

**Nyambura v Republic (Criminal Appeal E103 of 2022)
[2023] KEHC 926 (KLR) (Crim) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E103 OF 2022**

**LN MUTENDE, J
JANUARY 19, 2023**

BETWEEN

ROSE NYAMBURA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant (appellant) was charged with the offence of Importing into Kenya counterfeit goods contrary to section 32(1)(f) as read with section 35(1)(a) of the *Anti-Counterfeit Act*, No 13 of 2008. Particulars being that she imported into Kenya Kavells isolater circuit breakers valued at Kshs 13,384,000/- without authority of QRG Enterprises Limited, the registered owner, goods that imitated protected goods in a manner that the stated counterfeit goods were substantially similar copies of the protected goods.
2. The applicant was taken through full trial, found guilty, convicted and sentenced to pay a fine of Kshs 3,000,000/- and, in default, to serve four (4) years imprisonment. In addition, goods that were found to be counterfeit, were forfeited to the State with a view of being destroyed pursuant to section 28(3) of the *Anti-Counterfeit Act*.
3. Aggrieved, the applicant proffered an appeal and now seeks to be released on bail pending appeal.
4. The application is premised on grounds that the applicant is dissatisfied with the judgment of the court and has an intellectually incapacitated child in a special school who is in constant need of her love and support.
5. That throughout proceedings of the trial court, she did cooperate by attending court, a conduct that was appreciated by court.
6. Mr Rueben Ogachi Nyamweya, learned counsel retained by the applicant deposed an affidavit in support of the application where he reiterated what is deposed on the grounds of the application, and, added that the appeal has high probability of success.



7. The application was disposed through written submissions. On the question of principles that guide the court on either granting bail or not, the applicant relied on the case of [*Charles Aluoch v Director of Public Prosecutions \(2015\)eKLR*](#), where the court quoted the case of *Jivraj Shah v Republic*(1986) KLR 605 in respect of principles that guide the court when considering bail pending appeal.
8. It was further urged that the applicant did not specify the kind of circuit breakers she wanted to import by the Chinese Exporter Jiexin Trading Company; therefore, she did not knowingly import the purported counterfeit goods, and, that a date having not been assigned to the case, the applicant will have served a substantial part of the sentence by the time the appeal is determined.
9. On the question of existence of exceptional circumstances, it was urged that the applicant is a mother of two (2) children, one being intellectually incapacitated and in constant need of her care, love and support. On the principle of existence of exceptional circumstances, she relied on the case of [*Arvind Patel v Uganda SC Criminal Appeal No 1 of 2003*](#), where the court listed the following as issues for consideration: The character of the applicant; Whether he/she is a first offender; Whether the offence involved personal violence; Whether the appeal is frivolous and not likely to succeed; The possibility of substantial delay in the determination of the appeal; and, Whether the applicant complied with bond terms in the trial court.
10. Further, it was submitted that the trial court in its judgment took into account the applicant's character and conduct during trial where she cooperated with the court while out on bail. That the applicant is a first offender and the case did not involve personal violence, therefore, she will maintain the same behaviour while out on bond.
11. The applicant also faulted the trial magistrate for arriving at a decision that was erroneous for overlooking key aspects of the case that Kenya Government has a pre-shipment inspection requirement (Pre-shipment verification of conformity) for exports destined for Kenya. That the applicant's goods were inspected by Kenya Revenue Authority (KRA) agents in China and passed to have met required standards in Kenya Market.
12. In response thereto, the respondent opposed the application. It called upon the court to consider principles for granting bail pending appeal as set in the *Jivraj Shah* case (supra).
13. It is urged that the applicant has not given any substantial argument that the appeal has merit. That the appeal filed does not show any argument as to the conduct of trial, legality of the sentence or severity of the same. That the applicant was sentenced on June 17, 2022, for a sentence that has a default period of four (4) years and by the time the appeal is determined, it is unlikely that she would have served a substantial part of sentence.
14. That the applicant has not demonstrated any exceptional circumstances to warrant her release, as relying on a child with a condition does not affect the outcome of trial and that it was factored in during mitigation and sentence. That the applicant has not indicated that she is not a person of means who cannot afford to pay the fine.
15. That the case was decided upon merited facts adduced at trial and the court relied upon proper law to convict, a decision that should not be interfered with.
16. I have duly considered the application, affidavit in support, annexures thereto, and submissions by both parties. A convicted person who has appealed has the right to seek bail pending appeal, but, the court has the discretion to order release or decline. (See section 257 of the [*Criminal Procedure Code*](#) (CPC). This means that in as much as the offender has the right to appeal as provided by article 50(2)



(q) of the Constitution, bail pending appeal is not a constitutional right since the offender has been found guilty, convicted and sentenced, therefore, the presumption of innocence no longer exists.

