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Examination of the Law, Principles and Procedure for Bail Pending Appeal in the Court of Appeal

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Abstract

It is often thought, albeit wrongly, that a convict must irrevocably serve his sentence even when he has lodged appeal against his conviction to the Court of Appeal. Through doctrinal research technique, this paper examined the powers of the Court of Appeal under the Court of Appeal Act, 2004 and Court of Appeal (Civil Procedure) Rules, 2021 from wherein it established the unfettered power of the Court of Appeal to grant bail pending appeal. Plethora of judicial authorities considered in the paper were also unanimous that the Court of Appeal has the power to grant bail pending appeal although it is a judicial discretion that must be exercised judiciously. Being that an applicant for bail pending appeal is under a subsisting conviction by the lower Court, bail pending appeal is not a right. Hence the applicant must prove evidence of special or exceptional circumstance to warrant going on bail pending appeal. As this herculean burden is seldom discharged lightly, it was recommended that a convict who does not have convincing and credible evidence of peculiar circumstance should rather concentrate on diligent prosecution of his appeal than congesting the docket of the Court with an application for bail pending appeal.

Keywords: Appeal, bail, circumstance, discretion, pending

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1. Introduction

This paper addresses the law and practice regarding bail pending appeal in the Court of Appeal of Nigeria. Contrary to the thinking within the lay community, a convict has a window of opportunity to apply for bail during the pendency of his appeal. How he can do it is not a common understanding. In order to illuminate the law in this area, this paper will differentiate between bail pending trial and bail pending appeal as well as accentuate where the Court of Appeal derives its power to grant bail to an appellant. It will also explicate what quality of evidence and facts the appellant will be required to place before the Court of Appeal before he can successfully persuade the Court to exercise its discretion in his favour. To engender understanding and orderly presentation, the paper is further divided into the following segments namely: part 2 addresses the meaning of bail and distinction between bail pending trial and bail pending appeal; part 3 deals

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with the power of Court of Appeal to grant bail pending appeal; part 4 explains the contractual nature of bail pending appeal; part 5 addresses the consequences of absence from court by appellant on bail pending appeal; part 6 looks at the power of court to revoke or vary bail order or substitute sureties; part 7 discusses the principles governing the grant/refusal of an application for bail pending appeal; and part 8 embodies the conclusion.

2. Meaning of bail and distinction between bail pending trial and bail pending appeal

In *State v Ibrahim*,¹ the term “bail” and its main purpose was succinctly interpreted as follows:

Bail means a security in the form of cash or bond required by a Court for the release of a prisoner who is to appear in Court at a future time. See Black's Law Dictionary, 9th Edition, page 100. The main purpose of bail is therefore to guarantee the presence of the accused person at the trial of the case. See *Dokubo-Asari v FRN* (2007) 5-8 SC 150; *Suleman v COP Plateau State* (2008) 33 NSCQR [Pt. 2] 735.

Ordinarily, the right of bail is a constitutional right. This is however limited to bail pending trial. Section 36(5) of the Constitution of the Federal Republic of Nigeria,² 1999 as amended provides that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. This is the ageless presumption of innocence that avails a defendant charged with the commission of an offence. Bail is also contractual in nature. The Courts have repeatedly held that the effect of granting bail is not to set the accused free for all times in the criminal process but to release him from the custody of the law and to entrust him to appear at his trial at a specific time and place. The object of bail pending trial is to grant pre-trial freedom to an accused whose appearance in Court can be compelled by a financial sanction in the form of money bail. The freedom is temporary in the sense that it lasts only for the period of the trial. It stops on conviction of the accused. It also stops on acquittal of the accused. In *Suleman & Anor v COP Plateau State*,³ it was held that the contractual nature of bail is provided for in section 345 of the Criminal Procedure Code. The section provides that before any person is released on bail, he must execute a bond for such sum of money as determined by the police or the court on the condition that such a person must attend at the time and place mentioned therein until otherwise directed. If the person is released on bail, the sureties must execute the same or another bond or other bonds containing conditions to the same effect.

