



**Lubisia v Republic (Criminal Appeal E021 of 2025)  
[2025] KEHC 6820 (KLR) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6820 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E021 OF 2025**

**S MBUNGI, J**

**MAY 26, 2025**

**BETWEEN**

**ALVIN WERE LUBISIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant/appellant filed a motion dated 9<sup>th</sup> April, 2024 in this court under Certificate of Urgency seeking the following orders:
  - a. Spent
  - b. Spent
  - c. That this Honorable Court be pleased to admit and/or grant the appellant/applicant herein bond/bail pending the hearing and determination of the appeal against his conviction and sentence delivered on 10<sup>th</sup> January, 2025 in Kakamega Chief Magistrate’s Court Criminal Case No. E099 of 2023.
  - d. Any other orders that the Honorable Court may deem appropriate to serve the ends of justice.
2. The application was premised on the following grounds:
  - i. That the applicants were convicted on 10<sup>th</sup> January, 2025 and sentenced on 10<sup>th</sup> February, 2025. He was sentenced to twenty years imprisonment, but that’s the applicant have filed an appeal before the High Court (HCCRA E021 of 2025) which is pending hearing and determination. He has listed three strong grounds of Appeal. That appeal is strong and has high chance of success upon hearing.



- ii. That by the time the substantive appeal is heard and determined the Appellant would have served a good portion of the sentence and subsequent reversal of the decision sought to be appealed will not undo the damage he would have suffered as a result of the incarceration.
  - iii. That the Applicant is in poor health and the condition is already deteriorating as a result of the incarceration that requires specialized treatment outside of the prison clinic.
  - iv. That the Applicant was out on bond throughout the duration of the trial in the subordinate Court and he fully complied with the bond terms until the matter was finalized, without missing a single mention or hearing. He is not a flight risk.
  - v. That the Applicant is perennially sick with chronic anemia and other related health complications and he is currently incarcerated without access to proper medicines which he needs for his survival. The Honorable Court should consider and give appropriate weight to the Applicant's health conditions and grant him bond pending appeal to get proper medical attention. Holding the Appellant in prison with his given health conditions is nearly a death sentence.
  - vi. That it is in the interest of justice that the Orders sought be granted as prayed.
3. The application was supported by an affidavit sworn by Charles Malalah, learned counsel for the applicant who stated that the Applicant was convicted on 10<sup>th</sup> January, 2025 and sentenced on 25<sup>th</sup> February, 2025 to twenty years imprisonment. He has since filed the present appeal which is pending hearing and determination.
  4. He deponed that the appeal is strong and has high chances of success upon hearing and averred that by the time the appeal is heard and determined, the appellant would have served a good portion of the sentence and subsequent reversal of the decision sought to be appealed will not undo the damage he would have suffered as a result of the incarceration.
  5. Further, counsel stated that the Applicant is in poor health, suffering from chronic anemia and his condition is deteriorating in prison as a result of the incarceration. He further stated that the treatment the applicant is receiving in Prison is inadequate and that he requires further specialized medical attention for his medical condition.
  6. It was further stated that the applicant was out on bond during the entire trial period before the subordinate court and complied fully with all bond terms, never absconding or missing any mention or hearing. As such, he is not a flight risk and is willing to abide by any terms and conditions that this court may impose should bond be granted.
  7. Counsel deponed that the appellant is perennially sick with chronic anemia and other related health complications and he is currently incarcerated without access to proper medicines which he needs for his survival. Holding the Appellant in prison with his given health conditions is akin to a death sentence.
  8. On 15.04.2025, this court orders the probation office do conduct a social inquiry and file a pre-bail report, and that parties file written submissions. Parties complied. At the time of writing this ruling, no pre-bail report had been filed.

### **Applicant's Case**

9. The bulk of the applicant's submissions reiterated the contents of his application and supporting affidavit.



10. The applicant submitted that he should be granted bond pending appeal as mandated by the provisions of Section 357(1) of the *Criminal Procedure Code* which allows a court to grant bond pending appeal upon the satisfaction that the appeal has been properly filed.
11. The applicant submitted that the principles governing the grant of bail pending appeal were laid down in the seminal case of *Jivraj Shah v Republic* [1986] KLR 605, and have been consistently cited with approval by the courts. These include: The existence of exceptional or unusual circumstances, A prima facie showing that the appeal is likely to succeed or raises substantial questions of law, That by the time the appeal is heard, a substantial part of the sentence may have been served. He cited *Tom Omare Magutu v Republic* (Criminal Appeal No. 89 of 2017), where the court emphasized that where there is a high likelihood of success on appeal, or the appeal raises substantial legal questions, bail pending appeal may be granted.
12. In support of the claim that the appeal has high chances of success, the applicant submitted that the grounds of appeal raise serious legal issues, particularly relating to the identification of the appellant and proof of penetration, which are both critical elements of the offence of defilement. It was submitted that the prosecution's evidence on these elements was inadequate and failed to meet the standard of proof beyond reasonable doubt.
13. Counsel for the applicant further submitted that the applicant was not a flight risk, and placed referred the court to the case of *Nicholas Kabira Wangai v Republic* [2014] eKLR, where the High Court admitted the appellant to bond despite the conviction for attempted defilement, finding the appeal arguable and the applicant not to be a flight risk. Further, he averred that the applicant never missed court during his trial, always complied with all bond conditions, and undertook to obey any terms this court may impose should he be released on bond pending appeal.
14. The applicant has also cited *Peter Hinga Gatho v Republic* (Criminal Appeal No. 2 of 2016), and *Arvind Patel v Uganda*, where courts emphasized that the combination of factors such as character, being a first offender, presence of exceptional circumstances, and compliance with bond terms during trial, all contributed to the decision to grant bail pending appeal.
15. Counsel averred that the applicant's age, academic aspirations, and family obligations provided further justification for the court to grant bond/bail pending appeal. He submitted that the appellant was young, and had sat for his KCSE exams in 2024, attaining a C- grade, and had intended to join a TVET or TTI to pursue skill-based education. In addition, he submitted that the applicant/appellant was the sole caregiver to his blind mother, Roslyn Were, who is now left unattended and helpless in the village following his incarceration.
16. It was submitted that continued imprisonment would not only undermine the applicant's right to pursue his education and rebuild his life but would also amount to indirect punishment of his dependent mother, who is now suffering without his care.
17. He prayed that his application be allowed as prayed.

