



REPUBLIC OF KENYA



**Khayo v Republic (Criminal Appeal E001 of 2024)
[2024] KEHC 2562 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E001 OF 2024
WM MUSYOKA, J
MARCH 15, 2024**

BETWEEN

PRISCILA AKELO KHAYO APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from sentence by Hon. AN Karimi, Senior Resident Magistrate,
SRM, in Port Victoria SRMCCRC No. E16 of 2024, of 15th January 2024)*

RULING

1. The appellant was convicted on her own plea by the trial court. She was sentenced to a fine of Kshs. 210,000.00, or 12 months imprisonment in default. The appellant then lodged an appeal herein, on 16th January 2024.
2. What I am invited to consider is an application, dated 22nd January 2024, for orders that the appellant be admitted to bond/bail pending appeal. The application is founded on grounds, principally, that the appeal has good chances of success, and that she should be admitted to bond to obviate serving out the sentence pending appeal.
3. The application is opposed. There is an affidavit in reply, sworn on 6th February 2024, by Shirley Chepkonga, Principal Prosecution Counsel. It is averred that the appellant had pleaded guilty to the charge, and that the maximum penalty prescribed, under the law under which she was charged, was Kshs. 2,000,000.00 or imprisonment in default for 5 years. It is asserted that the sentence was lawful. Section 348 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, is cited, for the argument that no appeal should be allowed in the case of an appellant who pleaded not guilty, and had been convicted on his own plea of guilty, except to the extent of the legality of sentence. It is averred that the appellant was sentenced to a fine, which would be refundable, in case the appeal succeeds. It is further argued that bond/bail pending appeal was not a constitutional right. It is further averred that the appellant



- had not established that she had an appeal with overwhelming chances of success, the fact that there was a chance of serving out the sentence before the appeal was disposed of, and that there was going to be a delay in the determination of her appeal, to warrant discretion being exercised in her favour.
4. The application was argued orally before me on 12th February 2024. Mr. Shihemi, for the appellant, argued that the appellant had filed an appeal, where 5 grounds of appeal were listed, and that he believed that the grounds were not frivolous. He submitted that one of the substantial grounds upon which bond could be granted is where the court finds that a substantial part of the sentence could be served prior to the appeal being heard and disposed of. He submitted that as at that date, the appeal had not been admitted, and the appellant had already served 1 month of her 12-month sentence. He added that the offence for which she was convicted did not involve personal violence, and that the appellant was a first offender. He cited *Jivraj Shah v Republic* [1986] eKLR (Nyarangi, Gachuhi & Apaloo, JJA), *Arvind Patel v Uganda* [2003] UGSC 25 (Oder, JSC) and *Samuel Macharia Njagi v Republic* [2013] eKLR (Abuodha, J). My recent decision, in Busia HCCRA No. E017 of 2023 was also cited. He submitted that section 48 of the *Criminal Procedure Code* did not bar appeals, on severity of sentence. He also submitted that although bail/bond pending appeal was a constitutional right, it was, nevertheless, a right granted under section 357 of the *Criminal Procedure Code*. On whether there was a substantial appeal, he submitted that the court ought to look at the grounds of appeal as against the proceedings. On the possibility of delay, he cited the upcoming High Court recess, to submit that during that time the court would not be sitting.
 5. Ms. Chepkonga submitted in opposition to the admission to bond/bail. She argued that the appeal had not been admitted, hence it could not be argued that it had chances of success. She also cited section 248 of the *Criminal Procedure Code*, to argue that an appeal on a plea of guilty is barred, except on legality of sentence. She emphasised that the sentence imposed was legal, and was neither harsh nor excessive. She submitted that the sentence imposed was a fine, and the imprisonment was in default, and that, should the appeal succeed, the appellant would get reimbursement of what she would have paid. She submitted that bond pending appeal was a matter of discretion, to be exercised cautiously, as the appellant was already a convict, and the presumption of innocence was not available to her. She cited *Chimambhai v Republic* [1971] EA 343 (Harris, J) and *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA).
 6. In rejoinder, Mr. Shihemi submitted that the law did not state that bond could not be considered where the appeal had not been admitted. He cited Busia HCCRA No. E017 of 2023 in support. He further argued that the law gave the appellant a window of opportunity to apply for bond/bail, and that in the decisions that he had cited the courts had admitted to bond individuals who were serving sentence. .
 7. The appeal herein arises from a decision of a magistrate's court to the High Court. The rules of procedure for appeals from the magistrate's court to the High Court are set out in the *Criminal Procedure Code*. The relevant provisions are in sections 356 and 357. The 2 provisions allow the High Court, and the magistrate's court, a fairly wide discretion. Bail may be granted on "such terms ... as may seem reasonable to the High Court or the subordinate court." Under section 356(2), should the appeal be unsuccessful, the appellant would still be liable to serve the suspended sentence, and the period he spent out on bail/bond, or suspension of execution of sentence, shall be excluded from the computation of the term of his sentence.
 8. The factors taken into account in *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA), are not relevant for appeals from the magistrate's court to the High Court, and what would be more relevant are the principles enumerated in such cases as *Arvind Patel v Uganda* [2003] UGSC 25 (Oder, JSC) and *Samuel Macharia Njagi v Republic* [2013] eKLR (Abuodha, J), around the factors of the appellant being a first offender, the appeal having been admitted, the possibility of



