



REPUBLIC OF KENYA



**KENYA LAW**  
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**Amolo v Republic (Criminal Appeal E010 of 2025)  
[2025] KEHC 8096 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL APPEAL E010 OF 2025  
FN MUCHEMI, J  
JUNE 5, 2025**

**BETWEEN**

**MICHAEL OMONGE AMOLO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Brief Facts**

1. This application dated 5<sup>th</sup> March 2025 seeks for orders for release of the accused on bail pending the hearing and determination of the appeal.
2. The applicant was charged in Criminal Case No. E332 of 2025 at the Senior Principal Magistrate’s Court at Ruiru with the offence of having suspected stolen property contrary to Section 323 of the *Penal Code*. The applicant pleaded guilty to the offence and was sentenced to twelve months imprisonment.
3. The applicant states that he was arrested on 23<sup>rd</sup> February 2025 on allegations of that he had stolen a television set. The applicant states that while in custody at Ruiru police station, a police officer informed him that court sessions were currently being held virtually and the said police officer held up a phone and informed him that they were logged into the court session. The applicant avers that the proceedings lasted for about one minute and he neither heard nor saw the learned trial magistrate during the court virtual session. Further, the applicant states that he was not shown the charge sheet on any screen to enable him appreciate its contents.
4. The applicant argues that the proceedings were not conducted in a manner that was possible to understand the charges to enable him respond appropriately. Had the proceedings been conducted in an appropriate manner, the applicant states that he would have pleaded not guilty. He further argues



that the impugned proceedings contravene his right to a fair trial contrary to Articles 10, 25(c), 27(1) & (2) and 50(1) & (2) of *the Constitution*.

5. Further, the applicant states that the learned trial magistrate sentenced him to 12 months imprisonment without an option of a fine and without any justification whatsoever.
6. The applicant states that he has made an application that true copies of the transcripts and video recordings of the virtual court session held on 24/2/2025 through the learned magistrate's court link <https://tinyurl.com/3fxce8un> when he was arraigned in court be availed for scrutiny by this court.
7. The applicant states that the appeal raises weighty issues of both fact and law which he should be allowed to canvass on appeal without the appeal being rendered a mere academic exercise.
8. The applicant avers that he is asthmatic and the environment in the facility is not favourable to his health; he is likely to suffer if he continues to remain in custody given his medical condition.
9. The applicant further states that he recorded a statement at Ruiru police station and explained that the alleged television set came into his possession when it was sold to him at Kshs. 20,000/- by one Elijah, who is well known to him and that he had been playing pool with him on 21/2/2025 at Fort Jesus Estate, Ruiru.
10. The applicant argues that the charge sheet includes a subwoofer and a 13 kg Ola Mpishi, items which belong to him. Thus the charge sheet does not state who the items belong to or the complainant thereof.
11. The respondent filed a Replying Affidavit on 25<sup>th</sup> April 2025 to the effect that the intended appeal has no chances of success due to the overwhelming evidence against the appellant. The appellant was convicted on his own plea of guilty and was sentenced to fifteen (15) years imprisonment. The respondent argues that the applicant has to discharge the burden of proof that the appeal has high chances of success as unlike bail pending trial, bail pending appeal is not a constitutional right. There is a presumption that the applicant was lawfully convicted unless the contrary is proved.
12. Furthermore, the respondent states that the applicant has not discharged the burden that he shall serve a substantial part of the sentence in the event the appeal succeeds nor has the applicant demonstrated any exceptional circumstances to warrant the court's discretion to grant bail pending appeal.
13. The respondent argues that currently the law and practice favour quick determination of matters without unreasonable delay and thus the applicant is unlikely to serve a substantial part of the sentence before the appeal is heard and determined.
14. The respondent states that the appellant has not produced any medical documents to prove that he is asthmatic and further, the prison department addresses the medical needs of all the inmates. Further, the respondent argues that a solemn assertion by the appellant that he is the sole breadwinner is not sufficient ground for releasing a convicted person on bail pending appeal.
15. Parties put in written submissions.

### **The Applicant's Submissions**

16. The applicant relies on the cases of *Jivraj Shah vs Republic* [1986] eKLR and *Yahya Ahmed Shee vs Republic* [2021] eKLR and submits that he has demonstrated exceptional circumstances to warrant grant of bail pending appeal as the court will only be able to ascertain whether plea was equivocal or not upon reviewing certified true copies of the transcripts and video recordings of the virtual court session.



