



REPUBLIC OF KENYA



**Ndayisenga alias Sylvester Isangi v State (Criminal Appeal
E023 of 2025) [2025] KEHC 4957 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E023 OF 2025**

A MABEYA, J

APRIL 23, 2025

BETWEEN

SYLVESTRE NDAYISENGA ALIAS SYLVESTER ISANGI APPELLANT

AND

STATE RESPONDENT

RULING

1. This ruling determines the application dated 27/2/2025 in which the appellant sought to be admitted to bail pending the hearing and determination of his appeal.
2. The application was brought pursuant to section 357 (1) of the *Criminal Procedure Code* and was based on the grounds set out in the body of the Motion as well as the supporting and further affidavits sworn on the 27/2/2025 and 25/3/2025, respectively.
3. The appellant was charged and convicted of the offence of knowingly making a false declaration for the purpose of obtaining a Kenyan passport contrary to section 4 (2) of the Kenya Citizenship & Immigration Act 2011. He was sentenced to serve a 3year sentence.
4. The gravamen of the appellant's application was that he is suffering from a chronic medical condition being Chronic Bronchitis, Allergic Conjunctivitis and High Blood Pressure triggered by the present prison conditions that led to his having night attacks and chest pains risking his health condition.
5. That his appeal has very high chances of success; that he is not a flight risk and he undertook to attend Court as and when required. Further, that he was willing to comply with any condition the Court would deem fit to impose as security for his attendance.
6. The appellant relied on a medical report dated 19/3/2025 that confirmed his diagnosis of BHP, Cystitis and Severe Hypertension. Further, the medical report provided that the appellant needed to undergo



a delicate & urgent prostatectomy surgery that required post-operative care that would ideally not be offered within the prison environment.

7. The state opposed the application vide grounds of opposition dated 17/3/2025. It was contended that there was no medical records and/or documents to prove the appellant's claim; that the appellant is a Rwandese National and a high flight risk who was found in Kenya illegally and may thus jump bail or abscond. That the appeal had no chances of success as the evidence tendered by the prosecution was overwhelming and well corroborated.
8. The state relied on the cases of *Osore v Republic (2024) (Criminal Appeal E030 of 2023) [2024] KEHC 1760 (KLR) 22 February 2024 (Ruling)* and that of *Mwangi v Republic (Criminal Case E019 of 2023) [2024] KEHC 9453 (KLR) (25 July 2024) (Ruling)*.
9. The parties made oral submissions in support of their cases. It was submitted for the appellant that he had a family that resides in Kisumu with no family in Rwanda. That he had been fined and a deportation order issued but that in the circumstances of the case, he be allowed to pay the fine and the deportation order be stayed until the determination of the appeal.
10. Mr. Kipruto for the state submitted that the appellant had not provided any medical records to prove the fact that he had Chronic Bronchitis & HBP. That his further supporting affidavit introduced a new condition of prostate cancer which was not in the original grievances that he claimed to suffer thus demonstrating the same to be an afterthought.
11. That the fact that the appellant had not regularized his status was a serious ground to be denied bond as he is a flight risk. That he had not explained where he would stay during the pendency of the appeal. That the right of appeal under Article 49 of the [Constitution](#) was not absolute and that there was no evidence that the appellant was a truck driver as alleged.
12. In rejoinder, Mr. Emukule, Learned Counsel for the appellant submitted that at the time the original documents were filed, the appellant's condition was explained as that time. That the appellant subsequently attended Kisumu Referral Hospital leading to the updated medical report of 19/3/2025.
13. Learned Counsel submitted that the appellant had resided in Kenya since 2005 with a family. That the appellant was seeking medical attention within the country and had no intention of leaving Kenya. Counsel urged the Court to temper justice with mercy as the appellant's condition was deteriorating.
14. The only issue before this Court is whether the Appellant should be admitted to bond pending Appeal. The right to bail pending appeal is premised on section 357 (1) of the [Criminal Procedure Code](#) which states that: -

“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.”

15. Under Article 49 of the [Constitution](#), a person awaiting trial is entitled to bail as a matter of right. That right can only be taken away where the prosecution demonstrates that there are compelling reasons to deny it. On the other hand, however, bail pending appeal is at the discretion of the Court. In that regard, the onus is on an applicant to convince the Court as to why the discretion should be exercised in his favour. See *Charles Owanga Alouch v DPP [2015] eKLR*.



16. In *Chimambhai v Republic* 1971 EA 343, J. Harris observed as follows: -

“The case of an appellant under sentence of imprisonment seeking bond 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 ...”

17. In *Jivraj Shah v Republic* [1986] KLR 605, the court set out the applicable principles as follows: -

“(1) The principal consideration 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 face* 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.”

18. Thus, an appellant needs to demonstrate that the appeal has overwhelming chances of success and that there are exceptional circumstances warranting his release on bail. This is so because, such an applicant no longer enjoys the presumption of innocence having already been convicted of an offence.

19. I have considered the Petition of Appeal attached to the appellant’s application. Evidently, the only substantial or weighty point of law raised is that the appellant did not make an equivocal plea of guilty because of the obvious language barrier in the proceedings. The other grounds of appeal are basically faulting the trial court’s exercise of discretion in sentencing.

20. Unfortunately, only the appellant’s Petition of Appeal was availed but not the proceedings. This Court is thus not in a position to peruse the record to establish whether an arguable appeal with high chances of success have been disclosed by the grounds of appeal.

21. At this stage, the Court ought to be cautious not to try and determine the Appeal. This should await the appropriate time. Has the appellant placed before this Court evidence of exceptional and unusual circumstances to warrant him bail?

22. The appellant pleaded that he was suffering from a chronic medical condition being Chronic Bronchitis, Allergic Conjunctivitis and High Blood Pressure. In support of this assertion, he adduced a medical report dated 19/3/2025 that confirmed his diagnosis of BHP, Cystitis and Severe Hypertension and that he needed to undergo a delicate & urgent prostatectomy surgery that require post-operative. The said medical report further stated that the appellant was due for surgery on the 28/4/2025.

23. The medical report relied on by the appellant is from a Government Institution, The Kisumu County & Referral Hospital. Its authenticity has not been challenged by the state save for the submission that



the report provided for a new diagnosis, prostate cancer, which had not been pleaded as at the time the applicant initially approached the Court.

24. The State argued that the appellant was a flight risk for being a Rwandese national. That he was likely to jump bail. However, this was countered by the appellant that he had resided in Kenya since 2005 with a family in Kisumu and further that he was seeking medication within Kenya which was unavailable in Rwanda.
25. In this Court's opinion, the appellant's ill health and the upcoming surgery constitute exceptional and unusual circumstances in this case. There was no evidence to unseat these two issues that were advanced from a Government institution of great repute. There was no evidence to rebut the contention that the applicant was suffering life threatening deceases; that he needed an urgent surgery whose post procedure required careful attention not found in the prison institution.
26. In view of the foregoing, the Court hereby finds that the appellant's application for bail pending appeal is merited. The same is therefore allowed subject to the applicant posting a bone of Kshs.200,000/- with a Kenyan surety of a similar amount.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF APRIL, 2025.

A. MABEYA, FCI Arb

JUDGE

