



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CRIMINAL APPEAL NO. 1 OF 2018**

**GEORGE WAMBUGU THUMBLI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING (Bail pending appeal)**

Before me is a Notice of Motion dated 11<sup>th</sup> January 2018 brought under section 357 of the Criminal Procedure Code.

It seeks orders;

1. That the appellant be admitted to bail pending the hearing and determination of the appeal
2. That costs of the application be provided for.

The grounds for the application are set out on the face of the application as follows;

- a. That the pending appeal has overwhelming chances of success
- b. That the appellant stands to suffer great prejudice

The application is supported by the statement of facts from the lower court, the supporting affidavit of the applicant sworn on the 11<sup>th</sup> January 2018, and the grounds adduced at the hearing. Annexed to the affidavit as G'2' are the proceedings in Nyeri Chief Magistrate's Traffic Case no. 4 of 2018

The appellant is represented by Mr. CM King'ori and the State by Mr. Gitonga Muranga.

The appellant was charged with the offence of Driving Under the Influence of alcohol contrary to section 44(1) as read with section 45(1) of the Traffic Act cap 403 Laws of Kenya. It was alleged that;

*On the 1<sup>st</sup> day of January 2018 at about 1330 Hours at King'ong'o along Nyeri Nyahururu Road within Nyeri County of the Republic of Kenya, being the driver of PSV motor vehicle registration no. KBV 990K make Mazda Bongo Matatu did drive the same while under the influence of alcohol and when his breath was tested his blood alcohol concentration was found to be 0.29mg/l beyond the prescribed limit of 00.00mg/l for PSV drivers.*

He appeared before the Chief Magistrate on the 2<sup>nd</sup> January 2018. The record reads;

*The Substance of the charge(s) and every element thereof has been stated by the court to the accused person, in a language he /she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies; TRUE*

The facts were read more or less as they appear in the particulars of the charge.

Before he could plead the plea court sought to know whether he had passengers in the motor vehicle. The prosecutor was tasked to ascertain that fact. The matter was later mentioned and the prosecutor told the court he had confirmed that the accused person had three passengers in the motor vehicle.

COURT: Are the facts as read out true?

ACCUSED: Yes

His mitigation was that he had drunk the alcohol the night before

COURT: Plea of guilty entered

STATE COUNSEL: No previous records. He may be treated as a first offender

COURT NOTES: Accused is a PSV driver. He had passengers. I note the increase in accidents.

SENTENCE

Accused fined Ksh 100,000 in default one year in prison

In addition, the court will suspend his PSV license for a period of 6 months.

The appellant filed his petition of appeal on the 11<sup>th</sup> of January 2018 seeking that the conviction be quashed, the sentence be set aside; on the grounds that his plea was unequivocal, the conviction was based on inadmissible, insufficient and inconclusive facts, and that the sentence was harsh and excessive.

Based on this appeal and the proceedings set out he now seeks to be released on bail pending appeal.

Mr. Kingori submitted that the prosecution merely stated that the appellant was smelling of alcohol, a test was conducted but the nature of the test and documented report were not produced. He argues that the failure to produce the alleged report regarding the testing of the appellant's breath before the plea court rendered the facts insufficient to found a conviction as there was nothing upon which the accused could answer to. Hence the appeal has a high chances of success.

He relied on the cases of **Bukenya vs. Uganda (1967) EACA 341** where the court found that the trial magistrate erred in not admitting the medical report was 'indispensable for the purpose of establishing whether the injury was grievous harm or just ordinary hurt or no harm at all.'

And **Kato v R [1971] EACA 542**

In opposing the application Mr. Muranga submitted that no appeal lies against a plea of guilt except on the legality of the sentence. He argued there was no requirement by statute to state the legal limit on the charge sheet. That the plea was unequivocal as per **Aden vs R (1971) KLR 443**. Further that the appellant had not demonstrated as required by **Munjia Michubu v R [2014] eKLR**, that the appeal had overwhelming chances of success, the steps taken to pursue it with zeal, any prejudice he would suffer because of the delay.