Regarding categories of bail, there are mainly two types of bail: (a) bail pending trial; and (b) bail pending appeal. Grant or refusal of any of these types of bail is at the discretion of the Court although different considerations apply. In bail pending trial, a Court of trial pursuant to provisions made by the enabling law or other statutes which create the offence(s) charged, may admit to bail any person to be tried before it, while he is awaiting trial or during his trial. In bail pending appeal, the convict who has lodged an appeal may be admitted to bail pending determination of the appeal. The circumstances for bail vary in both situations. This is largely due to the fact that before conviction there is a presumption of innocence. After conviction, the convict, save under exceptional circumstances, has no right at all to bail. This important classification is made in the

¹ (2014) LPELR-23468(CA) (Pp. 14 paras. F-F).

² Hereinafter abbreviated and referred to as “CFRN”.

³ (2008) LPELR-3126(SC) (Pp. 19-20 paras. E).

case *Muri v I-GP*⁴ was re-confirmed in *Monye v FRN*,⁵ per Bada, JCA and *Abubakar v State*⁶ per, Abiriyi, JCA.

Against the foregoing general principles on bail pending trial and bail pending appeal, it must be accentuated that the applicant in application for bail pending appeal has already been found guilty and convicted. This paper however is therefore focused on determining how a convict may apply for bail pending appeal in the Court of Appeal of Nigeria. Thus, the next segment of the paper will examine whether the Court of Appeal has power to grant bail pending appeal and if yes, where the power emanates from.

3. Power of Court of Appeal to grant bail pending appeal

The Court of Appeal, established under section 237(1) of the CFRN, 1999 as amended, is next in the hierarchy of Courts to the Supreme Court. The Court of Appeal is in section 240 of the CFRN, 1999 as amended conferred with the jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the National Industrial Court, the High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of a State and from decisions of a court martial or other tribunals as may be prescribed by an Act of the National Assembly. Section 18 of the Court of Appeal Act, 2004 empowers the Court of Appeal to hear appeals in criminal causes or matters from decisions of the Court below sitting at first instance. Furthermore, section 22 of the Court of Appeal Act, 2004 empowers the Court of Appeal to hear appeals from decisions of the Court below in criminal causes or matters in which an appeal has been brought to the Court below from the same or other Court.

Regarding power of the Court of Appeal to admit an appellant to bail, both the Court of Appeal Act, 2004 and Court of Appeal (Civil Procedure) Rules, 2021 empower the Court of Appeal to grant bail pending appeal. Section 28(1) of the Court of Appeal Act, 2024 provides that “The Court of Appeal may, if it thinks fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal” while section 28(2) enacts that the time during which an appellant, pending the determination of his appeal, is admitted to bail shall not count as part of any term of imprisonment under his sentence and, any imprisonment under the sentence of an appellant, whether it is the sentence passed by the trial court or the sentence passed by the court below on appeal or the sentence of the Court of Appeal, shall, subject to any direction which may be given by the Court of Appeal, be deemed to be resumed or to begin to run, as the case requires, from the day on which he is received into prison under the sentence. In *Aliyu v FRN*,⁷ it was held that section 28(1) of the Court of Appeal Act, 2004 empowers the Court to admit Appellant to bail pending the determination of his appeal, if it thinks fit to do so. This is also provided for in Order 17 Rule 12 of the Court of Appeal Rules, 2021. Therefore, once an appeal is lodged against the conviction and sentence of the appellant by the trial Court, a motion for bail pending appeal may be entertained by the Court of Appeal.

Furthermore, both Orders 17 (dealing with Criminal Appeals) and 18 (dealing with Appeals from Court Martials and Tribunals) of the Court of Appeal Rules, 2021 confer power on the Court of Appeal to grant bail pending appeal. Specifically, Order 17, Rule 12(1) provides as follows regarding bail pending appeal-

⁴ (1957) NRNL 5.

⁵ (2012) LPELR-14845(CA) (Pp. 15-16 paras. G).

⁶ (2013) LPELR-22188(CA) (Pp. 13-14 paras. E).

⁷ (2024) LPELR-61668(CA) (Pp. 10-12 paras. D).

