



**Onuong'a v Republic (Criminal Appeal E084 of 2024)
[2025] KEHC 7688 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 7688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E084 OF 2024**

JM NANG'EA, J

JUNE 5, 2025

BETWEEN

JOSPHAT OGWAKA ONUONG'A APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. For the court's determination is a Notice of Motion dated 3rd February 2025 filed on 4th March 2025 by which the Applicant seeks bail pending hearing and determination of this appeal, and that the Court does make any other order it deems fit.

Applicant's Affidavit Evidence

2. The Application is propped by the grounds set out on its face and the Supporting Affidavit sworn by the Applicant on 3rd February 2025. The Applicant avers that he was charged before Nakuru Chief Magistrate's Court Sexual Offences Case No. E150 of 2021 with the offence of defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act*. After full hearing of the case, he was convicted thereof and sentenced to 20 years imprisonment.
3. Aggrieved by the conviction and sentence, he preferred this Appeal. He avers inter alia that the Appeal raises triable issues with a high probability of success based on his Memorandum of Appeal exhibited; that if he is not granted bail his appeal will be rendered nugatory should he succeed given that he may serve a substantial part of his sentence by the time the appeal is heard and determined.
4. He further states that he is the sole bread winner of his family and has always attended Court when required and will continue to do so if released on bail pending conclusion of the Appeal.



Respondent's Affidavit Evidence

5. The Respondent opposes the Application through a Replying Affidavit sworn by Nancy Sang (Prosecution Counsel) on 10th March, 2025. It is deposed inter alia that Appeals lodged in this court are being admitted and fixed for hearing fast enough and therefore this Appeal will also be disposed of expeditiously. It is observed that the Applicant has only served 02% of his sentence and he has not demonstrated that there are exceptional circumstances warranting grant of bail/bond pending appeal in the interests of justice.
6. While acknowledging that the Appellant has a right to be admitted to bail pending appeal, Counsel avers that the right is not absolute discretionary. According to the Prosecution Counsel, merely because the Applicant did not breach bond/bail terms during the trial process, or that the appeal is arguable is not enough to entitle him to bail/bond pending appeal.

Applicant's Submissions

7. The Appellant submitted that he has met all the conditions necessary to allow the Application. He argues that Grounds of Appeal need not to be confined to pure points of law only so long as the appeal raises a substantial question of law requiring the court's determination.
8. The Applicant relies on the case of *Onyancha vs Republic* [2023] KEHC (KLR) and *Samuel Macharia Njagi vs Republic* [2013] eKLR to submit that he need not satisfy every criterion but has to demonstrate application of two or more criteria that were highlighted in the Ugandan case of *Avid Patel vs Uganda S.C. Cr Appeal No. of 2013*, to wit; whether the Appellant is a first offender; the Appeal having been admitted, the offence not involving personal violence; the character of the Appellant; the Appeal not being frivolous; any substantial delay in determination of the Appeal; whether the Appeal has a reasonable chance of success and whether the Appellant had been on bail/bond at trial and complied with terms thereof.

Respondent's Submissions

9. By written submissions dated 10th March, 2025, the Respondent reiterates that the right to bond/bail pending trial guaranteed under Article 49 of the *Constitution* can be taken away where the prosecution demonstrates that there are compelling reasons for denial. Counsel, however, points out that bail pending appeal is at the discretion of Court as held in the case of *Charles Owanga Aluoch vs Director of Public Prosecutions* [2015] eKLR. According to the Respondent, the onus is on the Applicant to show why the court's discretion should be exercised in his favour.
10. Counsel for the Respondent also references the case of *Chimambhai vs Republic* [1971] EA 343 where Harris J. observed that the strongest element of presumption of innocence lacks in an application such as this one where an Appellant is seeking bond/bail pending appeal since there is conviction.
11. It is further submitted on behalf of the Respondent that the principles governing grant of bail pending Appeal were set out in case of *Jivrai Shah vs Republic* [1986] eKLR that is, the existence of exceptional circumstances; a prima facie from the totality of the circumstances that the Appeal is likely to succeed on account of 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. The court is told that the Applicant has not met the conditions, and the court is therefore urged to dismiss the Application.



Analysis and determination

12. Having considered the Application and the rival arguments advanced by Counsel, the statutory basis for an application for bail/bond pending appeal is Section 357 of the *Criminal Procedure Code* which enacts-

“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.”
13. The Applicant indeed has the right to release on bail/bond pending Appeal which right is not absolute but at the discretion of the Court. The court’s discretion is of course exercised in a judicious and not capricious manner depending on the facts and circumstances of the case before the court.
14. In *Jivrai Shah vs Republic* [1986] eKLR and *Samuel Macharia Njagi vs Republic* [2013] eKLR supra cited by Counsel for the parties, the following are among factors to consider in determination of an application for bail/bond pending appeal;
 - a. That the Appeal has overwhelming chances of success.
 - b. The sentence or a substantial part of it will have been served by the time the Appeal is heard.
 - c. The previous character of the Applicant.
 - d. The offence does not involve personal violence.
 - e. The existence of exceptional or unusual circumstances.
 - f. Compliance with bail and bond terms during trial.
15. As whether the appeal is likely to be successful, I have perused the Memorandum of Appeal which faults the trial court for various factual and legal reasons. The record of the lower court has not, however, been availed for this court to appreciate the decision of the learned trial magistrate. In fact the Record of Appeal does not seem to have been compiled and the Appeal admitted for hearing.
16. The Applicant is apprehensive that he stands to serve out a substantial part of the prison term before his appeal is heard and determined. He was sentenced on 8th October, 2024 for a 20-year imprisonment sentence as deduced from the Memorandum of Appeal. It is unlikely that he will have served out a substantial portion of the long sentence before his appeal is heard and determined.
17. The Applicant is charged with the offence of defilement and sentenced under Section 8 (1) (3) of the *Sexual Offences Act*. The offence is one involving personal violence and so the legal threshold is not met on this score as well.
18. As regards the question of whether or not there are exceptional circumstances for grant of bail/bond at this stage of the proceedings, Blacks Law Dictionary defines exceptional circumstances as:-

“Conditions which are out of the ordinary course of events; unusual or extraordinary circumstances.”
19. No exceptional circumstances are discernible on the material before the court. No substantial question(s) of law have been demonstrated to arise either. The Court has not also been provided with



evidence as to the character of the Applicant. The Applicant's assertion that he is the sole bread winner; he was a first offender and that he never breached the terms of bail/bond during trial do not in my view amount to exceptional circumstances for grant of bail/bond pending Appeal contemplated in law.

20. It is further worth noting that the Applicant has been convicted of the offence of defilement. In as much as this court will eventually determine whether or not the conviction is lawful, the right to the presumption of innocence no longer applies unlike in situations relating to arrested persons as per the provisions of Article 49 (1) (h) of the Constitution.

21. The upshot is that the Application 3rd February, 2025 is devoid of merit and is dismissed.

J. M. NANG'EA

JUDGE

RULING DATED, SIGNED AND DELIVERED THIS 5TH DAY OF JUNE, 2025 IN THE PRESENCE OF;

The Respondent's Counsel, Ms Sang

The Applicant's Counsel, Mr Akang'o

The Applicant,

J. M. NANG'EA

JUDGE

