



**Mwachofi v Republic (Criminal Appeal E081 of 2025)
[2025] KEHC 13340 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E081 OF 2025
WM KAGENDO., J
SEPTEMBER 25, 2025**

BETWEEN

AMBROSE MWANZA MWACHOFI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the conviction and sentence of the Learned Magistrate Hon. Green Odera in Mombasa S.O no. E098 of 2022 delivered on the 23rd of June, 2025)

JUDGMENT

1. By a Notice of Motion dated 21st July, 2025 under Sec 357 of the CPC, the applicant moved the court for Orders:
2. That this Honourable Court be pleased to admit the Appellant to bail and/or pending hearing and determination of the instant appeal.
3. That this Honourable Court be pleased to admit and/or release the appellant on bond terms similar to the bond terms ordered at the trial court pending the hearing and determination of the appeal.
4. That the Honourable Court may be pleased to make any further orders it deems just and reasonable herein.
5. The application is propped by the grounds on its face and the affidavit of Salim M. Khamisi, an advocate of the High Court of Kenya having conduct of the instant appeal on behalf of the appellant.
6. He deposed that the applicant was on 23rd June, 2025 convicted in Criminal S.O. No. E098 of 2022 which conviction and sentence he has presently appealed. which has high chances of success. That, during the pendency of the case at the trial court he always attended court as evidenced by the said court's records, and he is willing to provide a suitable surety in the matter.



7. As at the making of this determination, no written submissions were on record.

Analysis and Determination

8. The provisions of Section 357 (1) of the Criminal Procedure Code provide for admission to bail pending appeal, in the following terms:

“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.”

9. Whilst Article 49(1)(h) of the [Constitution](#) provides that an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released, a similar position does not apply for a convicted person.

10. In the case of *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR it was held that:

“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.

11. 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.”

12. In this instance, as earlier noted the applicant was charged with the offense of Defilement contrary to Sec 8 (1) as read with Sec 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006, and an alternative charge of committing an indecent act contrary to Section 11 (1) of the Act. The particulars of the charges are that on 23rd July, 2022 in Jomvu Sub-county within Mombasa County the appellant unlawfully and intentionally caused his penis to penetrate the vagina of SM a child aged 10 years, or alternatively intentionally and unlawfully caused his penis to rub the vagina of the said child. After trial he was found guilty on the main charge and sentenced to life imprisonment.



13. As grounds for his application pending appeal, he simply argues through counsel that he has a reasonable appeal with high chances of success, and the trial court's record evidence that he previously complied with his bond terms as is issued thereto.
14. It is noteworthy that the respondent was not opposed to the instant application.
15. In the case of *Jivral Shah V. Republic* (1980) KLR 605 the Court of Appeal addressed itself on parameters to be considered by appellate Courts in an application for bail pending appeal that:
 - a. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.
 - b. 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist."
16. On the aspect of demonstration of exceptional or unusual circumstances, the court observes that, the appellant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal. Previous good character or the fact that he never breached the bail terms in the trial court are not exceptional or unusual circumstances as highlighted above. For what is worth, at the trial court the appellant was simply an accused person, entitled to his constitutional right of presumption of his innocence until proven guilty. In the instance, he is a convict serving life imprisonment.
17. As to the prima facie likelihood of the success of the appeal, there is little to go by. In my view, in an application for bail pending appeal the burden weighing against the Applicant is to demonstrate to the court through the grounds of appeal set by the petition, that he prima facie has an overwhelming chance of success and not to simply allude out of his opinion of high chances of success of the appeal. This court has similarly considered the grounds as set out in his petition of appeal cautious not to delve deep into the merits of the case, and save for the usual grounds of appeal, nothing is deducible on account of some substantial point of law, towards an overwhelming chance of success of the appeal.
18. Further, noting that the applicant is serving a sentence of life imprisonment recently issued on 23rd June, 2025, it cannot be said that by the time the appeal is heard and determined he will have served a substantial part of the term of sentence which may be irreversible and a great punishment, should the Appeal be successful.
19. In the foregoing, the application fails to the extent held hereinabove. The hearing of the appeal shall be expedited.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2025.

W.K. MICHENI

JUDGE

In the presence of;

For The Applicant(s).....in September

For The Respondent.....Mr Sirima



Court Assistant.....Ms Bebora

Signed By/for:

HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

MOMBASA HIGH COURT

HIGH COURT CRIMINAL

DATE: 2025-09-25 11:10:02