### **Respondent's Case.**

18. Vide submissions dated 07.05.2025, prosecution counsel averred that the most outstanding ground cited by the applicant in support of his motion was that the appeal has high chances of success.
19. On the merits of the appeal, prosecution counsel submitted that there were obvious inconsistencies and evidentiary gaps in the trial court proceedings, which cast doubt on the strength of the prosecution's case and the trial court's findings on crucial elements of the offence of defilement.



20. Finally, the respondent highlighted the applicant's age and academic standing, affirming that he had recently completed his KCSE exams and is still a young adult, likely 19 years old. Given the appeal's arguable grounds, the respondent submitted that the State would not oppose the applicant's release on bond pending appeal.

### **Analysis and Determination.**

21. I have looked at the application, the court record, and the submissions by both parties.
22. The key issue for determination is whether the applicant has made out a case to warrant this court to grant him bail/bond pending the hearing and determination of this appeal.
23. Bond or bail pending Appeal is provided for under Section 357 of the *Criminal Procedure Code* (CPC). It provides;

“ 357. Admission to bail or suspension of sentence pending appeal

- (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: 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.
- (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.
- (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.”

24. I have also seen the charge sheet, the appellant/applicant herein was charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He denied both charges. The case proceeded to trial and the trial magistrate found the applicant/applicant guilty and sentenced him to serve twenty years in prison.
25. The applicant/appellant herein is a convict serving sentence. Bail/bond pending appeal, unlike bail/bond pending trial, is not a constitutional right. However, this court has discretionary powers to grant bond/bail pending Appeal.
26. In the case of Francis Kamote Mutua v. Republic [1988] eKLR (Platt, Apaloo JJA & Masime, Ag JA), the court held that an appellant, seeking bail pending appeal, is a convicted person, serving sentence



- for his crime. It would be open to the court to grant bail/bond, subject to such terms or conditions as the court may deem reasonable.
27. The principles for the grant or denial of bond/bail pending Appeal were set out in *Jivraj Shah v Republic (supra)*, *Ademba v Republic (supra)* and *Dominic Karanja v Republic (supra)* which outline the considerations for the court to grant or deny bond pending appeal as follows;
    - a. That the Appeal has overwhelming chances of success.
    - b. The previous good character of the Applicant
    - c. The existence of exceptional or unusual circumstances.
    - d. The sentence or substantial part of it will have been served by the time the Appeal is heard.
  28. The Applicant has complied with Sec 357 (1) of the *Criminal Procedure Code* by filing a memorandum of appeal dated 24<sup>th</sup> February, 2025.
  29. I have considered the Appeal filed. Both parties, in their submissions have averred that it raises triable grounds and has high chances of success. At this stage, the court ought to be cautious not to try and determine the Appeal.
  30. Learned counsel for the applicant/appellant has also submitted that the applicant is not a flight risk, having been out on bond during trial and faithfully attended court. He further submitted that the applicant is willing to attend court whenever needed. He has also submitted that the applicant suffers from anemia and lacks access to the required medical care which is inaccessible from prison. However, these two issues have no bearing on whether he is entitled to bail pending Appeal. No evidence has also been tendered to support the applicant's illness claim.
  31. The Court of Appeal in the case of *Dominic Karanja v Republic* [1986] KLR 612 stated that:-
    - “(a) 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;
    - (b) The previous good character of the Applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;
    - (c) A solemn assertion by an applicant that he will not abscond if released, even if sureties support it, is not sufficient ground for releasing a convicted person on bail pending Appeal;
  32. As to the fourth ground for granting bond/bail pending appeal, from the court file, the record of appeal is ready, it therefore means that what is remaining is admission of appeal and thereafter directions on how to dispose the appeal. The Appellant was sentenced to 20 years imprisonment and it is apparent that the Appeal will be concluded in less than one year. It therefore follows that the Appellant would not have served a substantial part of his sentence.
  33. The application is hereby dismissed.
  34. In the interest of justice and the expedient disposal of the matter, I hereby issue the following orders:



- I. The appeal filed is hereby admitted for hearing.
- II. Let the applicant serve the appeal and record of appeal upon the respondent today.
- III. The appeal shall be canvassed by way of written submissions.
- IV. The appellant is granted 14 days to file and serve, thereafter the respondent shall have 14 days to file a response.
- V. Judgment on July 8, 2025.

35. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF  
MAY, 2025**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Court Assistant – Elizabeth Angong'a

