - under section 48(1)(a)-

- i. 1st accused fined KShs. 500,000/- in default 3 years' imprisonment.
- ii. 2nd accused fined KShs. 500,000/- in default 3 years' imprisonment.
- iii. 3rd accused fined KShs. 500,000/- to be paid by the 1st and 2nd accused each in default each to serve 7 years' imprisonment.

On count 5 - under section 48(2)(a) which provides for two times of the quantifiable loss of USD 24,032-

- i. 1st accused fined USD 48,064 in default 7 years' imprisonment.



ii. 2nd accused fined USD 48,064 in default 7 years' imprisonment.

iii. 3rd accused fined USD 48,064 to be paid by the 1st and 2nd accused in default each to serve 7 years' imprisonment. The fine imposed in terms of US Dollars to be paid in Kenya shillings at the prevailing market rates.

Count 5 - under section 48(2)(b) being fine double the amount benefitted.

i. 1st accused fined Kshs 80,000,000/- in default to serve 7 years' imprisonment.

ii. 2nd accused fined Kshs 100,000,000/- in default to serve 7 years' imprisonment.

4. The trial court went further and ordered that in the event the fine is raised, the amount equivalent to the sums lost from National Cereals and Produce Board 'NCPB' account held at Kenya Commercial Bank, National Bank of Kenya and Co-operative Bank of Kenya as charged in counts 3, 4 and 5 be paid in terms that an amount equivalent to the court fine in count 3 out of the fines in count 3 be restored to NCPB, that in count 4 out of the fines in count 4, amount to the extent lost sum in count 4 be paid to NCPB, and lastly, that in count 5, NCPB to be compensated to a tune of the money lost from Co-operative Bank of Kenya as per count 5.

6. Aggrieved by the conviction and sentence, the applicant appealed against both the conviction and sentence, in which the High Court after consideration, returned a verdict agreeing with the trial court's decision.

7. The applicant has since manifested his intention to file a second and perhaps last appeal before this court against the judgment of the High Court, by filing a notice of appeal dated October 12, 2022. Pursuant to the said notice, the applicant has now filed the instant application before us for bail pending the hearing and determination of his intended appeal.

8. The application has been brought under rule 5(2)(a) of the *Court of Appeal Rules* that gives this court jurisdiction to grant an applicant bail pending the hearing and determination of an appeal in deserving cases. The motion is based on the grounds, inter alia, that: the applicant has an arguable appeal with high chances of success as can be gleaned from the 31 grounds set out in the motion which include: that he intends to question the findings of the two courts below as to whether a payment made pursuant to a court order and or decree can sustain criminal proceedings; whether as a director of a company whom it was not proved that he was involved in the day to day running of the company can be held liable in criminal proceedings for a transaction he never took part in; whether the two courts below had jurisdiction to sentence the applicant to serve the terms on behalf of the company as it did; and, whether having been acquitted on the count of uttering a false document, could he still be found guilty of fraudulent acquisition of public property. That the applicant during the pendency and hearing of the case in the trial court as well as in the High Court was out on bond and religiously attended the proceedings. He was therefore not a flight risk.

9. The application is further supported by the affidavit of the applicant dated October 12, 2022. The affidavit merely reiterates and expounds on the grounds in support of the application. Suffice to add that being a member of National Assembly, his continued detention will lead to the loss of his



parliamentary seat, and equally, his constituents in Sirisia will miss being represented in the National Assembly, and bills which may affect them, may be passed without the input of their member of the National Assembly, which amounts to unusual and exceptional circumstances. Further, the fine imposed is colossal and if paid, it may well not be possible to be recovered from NCPB by the applicant.

