



REPUBLIC OF KENYA



**Mangi v Republic (Criminal Appeal E106 of 2023)
[2024] KEHC 1021 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E106 OF 2023
M THANDE, J
FEBRUARY 9, 2024**

BETWEEN

KAZUNGU SULUBU MANGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By an application dated 31.10.23, the Appellant seeks the following orders:
 1. Spent.
 2. That the Honourable Court be pleased to admit the Applicant to bail pending appeal.
 3. That the Honourable Court be pleased to order stay and/or suspension of execution of sentence in this matter pending appeal.
 4. That the bond terms be similar to bond terms ordered at the trial Court.
 5. That this Honourable Court be pleased to issue any further and/or better orders as may meet the ends of justice herein.
2. In an affidavit sworn on even date by Gambo Allan Matana, the Applicant's advocate, it was averred that the Applicant was charged and convicted of the offence of threatening to kill, contrary to Section 223(1) of the *Penal Code*. Upon conviction on 22.9.23, he was fined Kshs. 100,000/= and in default a custodial sentence of 18 months imprisonment. Aggrieved by the decision of the trial court, the Appellant filed Appeal No. 90 of 2023 against both the conviction and sentence. The Applicant is apprehensive that if not granted bail, he will have served most of his sentence and the appeal which has a high probability of success will be rendered nugatory. The Applicant is the sole breadwinner of his family which consists of his elderly mother, a wife and 5 school going children. It was further deposed



that the Applicant has attended court religiously when required and will continue to do so if released on bail pending appeal.

3. The application is opposed by the Respondent, vide a replying affidavit sworn on 19.12.23 by Joseph Mwangi, prosecution counsel. He averred that following the Appellant's conviction and sentence, he lost the right to presumption of innocence as guaranteed by Article 49(1)(h) of the *Constitution*. It was deposed that the Applicant has not demonstrated that he is unable to pay the fine imposed. Further that the Appellant has not demonstrated that there will be a delay in the hearing of the appeal. Counsel urged the Court to take judicial notice of the Judiciary's current policy of hearing and determining cases in a timely manner. It was also deposed that the averments regarding the Applicant's family are not supported by evidence. Lastly that no peculiar or exceptional circumstances have been demonstrated to warrant the orders sought and that being a convict, there are high chances of the Appellant absconding as he can no longer be presumed innocent. He urged that the Application be dismissed.
4. The law empowers this Court to consider and if persuaded, grant bail pending appeal. Section 357 of the *Criminal Procedure Code* makes provision for admission to bail or suspension of sentence pending appeal. Subsection (1) provides as follows:

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.

5. The Orders sought by the Applicant are discretionary. In the case of *Jivraj Shah v Republic* [1986] eKLR the Court of Appeal articulated the principles to consider in an application for admission to bail pending appeal as follows:

There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.

6. Flowing from the above, there are 3 considerations in an application for bail pending appeal. First, the existence of exceptional or unusual circumstances and that such circumstances lead the court to fairly conclude that it is in the interests of justice to grant bail. Second, conditions for granting bail will exist if it appears prima facie from the totality of the circumstances that the appeal is likely to be successful. Lastly, that the sentence or substantial part of it will have been served by the time the appeal is heard.
7. The Court notes that in his submissions, the Applicant went into the ingredients of the offence with which he was charged and that the trial court found that he was a repeat offender, thereby denying him



- the right to be presumed innocent until proven guilty. With respect, these issues can only be raised in the appeal.
8. In the affidavit in support of the Application, it was averred that the Applicant is the sole breadwinner of his family which consists of his elderly mother, a wife and 5 school going children. No evidence was however placed before the Court to demonstrate that the Applicant has a mother, wife and children, their names, dates of birth, or that they are school going.
 9. On his appeal having high chances of success, the Applicant contends that he was denied the right to presumption of innocence. As such, the appeal is not frivolous and has a high chance of success. He further submitted that he has a known place of abode where he intends to live and further promised to surrender himself into custody on the date of judgement.
 10. The Appellant further contends that he has already served 3 months in prison. He has applied for certified copies of proceedings and judgment to enable him expedite the appeal but is to date yet to be supplied with the same. He thus fears that by the time the appeal is heard, a substantial part, if not the entire sentence will have been served, making the appeal nugatory.
 11. For the Respondent, it was submitted that while an accused person is entitled to bail pending appeal under Article 49(1)(h) of the Constitution, the same does not apply to a person already convicted and sentenced to a term of imprisonment. Further that on the Applicant lies the burden of proving that the existence of exceptional circumstances, that the appeal has high chances of success and that there is a likelihood of serving a substantial part of the sentence before hearing of the appeal.
 12. The right to bond or bail or bond guaranteed under Article 49(1)(h) of the Constitution is not available to a person convicted and sentenced after trial. This was the holding in *Masrani v R* (1960) EA 321 where the Court of appeal stated:

Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.
 13. In cases such as the one before me, where bail is sought after conviction and pending appeal, the onus is on the Applicant to demonstrate the high probability of success of the appeal and why justice requires that he should be granted bail. The allegation that he was denied the right to presumption of innocence is not in and of itself sufficient to demonstrate a high probability of the appeal succeeding or that justice requires that he should be released on bail. Further, the Applicant's place of abode cannot be ascertained as he did not place any material before the Court to show proof of residence. Additionally, the solemn promise to surrender himself into custody on the date of judgement, is not sufficient ground for granting him bail pending appeal. (See *Daniel Dominic Karanja v Republic* [1986] eKLR).
 14. The critical difference between bail pending trial and bail pending appeal is that a person seeking bail pending appeal lacks the presumption of innocence that is guaranteed under Article 50(2)(a) of the Constitution. Such person is already convicted and serving sentence, as in the case before me. A court must consider the prospects of success of an appeal as well as the risk of the appellant absconding and strike a balance. The possibility of a convicted person absconding is very real.
 15. Although the Applicant has alleged that delay in the supply of proceedings will in turn delay the hearing and determination of the appeal, he has not demonstrated his efforts in obtaining the same. Letters from his counsel to the trial court asking for proceedings would have supported his claim. None was however availed to the Court. The appeal before Court belongs to the Applicant. It is therefore t is his duty to ensure that the record of appeal is filed and that he sets the appeal down for hearing expeditiously. He cannot fail to diligently pursue the proceedings and then claim that there will be a



delay in the hearing and determination of the appeal. In any event, the mere anticipation of a delay in hearing the appeal, does not in itself constitute exceptional circumstances.

16. In the end and in view of the foregoing, I am not persuaded that there exist any exceptional or unusual circumstances to warrant the grant of bail pending appeal. Accordingly, the Application dated 31.10.23 is hereby declined.

DATED AND DELIVERED IN MALINDI THIS 9TH DAY OF FEBRUARY 2024

M. THANDE

JUDGE

