



**Mwanzia v Republic (Criminal Appeal E092 of 2024)  
[2025] KEHC 3105 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3105 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E092 OF 2024  
RM MWONGO, J  
MARCH 5, 2025**

**BETWEEN**

**JOHNAS MUTUA MWANZIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The appellant/applicant was charged with 5 counts, viz: making false documents, conspiracy to commit a felony, personation and procuring execution by false pretense as detailed in the charge sheet. He was convicted of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts and sentenced to 3 years imprisonment on each of the counts. The sentences were to run concurrently.
2. Dissatisfied with the decision of the trial court in Siakago MCCR 748 of 2021, the appellant/ applicant herein filed a petition of appeal alongside a notice of motion dated 14<sup>th</sup> November 2024 seeking orders that:
  1. Spent;
  2. The honourable court be pleased to admit the applicant to bail pending hearing and determination of the instant appeal;
  3. The honourable court be pleased to order stay and /or suspension of execution of the sentence imposed in Siakago MCCR 748 of 2021 pending hearing and determination if the instant appeal; and
  4. The bond terms be similar to the bond ordered at the trial court.
3. The application is premised on the argument that at the trial court, he was released on cash bail of Kshs.100,000/= and he complied with all the conditions set by that court. He stated that the appeal has high chances of success but the hearing of the appeal may take too long.



4. It was his case that given the court's conduct of appeals it is likely that he will serve his sentence or a substantial part of it by the time the appeal is determined. If this happens, he will suffer irreparable loss if the appeal succeeds. The applicant stated that he is the sole breadwinner of his young family and he is willing to comply with all the conditions set by the court upon granting him bail pending appeal. He urged the court to allow the application.
5. The respondent filed grounds of opposition stating that the application fails to disclose any exceptional circumstances that would warrant granting of the orders sought. That the applicant has not highlighted any weakness in the prosecution's case that would guarantee success of the appeal. The respondent urged the court to dismiss the application.
6. At the hearing of the application, the applicant submitted to the court that he has already served 3 months imprisonment out of the 3-year term. Given the terms of remission of the sentence, he will have about 2 years left on the sentence. He stated that if his application is denied, he will have served a substantial part of the sentence before the appeal is determined, thus the appeal will be rendered nugatory.
7. Further, he argued that the cash bail of Kshs.100,000/= deposited as bail pending trial in the lower court is still being held at Siakago Law Courts, and that it is convenient for the same amount to be transferred to the High Court as bail pending appeal. He stated that he still has a right to be heard by the court on the issues raised in his petition of appeal.
8. The respondent submitted that the applicant has failed to demonstrate that the appeal has high chances of success. That the prosecution's case against the applicant on all the counts was sufficient, and that he was presumed innocent. It was argued that the amount paid for bail pending trial cannot again be used as bail pending appeal.
9. The sole issue for determination is whether the application has merit.
10. An appellate court can only grant bail pending appeal on discretionary basis in light of Article 49(1) (h) of the Constitution which provides for an accused's right to bail as follows:

“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 to be released.”

Clearly, that provision does not refer to a convicted person and thus does not entitle a convicted person any constitutional right to bail pending appeal.

11. The motion thus correctly invokes Section 357 of the Criminal Procedure Rules which provides:

“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...”

12. In the case of *Masrani v R* [1060] EA 321, it was held regarding bail pending appeal 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.”



13. The principles guiding consideration of bail pending appeal are set out in the case of *Jivraj Shah v Republic* [1986] KECA 36 (KLR) as follows:-

- “ 1. The principal contribution 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 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 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.”

14. With regard to establishment of exceptional circumstances, the case of *Daniel Dominic Karanja v Republic* [1986] KECA 37 (KLR) offers guidance as follows:

“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors.”

15. I have perused the petition of appeal. Issues of fact and law have been raised in it. The applicant has challenged the manner in which the convictions were reached and the sentences imposed by the trial court. These are weighty issues to be addressed by this appellate court. As to whether the appeal has high chances of success, the issues raised remain valid and their determination may result in a successful appeal. However, the success or otherwise of the appeal will be adjudged by the court after its hearing.

16. The applicant herein stated that he is the sole breadwinner of his young family. At the trial, he was released on bail terms which he fully complied with until conviction. It is on this basis that he prays that the application be allowed, and that the bail money posted at that trial, be used as bail pending this appeal. According to him, all is not lost since the money is still being held by the trial court. In reference to the case of *Daniel Dominic Karanja v Republic* (supra), these are not exceptional circumstances. In my view, overwhelming chances of the appeal succeeding include such situations as reflect a mistrial, conviction for the wrong offence, or glaring (fatal) errors of procedure or the obvious misapplication of law at the trial.

17. The applicant argued that he has already served 3 months out of the sentence and that he foresees a delay in determining the appeal. He submitted that if the determination delays unduly, he will have served a substantial part of the sentence by the time the appeal is concluded, presumably successfully.

### **Disposition**

18. All factors considered; it is my view that exceptional circumstances have not been established by the applicant to the required threshold for allowing bail pending appeal.



19. Instead, directions are hereby given for a fast-tracked hearing of the appeal, the record of appeal having already been filed. Directions are given that the appellant do file his written submissions to the appeal within 14 days and the respondent to file submissions within 14 days often being served.
20. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 5<sup>TH</sup> DAY OF MARCH, 2025.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Ms. Musoma for State
2. Mr. Kahiga for Appellant
3. Appellant present in Court
4. Francis Munyao - Court Assistant

