



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthoni v Republic (Criminal Appeal E038 of 2024)  
[2024] KEHC 16321 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16321 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E038 OF 2024  
DR KAVEDZA, J  
DECEMBER 18, 2024**

**BETWEEN**

**SAMUEL MACHARIA MUTHONI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for bail pending appeal from the conviction and sentence delivered by Hon. W. Lopokoiyit (SRM) on 30th May 2024 at Kibera Chief Magistrate's Court criminal case no. E016 of 2024 Republic vs Samuel Macharia Muthoni)*

**RULING**

1. The applicant was charged and after a full trial convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to death. Being dissatisfied with the decision, he filed a memorandum of appeal and an amended memorandum of appeal.
2. Simultaneously, he filed a notice of motion dated 18<sup>th</sup> October 2024, seeking his release on reasonable bail and/or bond pending the hearing and determination of his appeal. The application is premised on the grounds on the face thereof which are reiterated in the supporting affidavit sworn by the applicant of a similar date. They are that the appeal has overwhelming chances of success. He has a young family with minor children in need of care and protection. He undertakes to abide by the terms set by the court.
3. The respondent did not file a response despite being given an opportunity to do so.
4. Having considered the application, the affidavit in support and the applicable law, the issue for determination is whether the appellant has met the threshold for the grant of bail pending appeal.
5. The provision of law that applies to bond/bail pending appeal is section 357 of the Criminal Procedure Code (Cap 75) Laws of Kenya which provides as follows:



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.
6. The principles for granting bond pending an appeal were reiterated in the case of *Jivraj Shah v Republic* [1986] KLR 605 which laid down the principles as follows:
  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.”
7. In the case of *Chimambhai v Republic* 1971 EA 343 J. Harris made another observation in such an application when he said;

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....”
8. Under Article 49 of the *Constitution* of Kenya, 2010 an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proven guilty, unlike a case where one is already convicted. In the above cases, the courts also held that anticipated delay in the hearing of the appeal, together with other factors may be grounds for grant of bail pending appeal.
9. I have carefully examined the grounds of appeal raised by the applicant. The applicant states that the appeal herein has a high chance of success and one need only look at the judgment and petition of appeal to see the trial court failed to rely on the full record of proceedings in writing the judgement.
10. The rationale for considering the chances of success of the appeal was given in *Somo v Republic* [1972] EA 472 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.”

11. In this case, I have considered the thirteen grounds of appeal raised in the memorandum of appeal and the amended grounds of appeal. However, I am not satisfied that the said grounds disclose the existence of an appeal with overwhelming chances of success. Whereas the appellant may succeed in arguing the said grounds at the hearing of the appeal, I am not satisfied that the chances of the appeal succeeding are overwhelming.
12. As regards the exceptional circumstances, it is argued that the appellant’s is the sole breadwinner in his young family. It is my finding that this is not an exceptional circumstance.
13. The upshot of the above analysis is that the applicant has not demonstrated the existence of exceptional or unusual circumstances to warrant the grant of bail pending appeal. The application for bail pending appeal is dismissed.

It is so ordered.

**RULING DATED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Absent

Mburugu for the Respondent

Achode Court Assistant