substantial delay in the disposal of the appeal, the offence not involving personal violence, the character of the appellant, the appeal not being frivolous and has a reasonable chance of success, and whether the appellant had been on bond at trial and complied with the bond terms there, among others. It was pointed out, in *Arvind Patel v Uganda* [2003] UGSC 25 (Oder, JSC), that all these factors need not be present in every case.

9. Taking those factors into account, I have made note of the following. Firstly, the appeal herein is yet to be admitted. Secondly, regarding bond/bail at the trial court, the appellant pleaded guilty, and was convicted and sentenced on the same day, and for that reason the issue of her being placed on bond did not arise. Thirdly, the prosecution did not avail any previous criminal records relating to the appellant, and she could be treated as a first offender. Fourthly, the offence for which the appellant was convicted did not involve physical violence, it was about possession of liquor which did not conform with the standards set by the relevant statute. Fifthly, that once appeals are admitted here, at the Busia High Court, they tend to be disposed of fairly quickly.
10. The discretion given to the High Court, and the magistrate's court, in sections 356 and 357 of the *Criminal Procedure Code*, is fairly broad. Of course, the caution sounded in *Chimambhai v Republic* [1971] EA 343 (Harris, J) must be borne in mind, that the case of an appellant seeking bond pending appeal lacks the strongest elements normally available to an accused person seeking bond pending trial, namely the presumption of innocence. There is also the caution, in *Francis Kamote Mutua v Republic* [1988] eKLR (Platt, Apaloo JJA & Masime, Ag JA), that an appellant seeking bail pending appeal is actually a convicted person, serving sentence for his crime. It would appear that it would be open to the court to grant bail/bond, subject to such terms or conditions as the court may deem reasonable, subject to the above cautions.
11. How should I exercise discretion herein? The appellant herein is a convict. She pleaded guilty to the charge, and the appeal is only on sentence. Under section 48 of the *Criminal Procedure Code*, an appeal against a conviction on own plea of guilty is not entertainable, unless it challenges how the plea was taken and recorded, or it challenges sentence on grounds of illegality. The appellant does not challenge the manner the proceedings were conducted, so as to say that the plea was equivocal. Neither is she arguing that the sentence was illegal. The cases cited by the appellant are distinguishable, for none relate to an appellant who had pleaded guilty, but related to individuals who faced a full trial, and some of who were on bond/bail during trial.
12. I am not persuaded that this is a proper case for me to admit the appellant to bond/bail pending appeal. Let the appellant remain in custody, pending hearing and determination of the appeal. To fast-track the matter, I hereby admit the appeal, seeing that a record of appeal has been filed, and the original trial court records have been availed. I direct that the appeal shall be canvassed by way of written submissions, to be filed and exchanged within 21 days. The matter shall be mentioned on 11th April 2024, to receive written submissions, and to allocate a date for judgement. It is so ordered.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 15TH DAY OF MARCH 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Shihemi, instructed by Maloba & Associates, Advocates for the Appellant.



Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Respondent.