- (1) Where the Court or the lower court admits an Appellant to bail pending the determination of his appeal, on an application by him duly made, such court shall specify the amounts in which the Appellant and his surety or sureties (unless such Court directs that no surety is required) shall be bound by recognisances and shall direct, if it thinks fit, before whom the recognisances of the Appellant and his surety or sureties (if any) may be taken.

Besides, under Order 17 Rule 12(6), it is provided among other things that when an Appellant is present before the Court, the Court may, on an application, made by any person or, if it thinks right so to do, without any application, make an order admitting the Appellant to bail.

Similarly, regarding bail pending appeal in appeals emanating from Court Martials and Tribunals, Order 18, Rule 8(1) of the Court of Appeal Rules, 2021 provides that where the Court or the lower court admits an Appellant to bail pending the determination of his appeal on an application by him duly made, such Court shall specify the amounts in which the Appellant and his surety or sureties (unless such Court directs that no surety is required) shall be bound by recognisance and shall direct, if it thinks fit to do so, before whom the recognisance of the Appellant and his surety or sureties (if any) may be taken. In addition, Order 18, Rule 6 enact that when an Appellant is present before the Court, the Court may, on an application made by any person or, if it thinks right so to do, without any application, make an order admitting the Appellant to bail

Discussions in the foregoing paragraphs clearly establish the unfettered power of the Court of Appeal to grant bail pending appeal where sentence of conviction was passed either in the superior Courts below it or in Court Martials and Tribunals. However, before delving into principles that guide bail pending appeal, it is important to explain the following namely: the contractual nature of bail pending appeal in the Court of Appeal; consequences of absence from Court by appellant on bail pending appeal; and power of Court the Court of Appeal to revoke or vary bail order or substitute sureties. This approach will engender full understanding of the law practice on bail pending appeal in the Court of Appeal.

4. Contractual nature of bail pending appeal

Where bail is granted pending appeal, it is contractual in nature. The Supreme Court also upheld the contractual nature of bail pending trial in *Suleman & Anor v COP Plateau State* (supra) wherein it was held that the object of bail pending trial is to grant pre-trial freedom to an accused whose appearance in Court can be compelled by a financial sanction in the form of money bail. The contractual nature of bail pending appeal in the Court of Appeal is confirmed by the following provisions of Order 17, Rule 12(1), (2), (3) and (4) and analogous provision of Order 18 Rule 8(1) (2), (3) and (4) of the Court of Appeal (Civil Procedure) Rules, 2021. The verbatim provisions of Order 17, Rule 12(1), (2), (3) and (4) are to the effect that-

- (1) Where the Court or the lower court admits an Appellant to bail pending the determination of his appeal, on an application by him duly made, such court shall specify the amounts in which the Appellant and his surety or sureties (unless such Court directs that no surety is required) shall be bound by recognisances and shall direct, if it thinks fit, before whom the recognisances of the Appellant and his surety or sureties (if any) may be taken.⁸

⁸ This is the same textual provision with Order 18, Rule 8(1) of the Court of Appeal (Civil Procedure) Rules, 2021 regarding criminal appeals from Court Martials and Tribunals.

- (2) In the event of the lower court not making any special order or giving any special directions under this Rule, the recognisances of the Appellant and of his surety or sureties (if any) may be taken before the Registrar. (This is the same textual provision with Order 18, Rule 8(2) regarding criminal appeals from Court Martials and Tribunals).
- (3) The recognisances provided for in this Rule shall be in Forms 8 and 9 in the Second Schedule to these Rules. (This is the same textual provision under Order 18, Rule 8(3) regarding criminal appeals from Court Martials and Tribunals).
- (4) The Registrar of the lower court, shall forward the recognisances of the Appellant and his surety or sureties to the Registrar. (This is the same textual provision under Order 18, Rule 8(4) regarding criminal appeals from Court Martials and Tribunals).

