



REPUBLIC OF KENYA



**Omar v Republic (Criminal Appeal E021 of 2024)
[2024] KEHC 5954 (KLR) (Crim) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E021 OF 2024
K KIMONDO, J
MAY 27, 2024**

BETWEEN

OSMAN ABDI OMAR APPELLANT

AND

REPUBLIC RESPONDENT

(Application for bail pending appeal from the decision of W. Nyamu, Senior Resident Magistrate, dated 26th February 2020 in Nairobi criminal Case No. 2048 of 2020)

RULING

1. The appellant seeks bail pending appeal through a notice of motion dated 28th February 2024. It is supported by a deposition of even date.
2. He was first convicted by the lower court on 6th September 2021 under a plea agreement in which he admitted guilt for operating a bulk liquefied petroleum gas (LPG) facility without a valid licence contrary to section 74 (1) (A) of the *Petroleum Act* (No. 2 of 2019). He also pleaded guilty to a further count of illegally refilling LPG cylinders without authority of brand owners and contrary to section 99 of the Act.
3. On 19th October 2021, he was sentenced to pay fines totaling Kshs 1,200,000 in default to serve imprisonment for 3 years. He met the fine but his freedom was short lived. The complainant lodged a revision at the High Court at Nairobi in consolidated revisions numbers E071, 409 & 413 of 2021 Petroleum Institute of East Africa v Republic & 5 others. On 25th July 2022, the High Court (Nzioka J) enhanced the fines to Kshs 10,000,000 and in default to serve 5 years in prison. He was accordingly resented by the lower court on 26th February 2024.



4. Being aggrieved, he lodged a petition of appeal through counsel on 29th February 2024. Contemporaneously with the petition, he sought release on bail pending appeal.
5. The appellant contends that the appeal has overwhelming chances of success; and, that there is a risk of serving a substantial part of the sentence before the appeal is heard and determined. His learned counsel, Mr. Okoth, also submitted that the appellant was out on bond in the lower court and attended court faithfully. The key point urged is that when the High Court enhanced the sentence, it failed to take into account that the appellant had entered into a plea-agreement in the lower court; and, that his right to a fair hearing were infringed.
6. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail.
7. The application is contested by the Republic. Learned prosecution counsel, Mr. Mutuma, relied on grounds of opposition dated 28th March 2024. The gravamen is that the appellant was represented both in the lower court and in the Criminal revision before the High Court; and, that the sentences were lawful. It was further submitted that the main appeal has little or no chance of success.
8. The legal parameters in an application of this nature were well stated by the Court of Appeal in [*Jivraj Shah v Republic*](#) [1986] KLR 605-

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 is *Somo v Republic* [1972] EA 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.

9. It would be prejudicial to delve deeper into the merits of this appeal. It will be the duty of the first appellate court to re-evaluate the evidence and reach an independent view on the conviction and sentence and whether the High Court was entitled to enhance the sentence.
10. But I can safely state the following. There is no doubt that the initial plea of guilt was founded on a plea agreement. But I did not hear the appellant to say that the sentence formed part of the plea agreement. In fact, in paragraphs 3, 8, 9 and 10 of the supporting affidavit he states that his counsel gave him the mistaken impression that it would be as low as Kshs 100,000. Nevertheless, he says he was content to pay the fines of Kshs 1,200,000.
11. It will be for the first appellate court to determine whether the appellant was properly heard in the revision by the High Court before the sentences were enhanced; or, whether such power reposed in the High Court granted all the circumstances. The argument by the appellant is that taking into account the plea agreement, his employment status, age and health the enhanced sentence was too severe.
12. I agree that the points raised in the petition of appeal are arguable. But I am not persuaded that there are exceptional grounds or that a substantial point of law or evidence has been urged. In view of the provisions of the sentences provided under the [*Petroleum Act*](#) (No. 2 of 2019), I am unable to say at this stage that the sentence is illegal. For instance, section 74 (3) (a) provides for a fine of not less than 10,000,000 or imprisonment for 3 years or both. Section 99 (1) (ii) provides for a fine of not less than 10,000,000 or imprisonment for 5 years or both.



13. I say that obiter and very carefully since the appeal is still pending. It will be for the appellate court to inquire into the severity of the sentence and recent precedents on minimum sentences. The less I say about it the better.
14. In view of the prison term meted out, I cannot also say that a substantial part of the sentence will be served before this appeal is heard and determined. To be fair to the appellant, I will direct that this appeal be fast-tracked.
15. It is true that the appellant was admitted to bail during his trial. But the presumption of innocence no longer holds pure. The conditions precedent to grant of bail pending appeal are fairly different as discussed in the precedents above.
16. The upshot is that the appellant has not reached the benchmark for grant of bail pending appeal. It follows that the notice of motion dated 28th February 2024 is dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

The appellant.

Mr. Okoth for the appellant instructed by Okoth & Company Advocates.

Mr. Mongare for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