17. The applicant argues that under Section 323 of the *Penal Code*, there is a special procedure for taking plea. The trial court must seek an explanation from the accused how the goods came into his possession before entering a plea of guilty. The applicant relies on the cases of *Murigi vs Republic* [1983] eKLR and *Stephen Chege vs Republic* [1983] eKLR and submits that under Section 323 of the *Penal Code*, an accused commits no offence until he fails to give an account to the satisfaction of the court of how he came by the suspected goods. The applicant argues that in the instant case, the trial court did not seek an explanation from him as to how the goods came into his possession.
18. Alternatively, the applicant argues that he seeks to demonstrate that in so far as Section 323 of the *Penal Code* mandatorily requires an accused to justify possession of goods before plea is entered then the section unduly shifts the burden to the accused hence the section is unconstitutional.
19. The applicant refers to Articles 25(c) and 50 of *the Constitution* and the cases of *Elisha Kare Busienei & 3 others vs Japhet Kipyego Chepkwony & 3 Others* [2020] eKLR; *Nathan Ngumabo Kata vs Attorney General & Another* [2022] eKLR; *Patriotic Guards Ltd vs James Kipchirchir Sambu* [2018] eKLR and *JMK vs MWM & Another* [2015] eKLR and submits that failure for the trial court to call for an explanation before entering a plea of guilty required by Section 323 of the *Penal Code* amounted to condemning him unheard.
20. The applicant argues that the trial magistrate did not give any reasons why she did not accord him the option of a fine in substitution of imprisonment. The applicant submits that the appeal is highly meritorious since the circumstances of the case indicate that this is a suitable case for the honourable court to interfere with both on conviction and sentence. Further, the applicant submits that the sentence or a substantial part of it will have been served by the time the appeal is heard. The applicant states that the sentence runs from 24/2/2025 and he has already served 2 months.

#### **The Respondent's Submissions.**

21. The respondent relies on Section 357(1) of the *Criminal Procedure Code* and the case of *Jivraj Shah vs Republic* [1986] eKLR and submits that the applicant has not met the required threshold for an application for bail pending appeal. Further, the respondent relies on the case of *Somo vs Republic* [1972] EA 476 and submits that the appeal does not have overwhelming chances of success as the evidence shows that the applicant was properly convicted. The respondent further submits that the applicant has failed to demonstrate that he shall serve a substantial part of the sentence if the appeal is likely to succeed.
22. The respondent relies on the case of *R vs Kanji* [1946] 22 KLR and submits that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.
23. Relying on the case of *Chimambhai vs Republic* [1971] EA 343, the respondent contends that currently, the law and practice favour quick dispensation of matters without an unreasonable delay. The respondent argues that the applicant failed to discharge the burden of proof that he is likely to serve a substantial part of the sentence before the appeal is heard which in turn could be successful hence leading to prejudice.
24. The respondent argues that the current court does not have jurisdiction to review or set aside orders made on 10<sup>th</sup> March 2023 before the High Court in Kiambu which denied the applicant bond pending appeal. The respondent submits that this court does not have the jurisdiction to entertain a matter that has been heard and determined by a court of similar jurisdiction, it has now become *functus officio*.



## The Law

### Whether the applicant has met the threshold for granting bail pending appeal.

25. Section 357(1) of the *Criminal Procedure Code* provides for the granting of bail pending appeal, it states that:-

After 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.

26. The principles for granting bond pending appeal were reiterated in the case of *Jivraj Shah vs Republic* [1986] KLR 605 which laid down the principles as follows:-

- a. 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.
- b. 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.
- c. 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.

27. It is trite law that in considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration the following factors.

### Does the appeal have overwhelming chances of success?

28. The applicant argues that the appeal has a high probability of success as his plea was unequivocal.
29. I have carefully perused and examined the trial court proceedings and judgment. I have further examined the grounds of appeal and without pre-empting the appeal, that the said grounds do not disclose the existence of an appeal with an overwhelming chance of success. This does not mean that the appeal is not arguable. The appellant will still have his day in court to argue his appeal.

### Is there a possibility of delay in hearing and determining the Appeal?

30. The applicant was sentenced on 24<sup>th</sup> February 2024 to serve twelve (12) months imprisonment. Thus it is highly unlikely that he shall have served a substantial part of the sentence before the appeal is heard. The court diary is accommodative of appeals whereas hearing dates are available. As such, I am of the view that the applicant will not serve a substantial part of his sentence before the appeal is heard and determined.

### Demonstration of exceptional or unusual circumstances

31. In *Dominic Karanja vs Republic* [1986] KLR 612 the Court of Appeal held: -



- 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 exceptional circumstances where there existed medical facilities for prisoners;
  - c. A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;
32. Similarly in *Peter Hinga Ngotho vs Republic* [2015]eKLR it was held that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.
33. In the instant case, the applicant argued that he is asthmatic and the environment in the facility is not favourable to his health. Further, the applicant states that he is sole breadwinner and father of a minor who solely depends on him for school fees, food, clothing and all her needs.
34. Relying on the above cited cases, it is my considered view that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal. The fact that the applicant suffers from asthma and further that he is the sole breadwinner and father to a minor who depends on him do not constitute any unusual or exceptional circumstances.
35. I therefore find that the application dated 5<sup>th</sup> March 2025 lacks merit and is hereby dismissed.
36. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5<sup>TH</sup> DAY OF JUNE 2025.**

**F. MUCHEMI**

**JUDGE**

