



Kitsao v Republic (Miscellaneous Criminal Application E052 of 2024) [2025] KEHC 95 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 95 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CRIMINAL APPLICATION E052 OF 2024**

**M THANDE, J
JANUARY 17, 2025**

BETWEEN

NICKSON HARE KITSAO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By his undated Application, the Applicant seeks that he be admitted to bail/bond pending appeal. In his affidavit in support of the Application, the Applicant stated that he was convicted of the offence of attempted murder contrary to Section 220(a) of the *Penal Code* and sentenced to 11 years imprisonment.
2. Aggrieved by the decision of the trial court, the Appellant filed *Appeal No. E026 of 2024* against both the conviction and sentence. He averred that the conviction and sentence were against the weight of evidence adduced by the prosecution as that the trial court failed to consider the sharp contradictions. Further that the trial court failed to consider his defence. He contended that his appeal is meritorious, raises several issues and has overwhelming chances of success.
3. The Applicant further stated that he is a family man with 1 wife and 5 children. He added that releasing him on bond will allow him to continue with his activities and to take care of his family. He promised to comply with the bail/bond terms and conditions that will be imposed.
4. Although counsel for the Respondent informed the Court that he had filed a replying affidavit, none was in the e-filing platform.



5. The law empowers this Court to consider and if persuaded, grant bail to a convicted person, pending appeal. Section 357 of the *Criminal Procedure Code* makes provision for admission to bail or suspension of sentence pending appeal. Subsection (1) provides as follows:

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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

6. The right to bond or bail or bond guaranteed under Article 49(1)(h) of the *Constitution* is not available to a person convicted and sentenced after trial. This was the holding in *Masrani v R* (1960) EA 321 where the Court of appeal stated:

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.

7. The critical difference between bail pending trial and bail pending appeal is that a person seeking bail pending appeal lacks the presumption of innocence that is guaranteed under Article 50(2)(a) of the *Constitution*. Such person is already convicted and serving sentence, as in the case before me. A court must consider the prospects of success of an appeal as well as the risk of the appellant absconding and strike a balance. The possibility of a convicted person absconding is very real.

8. The Orders sought by the Applicant are discretionary. In the case of *Jivraj Shah v Republic* [1986] eKLR the Court of Appeal articulated the principles to consider in an application for admission to bail pending appeal as follows:

There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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.

9. Flowing from the above, it can be seen that there are 3 considerations in an application for bail pending appeal. First, the existence of exceptional or unusual circumstances and that such circumstances lead the court to fairly conclude that it is in the interests of justice to grant bail. Second, conditions for granting bail will exist if it appears prima facie from the totality of the circumstances that the appeal is likely to be successful. Lastly, that the sentence or substantial part of it will have been served by the time the appeal is heard.

10. The Applicant stated that he seeks to be granted bond so that he can continue with his activities and take care of his wife and 5 children. He promised to comply with the bail/bond terms and conditions



that will be imposed. No evidence was however placed before the Court to demonstrate that the Applicant has a wife and 5 children. He did not provide their names, dates of birth, or the school they attended if at all. He further did not give any details of the activities he intended to continue with. With respect, the foregoing does not constitute exceptional or unusual circumstances to warrant the grant of bail pending appeal.

11. The Applicant has made a solemn promise that he will comply with the bail/bond terms and conditions that will be imposed. The obligation of an accused person or a convicted appellant to attend court when required to do so cannot be gainsaid. Merely stating that he will do what is required of him does not constitute unusual and exceptional circumstances to warrant the grant of his application.
12. As regards the merit of the appeal, the onus is on the Appellant to demonstrate the high probability of success thereof and why justice requires that he should be granted bail. While he asserted that his appeal is meritorious, raises several issues and has overwhelming chances of success, he did demonstrate to the Court in what way or manner the appeal had a high probability or chances of success. The Appellant did not also demonstrate in what way the conviction and sentence were against the weight of evidence adduced by the prosecution or show the alleged sharp contradictions. Additionally, he did not give any details of his defence which the trial court allegedly disregarded. In the premises, the test of demonstrating probability of success of the appeal has not been met.
13. Lastly, the Appellant has not told the Court when he was sentenced and the period he has served out of the 11 years to which he was sentenced. Additionally, he has placed nothing before the Court to persuade it that the interests of justice will be served by granting him bail/bond.
14. In the end and in view of the foregoing, I am not persuaded that there exist any exceptional or unusual circumstances to warrant the grant of bail pending appeal. Accordingly, the Application herein is hereby dismissed.

DATED AND DELIVERED IN MALINDI THIS 17TH DAY OF JANUARY 2025

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M. THANDE

JUDGE

