



**JWS v Republic (Criminal Appeal E131 of 2024)
[2025] KEHC 10390 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E131 OF 2024**

**REA OUGO, J
JULY 2, 2025**

BETWEEN

JWS APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, through a motion dated 12th November 2024, brought under section 350 (2) (iv) & (v), 356, 357,358 of the Criminal Procedure Code, seeks the following orders;
 - i. Spent
 - ii. That the appellant/ applicant be granted leave to tender further and/or additional evidence on appeal.
 - iii. That an order be issued directing Safaricom PLC to produce records of certified M-Pesa statements for the Account holder JS of number xxx for the period January 2021 to September 2021, further Safaricom OLC to produce Shor Message Text transcripts between the Appellant’s phone number xxx and the complainant’s phone number xxx for the same period.
 - iv. That the appellant/ applicant be granted bond pending hearing and determination of this appeal.
 - v. That the Appellant/ applicant be granted leave to amend the notice of appeal.
2. The application is supported by the appellant/applicant’s affidavit dated 12 November 2024. She deposes as follows: she was charged with robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. She was convicted and sentenced to death by the trial court. It was the complainant’s evidence that they had met for the first time on 9 September 2021, the day she



allegedly committed the offence. During her defence, she testified that she lived with the complainant as husband and wife, and at the time of the alleged offence, she was pregnant with his child. She stated that the incident was a case of domestic violence, during which she was assaulted by the complainant. Counsel representing her during the trial, however, did not advise her to obtain call logs and text messages between herself and the complainant to prove that they were a couple. If the court grants leave to adduce additional evidence, she will be able to demonstrate that she was not a stranger to the complainant as alleged, which could influence the court's decision. She delivered her son, ES, during the pendency of the suit, and if granted the orders, she will seek to adduce further evidence to undergo a DNA test to prove that she is the mother of the child with the complainant.

3. She also states that during her defence, she had a P3 form and blood-stained clothes in court, which her advocate did not present as exhibits. This evidence will reinforce her argument that the complainant assaulted her during a domestic quarrel and that it was not a robbery with violence.
4. On her request to be released on bail, she argues that none of the elements of the offence of robbery with violence were proven, and therefore, she should be granted bail as the appeal has a strong chance of success. In her third request, she states that the impugned judgment was delivered virtually on 26th September 2024, and the trial magistrate was transferred to another station. She asked her advocate to lodge an appeal on her behalf, but by then, the file had not yet been returned to Bungoma Law Courts, and her current advocate, who was not satisfied with the facts of the case, filed a petition of appeal to meet the deadlines for lodging an appeal. Her current advocate has drafted a proper petition of appeal covering all the issues she wishes to raise in her appeal.
5. The respondent did not oppose the application. The applicant filed written submissions in support of her application.

Determination

6. I have considered the application and the written submissions. The power to allow an appellant to adduce additional evidence on appeal is discretionary and is stipulated under the provisions of Section 358(1) of the *Criminal Procedure Code*. The said provision stipulates that:

“In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.”
7. The principles that a court ought to take into account in exercising such discretion were stated in the case of *Elgood v Regina* (1968) E.A. 274, The principles are:
 - a. That the evidence that is sought to be called must be evidence which as not available at the trial.
 - b. That it is evidence that is relevant to the issues.
 - c. That it is evidence that is credible in the sense that it is capable of belief.
 - d. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.”
8. Applying the principles to this case, I find that the applicant has explained her counsel did not satisfactorily conduct her case before the lower court. Evidence demonstrating that the complainant was her husband and that the alleged robbery with violence was a case of domestic violence was not tendered. The power to allow the appellant or applicant to adduce additional evidence is discretionary.



Having considered her affidavit, the evidence presented before the trial court, and noting that she was sentenced to death, as well as the fact that the prosecution did not oppose the application, I find that there is sufficient reason to allow the appellant to adduce further evidence based on her deposition. No prejudice will be caused to the respondent. I therefore grant her application to adduce further evidence on appeal. I also grant the third prayer that Safaricom PLC produce records of certified M-Pesa statements for the account holder, Janet Simiyu, of number xxx, covering the period from January 2021 to September 2021. Additionally, Safaricom OLC is ordered to produce short message text transcripts between the appellant's phone number xxx and the complainant's phone number 07044589443 for the same period.

9. The appellant/ applicant has explained the reason why she delayed in seeking leave to amend her notice of appeal. I accept her explanation; she shall file the amended notice and an amended petition within 14 days and serve forthwith.
10. On being released on bail pending appeal. The principles for granting bond pending an appeal were set out in the case of *Jivraj Shah v Republic* [1986] KLR 605 which laid down the 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.”
11. She must demonstrate that her case involves exceptional or unusual circumstances to justify being released on bond or bail pending appeal, and that her appeal has a high likelihood of success. Although her counsel has argued that her case has reasonable prospects of success, I note that the appellant/ applicant was sentenced to death, which is a severe penalty. The arguments presented by her counsel in the submissions are valid and will be addressed appropriately at the appeal hearing. The applicant has failed to convince this court that her case presents exceptional or unusual circumstances. Appeals in this court are processed swiftly and heard expeditiously. The Record of Appeal is ready. Once directions are issued, the appellant's appeal will be heard within a few months. Therefore, I decline to grant her request for bond pending appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF JULY 2025.

R.E.OUGO

JUDGE

In the presence of:

JNS/ Appellant/Applicant

Miss Lunani -For the Appellant/ Applicant

Miss Matere -For the Respondent/ State

Wilkister - C/A