5. Consequences of absence from Court by appellant on bail pending appeal

As will be seen shortly, bail pending appeal is seldom granted except in special, peculiar or exceptional circumstance. Grant of bail whether during pending trial or pending appeal does not connote that the defendant or appellant can stay away from attending Court. Absence of appellant from Court can lead to revocation of bail or other disastrous consequences. Tersely stated, bail pending appeal is temporary and can be revoked at will by the Court of Appeal. Consequently, Order 17, Rule 12(5) of the Court of Appeal Rules, 2021 provides that an Appellant who has been admitted to bail shall be personally present at each and every hearing of his appeal and at the final determination thereof. The Court may in the event of such Appellant not being present at any hearing of his appeal, if it thinks right so to do, decline to consider the appeal, and may proceed summarily to dismiss the same and may issue a warrant for the apprehension of the Appellant in Form 10 in the Second Schedule to these Rules: Provided that the Court may consider the appeal in his absence, or make such other order as it deems fit. This is the same textual provision under Order 18, Rule 8(5) regarding criminal appeals from Court Martials and Tribunals.

6. Power of Court to revoke or vary bail order or substitute sureties

The Court of Appeal reserves the right to revoke bail, vary bail conditions or substitute sureties on application made by any person or on its own accord (*suo motu*) Under Order 17, Rule 12(6) of the Court of Appeal (Civil Procedure) Rules, 2021, when an Appellant is present before the Court, the Court may, on an application, made by any person or, if it thinks right so to do, without any application, make an order admitting the Appellant to bail, or revoke or vary, any such order previously made, or enlarge from time to time, the recognisances of the Appellant or of his sureties or substitute any other surety for a surety previously bound as it thinks right. This is also the same textual provision under Order 18, Rule 8(6) relating to criminal appeals from Court Martials and Tribunals.

Order 17, Rule 12(7) At any time after an Appellant has been admitted to bail, the Court may, if satisfied that it is in the interest of justice so to do, revoke the order admitting the Appellant to bail and issue a warrant in Form 10 in the Second Schedule to these Rules. This is the same textual provision under Order 18, Rule 8(7) concerning criminal appeals from Court Martials and Tribunals.

7. Principles governing the grant/refusal of an application for bail pending appeal

Bail pending appeal, though permitted by law and Rules of Court, is not a right. It is granted or refused at the discretion of the Court on the condition that judicial discretion is not an indulgence of a judicial whim. It is the exercise of judicial judgment based on facts and guided by the law or equitable decision which must be exercised judicially and judiciously. In plethora of decisions, it has been firmly established that the grant of an application for bail pending appeal lies within the discretion of the appellate Court, which discretion may be exercised in favour of the applicant, upon the applicant showing peculiar, exceptional or special circumstance. Decisions in *Ojo v FRN*;⁹ *Arowolo v State*;¹⁰ *Obakponovwe v State*;¹¹ *Peter v The State*;¹² *Ogundare v State of Lagos*;¹³ and *Aliyu v FRN*¹⁴ all validate that the law is now well settled that an appellate Court will not grant an application for bail pending appeal unless there are exceptional circumstances why bail ought to be granted to the applicant.

As a general rule, application for bail pending appeal is not granted as a matter of course. Two strong reasons account for this position of the law namely: (a) the applicant in such application has already been found guilty and convicted. Having been convicted and sentenced, the conviction by the lower Court becomes a subsisting judgment until it is set aside on appeal. (b) The constitutional presumption of innocence of an accused person under section 36(5) of the CFRN, 1999 as amended is not in favour of a convict. As variously held by the apex Court in *Ogu v COP*¹⁵ and *Alo v The State*,¹⁶ this is in contradistinction to the case of an applicant in an application for bail pending trial who is presumed innocent till proven guilty.

As bail pending appeal is not a right, an applicant for bail pending appeal has the herculean duty to convince the appellate Court that he is entitled to bail pending the determination of his appeal. He can only do so upon the applicant showing peculiar, exceptional or special circumstance. Thus, evidence of peculiar, exceptional or special, circumstance must be averred in the affidavit and proved. Appellant/Applicant must satisfy the burden on him to demonstrate to the Court that there are exceptional circumstances to persuade the Court to grant the application for bail pending appeal. In *Ojo v FRN*,¹⁷ the Court of Appeal cited and relied on the classical decision in *R v Tunwashe*¹⁸ in which the West African Court of Appeal emphasized that the grant of bail to a convict would be granted where special or exceptional circumstances exist, or where the hearing of the appeal is likely to be unduly delayed, and a refusal would have the result of a considerable proportion of the sentence being served before the appeal can be heard.