**Section 348** of the Criminal Procedure Code stipulates;

*No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.*

The Court of Appeal has indicated that this bar is not absolute. There are exceptions to this, and the appeal could be considered on its merit. Hence the prosecution's argument that there can be no appeal to a plea of guilty is not supported by the authorities available. **See:**

In **John Muendo Musau v Republic [2013] eKLR** the Court of Appeal, Kihara Kariuki, PCA, Ouko & Murgor, JJ.A. stated;

***There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute. The case law was reviewed by the predecessor of this Court in Adan (supra). In Ndede vs Republic [1991] KLR 567 this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused person to court from the date of arrest. (emphasis added)***

In **Wandete David Munyoki v Republic [2015] eKLR** the Court of appeal Makhandia, Ouko & M'inoti, JJ.A. stated ***It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in Ndede v R [1991] KLR 567, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty,***

**are not closed. (emphasis added)**

Section 357 of the Criminal Procedure Code provides for admission to bail or suspension of sentence pending appeal. It states at sub section (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:*

The appellant has filed an appeal.

I reiterate the words of the Court in **Gerald Macharia Githuka vs Republic Criminal Appeal No. 119 of 2004**, that;

**‘The cornerstone of the justice system is that no one will be punished without the benefit of due process including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle... ‘**

This is the essence of the right to bail pending appeal where the applicant has fulfilled the requisite conditions, despite losing the presumption of innocence.

Without going to the merits of the appeal, a plea of guilt that is not unequivocal cannot found a conviction. That will only come out during the hearing of the appeal. I think that is the basis of Court of Appeal’s interpretation of s. 348 of The CPC providing that there can be exceptions.

I adopt the words of Haris J in **Chimambhai vs Republic (No 2) {1971} E.A.343;**

*“The case of an appellant under sentence of imprisonment seeking bail 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. ....**” (emphasis added).*

These words are in resonance with the Constitutional provision that an accused person has the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law at article 50(2) (q)

The prosecution in opposing the application relied on **Munjia Michubu v R [2014]** where the High Court refused the appellant’s application for bail pending appeal. The granting of bail pending appeal is discretionary, depending on the circumstances of each case. That is why in other cases for instance **Samuel Macharia Njagi v Republic [2013] eKLR** the same High Court allowed a similar application following **Arvind Patel -vs- Uganda S.C Cr. Appeal No. 1 of 2003.**

I also draw guidance from this case where the Supreme Court of Uganda, Justice Oder, set out the circumstances under which bail pending appeal could be granted:

1. *The character of the offender*
2. *Whether the applicant is or not a first offender;*
3. *Whether the offence of which the applicant is convicted involved personal violence;*
4. *The appeal must not be frivolous and has reasonable chance of success;*
5. *The possibility of substantial delay in the determination of appeal and;*
6. *Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.*

The same court also stated that an applicant did not have to demonstrate all these considerations in order to be granted bail. A combination of two or more of the conditions would be sufficient.

The applicant has complied with the provisions of section 357(1) of the Criminal Procedure Code and has filed an appeal. If unable to pay the fine he may have served his full sentence of one-year imprisonment or a substantial part of the same by the time the appeal is determined.

I allow the application and order that;

1. He be released on bond of Ksh 100,000 with a surety of the same amount or cash bail of the Ksh 50,000.
2. In both cases to provide the court with a recent full photograph of himself and a copy of his Identity Card in addition to any

documents the surety may deposit.

3. The deputy Registrar to ensure strict compliance with 2 above

4. To appear for mentions before the Deputy Registrar every 30 days pending the hearing and determination of the appeal.

**Dated, delivered and signed this 15<sup>th</sup> day of February 2018 at Nyeri.**

**Teresia M. Matheka**

**Judge**

In the presence of

Court Assistant Harriet

Ms. Jebet for state

Appellant present. N/A for counsel