

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. E033 OF 2025

JAMES NDETI MAEKE.....APPELLANT/
APPLICANT

-VERSUS-

REPUBLIC
RESPONDENT

RULING

1. The applicant, James Ndeti Maeke, was arraigned at the Chief Magistrate’s Court sitting in Machakos (Wamunyu) on 3rd March 2021 and charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. At conclusion of the trial, the trial Magistrate, in a judgement delivered on 18th March 2025 found the applicant guilty convicted and sentenced him to 15 years imprisonment.
2. The applicant being dissatisfied with the conviction and sentence filed the appeal herein challenging both conviction and sentence.
3. The applicant has also filed a Notice of Motion application dated 24th April 2025 and prays to be admitted to bail pending the hearing and determination of his appeal. Through his Counsel, Mr. Mauncho, the applicant also filed written submissions dated 9th June 2025 in support of his application.
4. The application is opposed by the State. The Office of the Director of Public Prosecutions, through Ms. Agatha Abang, Prosecution Counsel filed grounds of opposition dated 14th May 2025 in opposition to the application. Ms. Agatha also filed written submissions dated 16th June 2025 in opposition to the application.

Applicant’s Submissions

5. The applicant has submitted that his application is promised on the provisions of Section 357(1) of the Criminal Procedure Code Cap 75 Laws of Kenya, propped upon grounds on the face of it and supported by an affidavit by the Applicant. The Applicant’s case is that he was convicted with an offence of robbery with violence and sentenced to a prison term of fifteen years. Being aggrieved by the conviction and sentence, the Applicant preferred the instant appeal.
6. He submits that the right to bail pending appeal is premised on Section 357 (1) of the Criminal Procedure Code which states that:

“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.”

7. That the right is further entrenched in Article 49 of the Constitution of Kenya which stipulates that a person awaiting trial is entitled to bail as a matter of Right. That right can only be taken away where the prosecution demonstrates that there are compelling reasons to deny it.
8. It is submitted that the principles for granting bond pending an appeal were set out in the case of **Jivraj Shah v Republic [1986] KLR 605** as was quoted with approval in **Osore v Republic (Criminal Appeal E030 of 2023) [2024] KEHC 1760 (KLR) (22 February 2024) (Ruling)** which laid down the principles as follows;

“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.

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.

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.” (Emphasis ours)

9. The applicant further submits that the instant appeal has facts and circumstances which clothe it with overwhelming chances of success. This is premised on the issues raised by the Applicant as follows;
- a) In order to sustain a charge of robbery with violence, the Accused must have been armed with a dangerous weapon and the charge sheet must name the said dangerous weapon.
 - b) The charge does not say the Complainant was robbed rather it says that he lost items.
 - c) No serial number of the subject phone was given at trial.
 - d) Identification of the accused person was never conducted.
 - e) The arrest was done a year later notwithstanding that the Appellant/Applicant was on police bail for the entire period.
10. It is submitted that the issues raised hereinabove disclose substantial merit in the appeal which warrant granting the orders sought. That a perusal of the court record clearly shows that the Applicant was convicted in circumstances which are unsafe to the extent of making the instant appeal to have high chances of success.
11. That the charge sheet upon which the Applicant was convicted gives a misdescription of the alleged offence in its particulars. It only states that the complainant lost items rather than he was robbed. It is prima facie defective.
12. It is argued that the charge sheet does not contain a statement of the specific offense(s) and the particulars necessary to provide reasonable information about the nature of the offense contrary to the provisions of Section 134 of the Criminal Procedure Code which provides thus;
- “Every charge or information shall contain, and **shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”*****
13. The applicant places reliance upon the case of **Akolon v Republic (Criminal Appeal E010 of 2024) [2024] KEHC 7987 (KLR) (21 June 2024) (Judgment)** where it was determined thus;

“The Court of Appeal in Yongo v Republic [1983] KLR, 319 held that a charge is defective when it gives a misdescription of the alleged offence in its particulars. Said the court: “In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

(a)It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b)It does not, for such reasons, accord with the evidence given at the trial; or

(c)It gives a misdescription of the alleged offence in its particulars.”

