



REPUBLIC OF KENYA



**Omwoyo v Republic (Criminal Appeal 41 of 2024)
[2024] KEHC 8321 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 41 OF 2024**

**TA ODERA, J
JUNE 20, 2024**

BETWEEN

JOB MATARA OMWOYO APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence in Criminal Case
No.26 of 2021 of the Chief Magistrate's Court at Kisii)*

RULING

1. The appellant filed application dated 20.3.24 through his mother Pamela Nyaboke Omwoyo seeking bail pending appeal.
2. The application is based on the ground that the applicant is nursing serious injuries and is supported by the annexed affidavit of Pamela Nyaboke Omwoyo dated 20.3.24 in which she deponed that she is the mother to the appellant and that she is advised by counsel on record that bond is a constitutional right and that she is willing to bail out the appellant on such terms as this court may deem fit.
3. The State did not oppose the application saying that the appellant was sentenced to 3 years imprisonment of which he had served 2. This is not the correct position as the appellant was sentenced to 4 years (which was to run from 17.1.23) imprisonment and 3 years' probation upon completion of the prison term. A pre-bail report was filed on 19.6.24 and the same indicates that the situation at home is favourable for his release.
4. Bond is generally available to an accused person as a matter of right under Article 49 (1)(h) of the Constitution unless there is a compelling reason. The said Article also applies to appellants awaiting



hearing and determination of their appeals. In the case of *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR where it was held that: -

“The right to bail is provided under Article 49(1) of the *Constitution* but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court’s discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah v R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated 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.
- (3) 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.”

5. The applicant says that the appellant is sickly and hence the application and she has stated that she is willing to bail out the appellant. Appellant was escorted to Kisii County Referral Hospital for medical attention on orders of this court and the doctor indicated that x-ray was done but did not reveal a fracture of muscle spasms.
6. On the issue of whether appellant is likely to serve that prison terms before the appeal is heard. He was sentenced to 4 years imprisonment on 27.9.23 which is running from 17.1.23. He has already served about two years as rightly submitted he is thus likely to serve the remainder in prison before the appeal is heard.
7. On the chances of appeal to succeed I have seen the memorandum of appeal and it raises the issues of insufficiency of evidence, shifting of the burden of proof to appellant and that the sentence was excessive, I would not go into the merits and demerits of the appeal at this juncture as it will prejudice the outcome of the appeal but I have perused the proceedings herein and I note that the said points are arguable and has high chances of success.
8. I do find merit in the application and I proceed to allow it. Appellant is released on bond of Kshs. 300,000/= WSLs pending appeal. Record of appeal be prepared and served within 45 days from today. Mention on 8. 8.24 before the Deputy Registrar for compliance.

T.A ODERA

JUDGE

20.6.24

Delivered Virtually in the presence of:

Mr. Kerosi for the Appellant



Mr. Koima for Prosecution

Court Assistant: Oigo