10. The application is opposed by the respondent who has filed grounds of opposition dated October 28, 2022 in which it states that: the application does not meet the threshold for the grant of the orders sought as it had not been proved that the intended appeal, if any, is arguable, and that it will be rendered nugatory if the orders sought are not granted; the issues raised as grounds of appeal were exhaustively dealt with by the High Court; and that in any event, the issues raised are matters of fact which this court has no jurisdiction to entertain on a second appeal. Finally, it was stated that NCPB was a state corporation and would repay the amount paid to it pursuant to the court order.
11. Both parties filed their respective written submissions which we have carefully read and considered. The respondent was very categorical while relying on the case of *Epungure vs Republic [2021] KECA*, that: the applicant has neither proved the existence of unusual and exceptional circumstances to warrant the grant of bail; or that the appeal is likely to be successful; or that the sentence or a substantial part thereof will have been served by the time the appeal is heard and determined. The applicant on the other hand reiterated the contents of the grounds and affidavit in support of the application.
12. When the application came up for hearing on November 2, 2022, Mr Otiende, C alongside Mr Ongoya and Ms Ngania learned counsel appeared for the applicant while Mr Muteti, learned counsel from the office of the director of public prosecutions appeared for the respondent. Counsel reiterated and expounded on their respective written submissions. We do not see the need to rehash them.
13. It is trite that for such an application to succeed, the applicant must demonstrate to the court that he has an appeal that has overwhelming chances of success, or that there are exceptional or unusual circumstances that would justify his release on bail pending appeal. See *Dominic Karanja vs Republic [1986] KLR 612*.
14. In the most celebrated and severally cited case of *Jivraj Shah vs Republic [1986] KLR 605*, this court held that the principle consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail. The court explained that the existence of overwhelming chances of success does not differ from a set of circumstances that disclose substantial merit in the appeal, and, that the proper approach would be the consideration of the particular circumstances, the weight and relevance of the points to be argued.
15. The Supreme Court of India in the case of *Krishnan vs The People (SCZ 19 of 2011)* enumerated the following conditions to be satisfied in an application for bail pending hearing of an appeal:
 - i. Bail is granted at the discretion of the court.
 - ii. The court must be satisfied that there are exceptional circumstances that are disclosed in the application.
 - iii. The fact that the appellant due to delay in determining the appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances.



- iv. It is important to bear in mind that in an application for bail pending appeal, the court is dealing with a convict, and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.
 - v. It is not for the court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.
 - vi. The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an application to bail; pending appeal.
16. We also revert to the Bail and Bond Policy Guidelines March, 2015 in which it is stated with respect to bail pending appeal that the burden of proof is on the convicted person to demonstrate that there is an 'overwhelming probability' that his or her appeal will succeed.
 17. We have duly considered the above threshold and we are satisfied without delving into their success or otherwise, that the said grounds of appeal are arguable and capable of causing an inquiry into the same, the success or otherwise notwithstanding, as our obligation is only to find the arguability aspect in them.
 18. On the second limb of the application, is the issue of whether there are exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interests of justice to grant bail. As was stated in *Somo vs Republic [1972] EA 476*:

' 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.'
 19. According to the applicant, the special circumstances of his case are that he is a serving member of the National Assembly for Sirisia Constituency in Bungoma County. That failure to release him on bail will cause him to miss sittings in the National Assembly which will automatically lead him to lose his seat as a member of the National Assembly, which seat if the appeal succeeds, he may not recapture as a by-election shall have been conducted and another person taken up the seat. That either way even if elections are held after the seat is declared vacant, he will not be eligible to vie for he will have served six months' jail in the period intervening in the said election. This will greatly prejudice the applicant in case the appeal succeeds, for that reason, what will have happened may not be reversed. Similarly, his constituents will miss out on representation on some bills that may affect them which may be passed without the input from their member of National Assembly.
 20. The *Constitution* under article 103(1) provides for the ways in which a member of parliament can lose his seat and among them is when he misses eight consecutive sittings of the National Assembly without authority from the speaker. That aside, the applicant has stated that the people of Sirisia are disadvantaged given that they are currently unrepresented in the decision-making process in the National Assembly as their representative is in jail, hence cannot participate, yet, when they elected him he was on bail.
 21. We agree that indeed the applicant would lose his seat if he continues to remain in jail if bail is not granted. The circumstance is special in the sense that, should his appeal succeed, he shall not be able to recapture the seat as another member of Parliament shall already have been elected. This, to us, is greatly prejudicial and would incline us to find in his favour.



22. Intertwined with the above, is that the people of Sirisia rightfully elected their representative and to us, they are greatly prejudiced in representation given the jurisprudential nature of the representation of a people world over. If the appeal is to succeed and the applicant loses his seat, and several bills are passed in parliament without his input on behalf of the people of Sirisia, this will greatly prejudice the applicant and the general populace at large.
23. We find that given the peculiar circumstances of this case, the instances cited and the circumstances therein, lead us to the conclusion that there are indeed exceptional and unusual circumstances to warrant the applicant being admitted to bail pending appeal.
24. We find that the applicant has met the threshold for admission to bail pending appeal under rule 5(2) (a) of this court's rules. His application for bail pending appeal is therefore allowed. The High Court had admitted the applicant to bail terms of a cash bail of KShs 10 million in default a bond of KShs 20 million with one surety of similar amount. The said terms were not discharged as at the time the judgment was delivered. This issue was not disputed by the respondent but rather it was stated that it was the duty of the applicant to have brought the matter to the attention of court. We would therefore admit the applicant to bail pending appeal on the same bail terms as in the High Court.
25. This ruling is delivered pursuant to rule 34(3) of the Court of Appeal Rules, 2012 as Kantai, JA has declined to sign.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

GW NGENYE

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

