



REPUBLIC OF KENYA



**Biwott & another v Republic (Miscellaneous Criminal Application  
E032 of 2023) [2024] KEHC 9525 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9525 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
MISCELLANEOUS CRIMINAL APPLICATION E032 OF 2023**

**RL KORIR, J**

**JULY 25, 2024**

**BETWEEN**

**ALFRED KIPRONO BIWOTT ..... 1<sup>ST</sup> APPLICANT**

**BETTY CHELANGAT ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicants filed a Notice of Motion Application dated 12th September 2023 where they sought the following orders:-
  - I. That there be a stay of sentence against the Applicants/Appellants herein in the Judgement in Bomet CMCC Criminal Case No. 261 of 2022 delivered on 7th September 2023 by the Honourable Wamae at Bomet Law Courts pending the entry of the Applicant/Appellants Appeal against the said sentence and the conviction herein.
  - II. That the Applicants/Appellants be released on court terms pending the hearing and determination of the Appeal.
  - III. Any other orders that the Honourable Court may grant.
2. The Application was brought under section 356(1) of the *Criminal Procedure Code*. It was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Alfred Kiprono Biwott on 12th September 2023.

**The Applicants' case.**

3. The Applicants stated that they were jointly charged in Bomet Criminal Case Number 261 of 2022 for the offence of obtaining by false pretences and were convicted by Hon. Wamae and sentenced to



serve two years imprisonment. That the offence pertained to the sale of a commercial plot for the sum of Kshs 3,600,000/= which was a subject of succession proceedings.

4. It was the Applicants' case that they had filed an Appeal and it had high chances of success. That they were willing to refund the Kshs 3,600,000/= to the complainant as spelt out by the trial court.
5. The Applicants stated that the Respondent erred in admitting the charge sheet and processing them for trial as the case was civil in nature. That they received the money from the complainant but were unable to issue vacant possession of the land due to the delay caused by the succession proceedings.
6. It was the Applicants' case that they were both bread winners of their family which had five school going children. That if they are jailed, it could put their children's social welfare, upkeep and school in jeopardy.
7. The Respondent through learned Prosecution Counsel, Mr. Njeru stated that he did not oppose the Application by the 2nd Applicant. That the main offender was the 1st Applicant.

#### **Applicants' submissions.**

8. The Applicants submitted that they had filed an Appeal as provided for in section 347 of the [Civil Procedure Code](#) as this matter had a background of a civil suit. That the court had the discretion to issue bail pending Appeal. They relied on [Jivraj Shah vs Republic](#) (1986) eKLR and [Charles Owanga Aluoch vs Director of Public Prosecutions](#) (2015) eKLR.
9. It was the Applicants' submission that if they were jailed together it would put their four children in dire need and negatively impact them. That this court should consider that an exceptional circumstance.
10. The Applicants submitted that they own the land that was the subject of sale and purchase and that the complainant panicked and filed a complaint with the police after the delay in issuing vacant possession owing to the succession proceedings. That intent to defraud or the actual fraud was not established by the trial Magistrate.
11. I have gone through and considered the Notice of Motion Application dated 12th September 2023, the Respondent's oral submission in court and the Applicants' written submissions dated 4th November 2023. The only issue for my determination is whether the Applicants deserve to be granted bail pending the hearing and determination of their Appeal.
12. Article 49(1)(h) of the [Constitution](#) provides that:-

An accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.
13. Section 356 of the [Criminal Procedure Code](#) provides that:-
  - (1) The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.
  - (2) If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the



term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the person, otherwise orders.

14. Section 357 of the *Criminal Procedure Code* provides that:-

- (1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

- (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.
- (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.

15. The principles to be considered in an application for bail pending appeal pursuant to the provisions of Section 356 and 357 of the *Criminal Procedure Code* were set out in the Court of Appeal case of *Jivraj Shah vs Republic* (1986) eKLR which held as follows:-

“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) EA 476 which was referred to by this court with approval in Criminal Application 5 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. It is almost self defeating to attempt to define phrases or to establish formulae.”

16. Similarly, the Court of Appeal in the case of *Dominic Karanja vs Republic* (1986) eKLR 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.....”

17. As stated earlier through case law, the conditions to be satisfied before a court can grant bail pending appeal can be summarised as follows:-
  - i. Whether the appeal has overwhelming chances of success.
  - ii. Whether there are exceptional or unusual circumstances to warrant the grant of bail pending appeal.

