



**Wambaya v Republic (Criminal Appeal E094 of 2024)
[2024] KEHC 15269 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E094 OF 2024
RE ABURILI, J
DECEMBER 3, 2024**

BETWEEN

JACOB JOSEPH WAMBAYA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the conviction and sentence in Kisumu CM Traffic Case No. E214 of 2024 delivered on 28th October, 2024 by Hon. G.C SAEREM, Resident Magistrate)

RULING

1. Before this Court for determination is the appellant's application 6th November, 2024 seeking orders that the appellant herein Jacob Joseph Wambaya be admitted to bail pending the hearing and determination of this appeal on its merits.
2. The Application is predicated on the grounds on the face thereof and an affidavit in support sworn by Janet Wairimu Kuira Wambaya the spouse to the applicant sworn on the 6th November, 2024.
3. The Applicant's case is that he was charged before the Chief Magistrate's Court at Kisumu with two counts of causing death by dangerous driving, was tried, convicted and sentenced to serve three (3) years imprisonment without an option of a fine.
4. That he was aggrieved by the said conviction and sentence and has preferred this appeal. He avers that his appeal has high chances of success as demonstrated by the petition of appeal. That there are exceptional circumstances warranting this court to exercise discretion and grant him bail because his health condition is bad and is worsening in prison as he suffered serious injuries and he is diabetic requiring urgent medical attention otherwise he could lose his life before his appeal is heard and determined on merit.



5. The Respondent did not file any response to the application which was argued orally on 20/11/2024. Mr. Odeny counsel for the applicant reiterated the application and the grounds as well as depositions by the spouse to the applicant while Mr. Marete Principal Prosecution Counsel submitted that he was not opposed to the application as the trial court could have considered a option of a fine because this was a traffic offence.
6. I have considered the application, the grounds, supporting affidavit and submissions by Mr. Odeny on behalf of the applicant/ appellant.
7. The authority supplied to court in the case of *Daniel Wainaina Mburu v Republic* [2024] eKLR ruling by HM.Nyaga J is relevant as far as the principles guiding the grant of bail pending appeal is concerned.
8. Bond or bail pending Appeal is provided for under Section 357 of the *Criminal Procedure Code* which provides:
 357. Admission to bail or suspension of sentence pending appeal
 - (1) 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.
 - (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.
 - (3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.”
9. This court has power which is discretionary, unlike in the case of bail pending trial which is a guaranteed right, though not an absolute right, to grant bond/bail pending Appeal.
10. The principles for the grant or denial of bond/bail pending Appeal were set out in *Jivraj Shah v Republic*, *Ademba v Republic* (*supra*) and *Dominic Karanja v Republic* These considerations are that:
 - a. the Appeal must have ooverwhelming chances of success;
 - b. the previous good character of the Applicant;
 - c. the existence of exceptional or unusual circumstances;
 - d. the sentence or substantial part of it will have been served by the time the Appeal is heard.
11. I have considered the Appeal filed. Evidently, it does not raise any unusual substantial or weighty point of law. It is essentially founded on facts and the findings of the trial court. However, at this stage, the



Court is cautious not to attempt and determine the merits of the Appeal as that might be prejudicial to the appellant.

12. That aside, the grounds stated by the applicant and the affidavit sworn by his spouse as submitted on by Mr. Odeny Advocate calls upon this Court as a first appellate Court to re-evaluate the evidence as mandated by the decision in *Okeno v Republic* and reach its own independent conclusions.
13. The exceptional circumstances stated by the appellant are that the accident subject of the double fatal traffic offence is such that the appellant was being hotly pursued by the deceased who was escaping from the mob who then blocked him when he caused the accident hence that could not have been a situation that he could have avoided.
14. Further, that the applicant's poor health situation as demonstrated by the treatment and medical documents filed in court are self-evident that he suffered serious injuries adding up to his already existing medical condition which included epilepsy, thereby exacerbating his poor health to deteriorate. That he should have been given an option of a fine and further, that it will take long for proceedings to be typed to prepare the appeal for hearing. That in the lower court, he was out on cash bail pending trial and he abided by the bond terms given and shall abide by the terms to be imposed by this Court.
15. However, the previous good record of the Applicant having abided by the bond terms granted by the lower court alone is not sufficient to warrant the grant the orders sought. This is because during the trial, the Applicant was presumed to be innocent, unlike now on appeal after his conviction by a Court of competent jurisdiction.
16. It follows that the provisions of Article 49 (1) (h) of the Constitution on the right to bail do not apply to the Applicant at this stage. This is what the court stated in the case of Charles Owanga Oluoch v The DPP [2015] eKLR 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 consideration 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 *JivRaji Shah v R* [1966] KLR 605, the principle considerations for granting bail pending appeal were stated as follows:“(1)The principle 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 in the interest of justice to grant bail.(2)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.(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.”

17. On whether the appeal shall take time to be determined, this Court is expeditiously hearing appeals and we have service week on appeals going on this week such that had the lower court record been available, the appeal would have been admitted to hearing and parties would have been advised to file submissions expeditiously to canvass the appeal.
18. However, this Court takes judicial notice of the fact of shortage of staff at Kisumu Law Courts to type court proceedings expeditiously. Only one Office Administrator is assigned files from 11 Magistrate's



Courts to type court proceedings in all cases where appeals have been preferred. This is a situation that overwhelms staff and which issue has been raised with the employer for support as court users continue to raise issues with delays in supplying of court proceedings for appeal purposes.

19. It therefore follows that albeit the applicant was only convicted and sentenced about a month ago, the fact that his health condition is worsening due to the accident in question and other preexisting conditions, I am of the view that it will take long before the lower court proceedings and record are availed to this court for admission of the appeal in view of the endemic situation of shortage of court staff to type court proceedings.
20. Accordingly, I am satisfied that there are exceptional circumstances warranting exercise of judicial discretion to grant the applicant bail pending appeal and on conditions.
21. In the end, I hereby find the application dated 6/11/2024 merited. It is hereby allowed on terms. The applicant/ appellant herein Jacob Joseph Wambaya is hereby granted bail pending appeal and he may be released on cash bail of Kshs 100,000 (one hundred thousand Kenya shillings only) to attend medication and to appear in court as and when he is required to do so until the appeal is heard and determined.
22. Mention on 20th February, 2025 before High Court one to confirm availability of the lower court file for admission of the appeal.
23. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

