



**Masavu v Republic (Criminal Appeal E053 of 2023)  
[2024] KEHC 11174 (KLR) (Crim) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11174 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E053 OF 2023  
K KIMONDO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**DENNIS WAMBUA MASAVU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Application for bail pending appeal from the judgment of Z. Abdul, Principal Magistrate, dated 26th April 2024 in Milimani Criminal Case No. E630 of 2024)*

**RULING**

1. The appellant was adjudged guilty of threatening to kill contrary to section 223 (1) of the Penal Code and sentenced to imprisonment for two years.
2. The particulars were that on 11<sup>th</sup> March 2023 at Ngoni Village, Mbooni East District within Makueni County without lawful excuse, he uttered the following words:

“My votes were stolen and I went to Tawa Court but later realized that there is no court in Tawa only money changes hands. Money was poured and my case was thrown out of court. I cannot surrender its either the current MCA dies or I die. because my votes cannot be stolen and then ordered to pay someone one million. It’s not possible”.
3. The appellant lodged a petition of appeal on 15<sup>th</sup> May 2024 raising eleven grounds of appeal. A number of those grounds are repetitive. The principal grounds are essentially three: Firstly, that in view of the locus in quo, the Magistrates Court in Nairobi lacked jurisdiction. Secondly, that there was no proof beyond reasonable doubt of the threat to kill; and, thirdly, that the sentence was draconian particularly in view of the fact that the complainant and the appellant had reconciled.



4. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 14<sup>th</sup> May 2024 pleading for bail. It is supported by his deposition of even date.
5. The appellant contends that the appeal has overwhelming chances of success primarily on the above three grounds. In addition, he claims to be suffering from a serious ailment that cannot adequately be handled from prison; and, that the entire sentence or a substantial part thereof will be served before the hearing and determination of the appeal.
6. The appellant's learned counsel, Ms. Kilonzo, relied on submissions dated 19<sup>th</sup> July 2024. 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. On 26<sup>th</sup> June 2024, I directed that the motion be served on the DPP and granted him 14 days to reply. But on the date of the hearing of the motion on 30<sup>th</sup> July 2024, the learned Prosecution Counsel, Ms. Awino, had not managed to file a formal reply. In the interests of justice, I granted her leave to make an oral reply. She submitted that all the elements of the charge were proved to the required standard; and, that the appeal was accordingly hopeless.
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. I resist the temptation to comment about the merits of the appeal. It will be the duty of the first appellate court to re-evaluate the records and establish whether the evidence of the seven witnesses established the offence; or, whether the sentence was too punitive in all the circumstances of this case.
10. I can however safely state the following. The appellant argues that the trial court lacked jurisdiction because the alleged offence took place in Makeni County and he was arrested within Kiambu County. This issue falls squarely within the province of the first appellate court but I am not satisfied at the moment that it raises an exceptional point of law to warrant grant of bail pending appeal.
11. I would also say the same about the medical condition of the accused. I have seen the attached medical report dated 7<sup>th</sup> June 2024 indicating that he is hypertensive and asthmatic. But the report from Nairobi Remand Prison Health Centre does not state that he cannot get sufficient medical attention in prison or at the government referral hospital. Obviously, his condition is exacerbated by the prison environment but it is not a good ground for grant of bail pending appeal.
12. Regarding the sentence, the appellant was sentenced on 2<sup>nd</sup> May 2024. He has thus been in custody for nearly five months. It will be the duty of the first appellate court to determine whether the sentence of two years was deserved or the effect of the reconciliation between the appellant and complainant post-judgment. However, the original transcript of the lower court has not yet reached the High Court. I thus find that a substantial part of the term may be served before the conclusion of the appeal.
13. I also find that there is a substantial point of law or evidence whether on the totality of the testimony of PW1, PW2, PW3, PW4 and PW5 all the key elements of the charge of threatening to kill were



established. I say so very carefully and without making a finding. I must also emphasize that this does not mean the appeal will succeed. That determination exclusively lies in the first appellate court upon a full re-evaluation of the evidence including the defence by the appellant and his two witnesses.

14. But from what I have stated, the appeal is arguable; and, in view of the remainder of the sentence, there are exceptional circumstances which warrant grant of bail pending appeal. *Somo v Republic* [1972] EA 476, *Jivraj Shah v Republic* [1986] KLR 605.
15. The appellant may thus be released upon executing a cognizance in the sum of Kshs 500,000 together with one surety of a similar sum to be approved by the Deputy Registrar. He must appear at every mention or hearing of his appeal in default of which his bond will be cancelled and the surety called to account.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read virtually on Microsoft Teams in the presence of: -**

The appellant.

Ms. Kilonzo for the appellant instructed by Kilonzo & Company Advocates.

Ms. Awino for the respondent instructed by the office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