17. Legal principles that govern bail pending appeal are settled and have been stated in various cases from the appellate court. Mostly, granting bail pending appeal would be primarily geared to preventing punishment of an innocent person, just in case the trial court misdirected itself, but, at the same time, it must be for the purpose of administering justice. In the case of Jivraj Shah(supra) that was cited by both parties, the principles were enumerated as:-

- “(1) (1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.
- (2) If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.
- (3) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

18. In the case of Dominic Karanja v Republic (1986) KLR 612, the Court of Appeal 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.”

19. The applicant herein being a convict is serving a lawful sentence, therefore, does not benefit from the presumption of innocence and inherent right to bail pending trial. This fact was well captured in the case of Mutua v R [1988] KLR 497, where the Court of Appeal stated that:

“It must be remembered that an applicant for bail 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.”

19. It is therefore upon the applicant to demonstrate existence of circumstances that result into the appeal being successful that call for the court’s intervention so as not to be rendered nugatory. This fact has been captured in the Bail & Bond Policy Guidelines where it is provided that:

“.... the burden is on the convicted person to demonstrate that there is an overwhelming chance of success.”

20. The mere question of the applicant believing that the appeal has a high chance of success, should not be a ground to allow the application. In the case of Charles Ratemo Matumo v Republic [2021] eKLR, Odunga GVJ (As he then was) held that:

“The mere fact that the applicant believes that his appeal has chances of success does not necessarily amount to exceptional circumstances since appellants are only expected to lodge



appeal where they believed that their appeals have chances of success. It requires more than such belief to satisfy the court that there are exceptional circumstances.”

21. Looking at the entire application, the applicant admits having imported the goods into Kenya, save that she argues that she did not specify the kind of circuit breakers she wanted to import from the exporter which means that she had no criminal intent. This is a question that will be interrogated comprehensively and thoroughly on appeal. At this stage the allegation does not establish an arguable appeal with high chances of success.
22. On the issue of existence of exceptional circumstances alluded to herein, it is stated that the applicant’s child has intellectual incapacity. During mitigation before the trial court, it was submitted that the applicant who regretted her actions was a single mother of two children and one of them was attending a special school.
23. Section 35 (1)(a) of the [Anti-Counterfeit Act](#) provides thus:
A person convicted of an offence under section 32, shall be liable-
 - (a) In the case of a first conviction, to imprisonment for a term not exceeding five years, or to a fine, in respect of each article or item involved in the particular act of dealing in counterfeit goods to which the offence relates, not less than three times the value of the prevailing retail price of the goods, or both;
24. In meting out sentence, the trial court considered the fact of the applicant having a child with challenges and opted to impose a lesser fine. The items in question were valued at Kshs 13,384,000/-. This meant that the fine was supposed to be not less than Kshs 40,152,000/-. But, the court opted to exercise discretion by imposing a fine of Kshs 3,000,000/- a question that this court will be interrogating. In default, the appellant is required to serve four years imprisonment. The applicant having imported items worth Kenya Shillings Thirteen million or thereabout did suggest that she is a person of means who may pay the fine as she pursues the appeal.
25. In the case of [Ademba v Republic \(1983\) KLR, 442](#) the Court of Appeal held that:
“Bail pending appeal may only be granted if there are exceptional or unusual circumstances...
The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.”
26. Further, the fact that the applicant was of good behaviour and did not abscond trial during the trial is not a reason to grant bail.
27. In the case of [Dominic Karanja v Republic \[1986\] KLR 612](#) the Court of Appeal held that:
“...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*.”
28. The applicant further urges that she may serve a substantial amount of her sentence before judgement; the lower court file having been availed, it is a matter of administrative function of admission of appeal being undertaken and a date being set for hearing.



28. The upshot is that the application is bereft of merit, and, is accordingly dismissed. Let the applicant expedite filing of the record of appeal to pave way for hearing of the appeal.

30. It is so ordered.

DATED, SIGNED AND DELIVERED BY HON. LADY JUSTICE

L N MUTENDE, THIS 19TH DAY OF JANUARY, 2023.

L N MUTENDE

JUDGE

IN THE PRESENCE OF:

appellant/applicant

Mr Nyamweya for the applicant

Ms Chege for the respondent

Mutai C/A

