



**Thoya v Republic (Miscellaneous Criminal Application  
E002 of 2025) [2025] KEHC 3543 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3543 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2025**

**M THANDE, J  
MARCH 21, 2025**

**BETWEEN**

**ROBERT BAYA THOYA ..... 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 and sentenced to 15 years imprisonment in Malindi Sexual Offences Case No. 22 of 2022.
2. Aggrieved by the decision of the trial court, the Appellant filed Appeal No. E009 of 2024 against both the conviction and sentence. He averred that the appeal raises substantial and arguable points of law with a high probability of success. He contends that there was misapplication of the law by the trial court as well as failure to consider exculpatory evidence. Additionally, that the sentence was excessive and harsh.
3. The Applicant stated that he was granted bond during trial and faithfully attended court and complied with all conditions. He is young and that his continued incarceration will cause him undue hardship and unnecessary deprivation of liberty and violate his rights under Articles 28, 49(1)(h) and 50 of the *Constitution*. He further stated that he is not a flight risk and will abide by all conditions set by this Court if granted bond.
4. The Respondent opted not to file any response to the Application.



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. Article 49(1)(h) of the *Constitution* guarantees to every accused person the right to bond or bail. This right is however 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 applicant 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 to be made 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 because he is young and that his continued incarceration will cause him undue hardship and unnecessary deprivation of liberty. He promised to comply with the bail/bond terms and conditions that will be imposed. With respect, the foregoing does not constitute exceptional or unusual circumstances to warrant the grant of bail pending appeal. As a convict who has been sentenced to a term of imprisonment by a court of competent jurisdiction, the Applicant cannot speak of deprivation of liberty.
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 is mandatory. 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 Applicant to demonstrate the high probability of success thereof and why the interest of justice requires that he should be granted bail. While he asserted that his appeal is meritorious, raises substantial and arguable points of law with a high probability of success, he has not demonstrated to the Court in what way or manner the appeal had a high probability or chances of success. He has not stated in what manner the trial court misapplied the law or what exculpatory evidence it failed to consider. The Applicant has also not demonstrated in what way that the sentence was excessive and harsh. In the premises, the test of the appeal having a high probability of success has not been met.
13. Lastly, the Applicant will not have served his sentence or a substantial part of it, by the time the appeal is heard. This is because, having been sentenced on 28.10.23, he has only served about 1½ years of his 15 year sentence. As such, the conditions for granting the Applicant bail/bond pending appeal do not exist. Additionally, the Applicant 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, the Court finds that the Application lacks merit and the same is hereby dismissed.

**DATED and DELIVERED in MALINDI this 21<sup>st</sup> day of March 2025.**

**M. THANDE**

**JUDGE**