Courts have accepted that ill health constitutes an exceptional circumstance for the grant of bail pending appeal. The medical need of a convict whose proven state of health needs special medical attention, which the authorities may not be able to provide, is a factor that may be put before the Court for consideration in the exercise of discretion to grant bail to the appellant/applicant. However, the mere fact that an applicant is sick and in need of medical attention, without more will not qualify him for bail unless there are compelling grounds for doing so. There has to be

⁹ (2006) LPELR-5423(CA).

¹⁰ (2007) LPELR-8711(CA).

¹¹ (2019) LPELR-47180 (CA).

¹² (2020) LPELR-50476(CA).

¹³ (2023) LPELR-60340(CA).

¹⁴ (2024) LPELR-61668(CA) (Pp. 10-12 paras. D).

¹⁵ (2017) LPELR-43832(SC).

¹⁶ (2015) LPELR-24404(SC).

¹⁷ (2006) LPELR-5423(CA).

¹⁸ (1935) 2 WACA 236.

satisfactory and convincing evidence placed before the Court. For bail pending appeal to be granted on account of ill health, the ailment must be grave and dangerous to public health and the continued stay of the applicant in prison custody would pose health hazard to other inmates. Bail could also be granted a convict pending appeal if there is concrete evidence that medical facilities needed by the convict will not be accessible to him while he is in prison custody.

In *Aliyu v FRN*,¹⁹ this was an application praying the Court to grant bail pending the hearing and determination of appeal from the judgment of the trial Federal High Court. The Applicant prayed the Court of Appeal to grant him bail pending the hearing and determination of his appeal from the judgment of the trial Federal High Court to this Court sentencing him to 5 years imprisonment on the basis of eye medical problem of shortsightedness which, according to facts deposed, if not treated, may lead to the Applicant losing his sight. The facts deposed to by the applicant in his affidavit as supporting this application being the fulcrum of this application was that the Applicant, being dissatisfied with his conviction and sentence by the trial Court, has appealed same, and the records which are bulky were at the time being prepared for transmission to the Court of Appeal. The applicant deposed that application was necessary as the Applicant has shortsightedness eye problem which the Doctor in Kano advised that he the Applicant must always be close to the Hospital for treatment, or else he may lose his sight. The Applicant deposed succinctly that the Correctional Service does not have the medical facilities to take care of his eye problem without more, and if this application was not granted, the Applicant may serve the 5 years sentence and render this appeal nugatory. In dismissing the application, the Court of Appeal held that the application was a special one, and it is correct legal position that the grant of same is upon demonstration of special and exceptional circumstances, which the Applicant must show by affidavit evidence placed before this Court. The Court of Appeal reasoned that the special circumstances which the applicant had hinged his application on was that of ill health, in that the Applicant was suffering from shortsightedness, which the Correctional Service does not have the facilities to treat and that if same is not treated, the applicant stands the risk of losing his sight. The Court disagreed with the applicant that shortsightedness is an ailment in the category of a dangerous sickness to pose any serious danger to the applicant. The ailment as highlighted by the respondent was such that can be corrected by the use of special eye glasses, and the applicant did not file any further affidavit to debunk the contention of the respondent that the sickness can be so corrected. The applicant did not even make any reference to the medical report attached to show this Court that the ailment of shortsightedness is of such a dangerous category as to move this Court to exercise her discretion in the applicant's favour. The applicant just attached the medical report and believes that it would do the magic, in that this Court must look at it, without counsel making any submission to guide the Court as to its purport of being attached as exhibit. This Court is not an investigator of reports. The Court of Appeal found the application completely lacking in merit, the applicant has not satisfied this Court of any special circumstance to grant this application and same was refused. This is more so that by the nature of this application, the applicant who is a convict has lost his benefit of doubt of presumption of innocence.

