



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abdalla v Republic (Criminal Appeal E004 of 2023)  
[2023] KEHC 21688 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E004 OF 2023  
SM GITHINJI, J  
JULY 31, 2023**

**BETWEEN**

**MOHAMED ZUBEIR ABDALLA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Principal Magistrate Lamu  
Honourable M.M Wachira delivered on 10<sup>th</sup> November, 2022 in  
Criminal Case No.E104 of 2022 Republic Vs Mohamed Zubeir Abdalla)*

**RULING**

**CORAM:** Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1 The Applicant/Appellant herein was found guilty upon full trial for an offence of grievous harm, contrary to section 234 of the *Penal Code*. He was consequently sentenced to serve 7 years imprisonment. Dissatisfied with the said conviction he preferred an appeal before this Court. He as well filed a Notice of Motion praying for bond or bail pending appeal. The said application dated December 23, 2022 is pillared on the following grounds; -

1. The appellant has a meritorious appeal with a high probability of success.
2. By the time the appeal is heard and determined the appellant may have served the entire prison sentence which may render the appeal nugatory.
3. The appellant never jumped bond/bail before the trial court.



2 The said application was opposed by the respondents by way of a replying affidavit sworn on July 3, 2023 by the prosecution counsel Ms. Agatha Mkongo.

3 The application was canvassed by way of written submissions and both parties filed their respective submissions.

4 I have gone through the lower court proceedings, the grounds of appeal, grounds on which this application is founded, the affidavit by the respondent and submissions filed.

5 Bail or bond pending appeal is provided for under section 357 of the [Criminal Procedure Code](#) which states that; -

' After the entering of an appeal by the 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 the appeal.'

6 The foregoing provision does not provide for what the court needs consider in an application for bail pending appeal or on which grounds it should be granted or denied. However, such is found in various case law on the issue. In the case of [Jivraj Shab-Vs-Republic\[1986\] 605](#) the Court stated;-

1. There must be in existence exceptional or unusual circumstances upon which the court can conclude that it would be in interest of justice to grant bail.

2. If it appears prima facie that the appeal is likely to succeed.

7 Article 49 (1) (h) of the [Constitution](#) of Kenya provides that; -

' An accused person has the right

(h) To be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not be released.

8 It therefore follows that even the right to bail for an accused person which is anchored on the [Constitution](#) is not absolute as it can be denied on existence of compelling reasons. In the case of [Masrani-vs-R \[1060\] EA 321](#) the Court held that; -

' Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.'

9 The purpose for bail or bond pending appeal is to avoid an appellant who have demonstrated to the lower court or the appeal court that he has a pending appeal which prima facie stands chance of success, and is unlikely to abscond, from serving the sentence meted against him during the pendency of the said appeal. It therefore follows that such an applicant must establish; -

1. There is a pending appeal.

2. Prima facie, the appeal is likely to succeed.

3. He will have served a substantial part of the sentence or completed it by the time the appeal is determined.

4. He is unlikely to abscond if released on bail or bond.



10 Without getting into the details of the trial before the lower court which led to the conviction of the appellant, in his defence he did not deny having attacked the complainant but explained the reason why he did it. In my view he has been unable to demonstrate prima facie, that his appeal stands a chance of success. He is serving a 7 years sentence which is a long sentence. As the record of appeal is ready, the appeal is unlikely to take long before it's heard and determined. He therefore will not have served a substantial part of the sentence or completed it before the appeal is concluded. In short he has failed to demonstrate existence of exceptional or unusual circumstances which would entitle him to bond pending appeal. The application therefore lacks merit and is hereby dismissed. The appeal file be processed for directions.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>ST</sup> DAY OF JULY, 2023**

.....

**S.M.GITHINJI**

**JUDGE**

**In the Presence of; -**

1. The Applicant
2. Ms Mkongo for the Respondent
3. Mr Aboubakar for the Applicant