**i. Whether the Appeal has overwhelming chances of success.**

18. I am persuaded by Odunga J. (as he then was) in *Joshua Kiarie Nguguna vs Republic* (2021) eKLR, where he stated:-

“The rationale for considering the chances of success of the appeal was given in *Somo vs. R* (supra) at page 480 as follows:

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty 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 overwhelming probability that it will succeed.”

19. Similarly, Ochieng J. (as he then was) in *Sammy Libechi vs Republic* (2008) eKLR held that:-

“.....I am fully alive to the fact that should I be satisfied that the appeal had an overwhelming chance of success, there would be no good reason to keep the applicant behind bars pending the hearing and determination of his appeal.

20. The *Judiciary Bail and Bond Policy Guidelines* provide at page 27, paragraph 4.30 that:-

With respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an “overwhelming probability” that his or her appeal will succeed.

21. The onus fell on the Applicants to persuade this court that they had an arguable Appeal. I have gone through the grounds contained in the Memorandum of Appeal dated 12th September 2023 and I note that they have raised numerous grounds as to why they were dissatisfied with the Judgment of the trial court in Bomet Magistrate’s Court Criminal Case Number 261 of 2022.

22. It would be prejudicial to discuss the merits or demerits of the grounds of Appeal at this stage. From my perusal of the grounds of Appeal raised by the Applicants at a prima facie level, I am satisfied that



the Appeals is arguable. It is my finding therefore that the Applicants have satisfied the first condition for the grant of bail pending appeal.

**ii. Whether there are exceptional or unusual circumstances to warrant the grant of bail pending Appeal**

23. The second condition that the Applicants had to satisfy was the existence of exceptional or unusual circumstances to warrant the court's consideration.

24. The Applicants submitted that they were the sole bread winners of their family and that their children's welfare and education would suffer if all of them were incarcerated. It has been held severally that being a sole bread winner of a family is not an exceptional circumstance and I associate myself with the sentiments of Ibrahim J. (as he then was) in *John Njuguna Kinyanjui vs Republic* (2008) eKLR, where he held:-

“.....The fact that he is employed and is likely to lose his employment or that he is the sole bread-winner for his family do not amount to exceptional circumstances.”

25. Similarly in *John Njiru Njue vs Republic* (2017) eKLR, Muchemi J. held that:-

“The fact that the applicant is the sole bread winner of his family and his purported medical condition do not amount to exceptional or unusual circumstances.

26. The conditions to be satisfied before a court grants bail pending appeal are quite stringent compared to bail pending trial. The court must always remind itself of the fact that the Accused persons have been lawfully convicted and sentenced. The Court of Appeal in *Mutua vs. Republic* (1988) KLR 497 stated:-

“It must be remembered that an applicant for bail pending appeal (emphasis mine) has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.

27. The same was restated by Onyiego J. in *John Koyi Waluke & another vs Republic* (2020) eKLR, where he stated:-

“For a court to grant bail pending appeal, it has to bear in mind that the applicant is no longer innocent. In other words, his/her benefits for release on bail terms under Article 49 (1) (h) of the *Constitution* are limited.”

28. That said, this court has discretion on whether or not to grant the Applicants bail pending appeal. The same was held in *John Koyi Waluke (supra)* where the court held:-

“.....The court has however the discretion to grant or not to grant a bail application depending on the circumstances of each case.....”

29. Similarly, the Court of Appeal in the case of *Mutua vs Republic* (1988) KLR 497 held:-

“.....It is trite that when considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judiciously.....”

30. I have noted that the 1st Applicant has absconded and he is not serving his jail term but he managed to swear the Supporting Affidavit dated 12th September 2023. He cannot approach the very court he has run away from for bail. By his conduct he has demonstrated that he will not attend court.



31. For the 2<sup>nd</sup> Applicant, having considered the Application and in the exercise of my discretion, it is my finding that she merited, being granted bail pending appeal subject to the following conditions:-
- i. The 2nd Applicant, Betty Chelangat be and is hereby admitted to bail pending appeal.
  - ii. The 2nd Applicant, Betty Chelangat be and is hereby released on a personal bond of kshs. Fifty thousand (Kshs.50,000).
  - iii. The Applicants shall prepare, file and serve the Record of Appeal within 30 days of today's Ruling.
32. A warrant of arrest is hereby issued against the 1st Applicant, Alfred Kiprono Biwott.  
Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

.....

**R. LAGAT-KORIR**

**JUDGE**

Ruling delivered in the presence of 2<sup>nd</sup> Applicant in person, N/A for Mr. Korir for 2<sup>nd</sup> Applicant, Mr Njeru for the state and Siele (Court Assistant).