Conclusively, ill health does not automatically qualify an appellant for bail. The mere fact that an applicant is sick without more will not qualify him for bail unless there are compelling grounds for doing so. For bail pending appeal to be granted on ill health, the ailment must be grave and dangerous to public health and the continued stay of the applicant poses health hazard to other inmates as was the case in *Osadolor (alias Afro) v The State*.²⁰ Bail could also be granted a convict pending appeal if there is concrete evidence that medical facilities needed by the convict are not

¹⁹ (2024) LPELR-61668(CA) (Pp. 12-14 paras. C).

²⁰ (2013) 5 WRN 162 at 167. See also *Abacha v The State* (2002) 5 NWLR (Pt.761) 638 at 664 - 665.

accessible to him while he is in prison custody. Where medical facilities are either non-existent or inadequate for the purpose of peculiar health needs of an applicant in the place he is being detained or held in custody, in such a situation the sickness or ill-health of the applicant may constitute special circumstance of the exercise of the discretion of the Court to grant bail in his favour. This was the decision in *Chukwulozie (m) v FRN*.²¹

From the exhaustive discussion undertaken in this paper, the following may be aggregated as some of the useful laws and guiding principles that must be kept in mind concerning bail pending appeal namely:

- (a) Bail pending appeal is not a right. Being a convict, the constitutional presumption of innocence under section 36(5) of the CFRN, 1999 as amended does not inure in favour of a convict. This is unlike an applicant in bail pending trial. Conviction by the lower Court remains a subsisting judgment until it is set aside on appeal.
- (b) The Court of Appeal is consecrated with power both under the Court of Appeal Act, 2004 and Court of Appeal (Civil Procedure) Rules, 2021 to grant bail pending appeal in criminal appeals or appeals from Court Martials and Tribunals.
- (c) Grant or refusal of bail pending appeal is at the discretion of the Court which judicial discretion must be exercised judiciously.
- (d) Bail pending appeal is contractual. The appellant must fulfil the Court specified amounts in which the Appellant and his surety or sureties (unless such Court directs that no surety is required) shall be bound by recognizance.
- (e) Court may grant bail pending appeal either on application of the appellant or *suo motu* if it deems it fit to make.
- (f) Bail pending appeal is a special application. Peculiar, special and circumstances must be specifically asserted and proved by applicant in his affidavit in support of the application.
- (g) Medical reasons or ill-health can constitute special circumstance for grant of bail pending appeal but it is not automatic. The sickness, disease or ailment must be grave and dangerous to public health and the continued stay of the applicant poses health hazard. It is special circumstance if there is concrete or unassailable evidence that medical facilities are either non-existent or inadequate for the purpose of the convict's peculiar health challenge or indisposition.
- (h) Special circumstance that may warrant bail pending appeal exists if the hearing of the appeal is likely to be unduly delayed, and a refusal would have the result of a considerable proportion of the sentence being served before the appeal can be heard.
- (i) A convict on bail pending trial must attend Court without abstaining as that lead to the Court cancelling his bail or entering judgment in his absence.
- (j) Bail granted pending appeal may be varied or revoked for any reason the Court may deem fit.
- (k) The freedom enjoyed during bail pending appeal is temporary in the sense that, unless revoked, it lasts only for the period of the appeal unless revoke. It stops on confirmation of conviction

²¹ (2014) LPELR-24452(CA) (Pp. 11-13 paras. F).

and sentence of the appellant. It also stops where his appeal is upheld and sustained leading to the quashing of his conviction and sentence by the Court of Appeal.

8. Conclusion

From exhaustive interrogation of applicable Laws and Rules, this paper established the unfettered power of the Court of Appeal in Nigeria to grant bail pending appeal. Discussions herein have illuminated the pathways and cleared the ill-knowledge or ignorant thinking that a convict is irrevocably bound to serve his term during the pendency of his appeal. Rather, it is the law that a convict can apply for and secure bail pending appeal although it is not a leisure walk in the park. To assist laymen, legal practitioners and the Court alike, the paper systematically outlined what a convict must do to successfully activate the judicious exercise of the judicial discretion of Court of Appeal in granting him bail pending appeal. It is therefore recommended that a convict who does not have cogent, convincing and credible evidence of special or peculiar circumstance should rather concentrate on diligent prosecution of his appeal than congesting the docket of the Court with an application for bail pending appeal.