14. Further to this, elements required to sustain a charge of robbery with violence being that the accused person in the company of other persons at or immediately before or after the robbery wounds, beats, strikes or uses other violence were not proven by any shred of evidence. The record clearly shows that the complainant in this matter alleged in his evidence that he asked the appellant why he did not help him when he was being attacked by persons who were not brought before the trial court.
15. In addition to this, the Applicant submits that the evidence of the alleged stolen phone belonging to the complainant was too weak to support the charge. A receipt was produced before the trial court which lacked the serial number and/or IMEI number of the alleged stolen phone to prove its authenticity. The allegedly stolen phone was also never recovered with the record showing that no attempt at recovering the same was ever done.
16. The applicant submitted that these facts render the allegation that the Appellant robbed the Complainant of his phone to be highly implausible.
17. That the applicant was summoned the police station more than a year after the alleged robbery incident. He willingly and voluntarily availed himself to the police station without knowing the turmoil that lay ahead of him whereupon he was arrested. That it is quite telling

that the said arrest was done more than a year after the fact considering the gravity in law of the alleged offence.

18. The applicant complied with the terms of bail and bond given by the trial court and as such he has proven to be of good character. He was the sole bread winner of his young family with school going children which been left in a precarious position both financially and emotionally. The applicant also requires proper medical attention as evidenced by the annexures to his application.
19. The applicant submits that these circumstances in totality are exceptional to warrant the sought orders. Reliance was placed on the case of **Arvind Patel -vs- Uganda S. C. Cr. Appeal No.1 of 2003 as was quoted with approval in Gikiri v Republic (Criminal Appeal E070 of 2023) [2024] KEHC 7246 (KLR) (31 May 2024) (Ruling)** where the court pronounced itself thus;

“The usual and exceptional circumstances were expounded in the case of Arvind Patel -vs- Uganda S. C. Cr. Appeal No.1 of 2003 to include:-

- ***The character of the offender,***
- ***Whether the Applicant is or not a first offender,***
- ***Whether the offence of which the Applicant is convicted involved personal violence,***
- ***The appeal must not be frivolous and has reasonable chances of success,***
- ***The possibility of substantial delay in the determination of the appeal, and;***
- ***Whether the Applicant complied with bail conditions granted before the Applicant was convicted during the pending of the appeal.***

However, the court went on to state that all the listed considerations need not be present. One or two or more of this could be sufficient.”

20. The applicant thus invites this court to find merit in the instant application and proceed to grant the orders sought.

Respondent’s Submissions

21. The respondent submitted that the law regarding bond pending appeal is now settled. The requirements for admission to bond pending appeal have been summarized to three key issues:

- a. **THAT the applicant has filed an arguable appeal with overwhelming chances of success.**
 - b. **THAT the applicant has demonstrated unusual or exceptional circumstances that may persuade the court to exercise its discretion to admit the applicant to bail/bond pending the hearing and determination of his appeal**
 - c. **THAT the applicant is likely to serve his full sentence or a substantial portion thereof which may render the appeal nugatory**
22. The respondent further submits that the burden to prove the above requirements lies on the applicant. The Evidence Act Cap 80 imposes that burden under Section 107, 108 and 109 which provides that:
23. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides that:
 - (1) whoever desires any court give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
24. Section 108 of the Evidence Act Incidence of Burden the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
25. Section 109 of the Evidence Act Proof of particular fact the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
26. It is submitted by the respondent that the applicant has not shown this court that his appeal has an overwhelming chance of success. That the applicant in his submissions lists 6 points of the appeal having an overwhelming chance of success. However, he does not attach any evidence of the judgment or charge sheet to show that this appeal would have an overwhelming chance of success. The prosecution presented its evidence before the trial . court and the trial court was convinced that the applicant committed the crime. There mere listing of the grounds of the appeal on point 6 of the

applicant submission is not enough proof of chances of successes in the appeal.

27. The respondent placed reliance on the case of **Masika v Republic (Criminal appeal (Application) E003 of 2021) [2024/ KECA 1452 (KLR)]** the Court of Appeal observed that the application had very little details and held at paragraph 6 and 7 of the ruling as follows:

“ In this case, the applicant has only made bare assertions without demonstrating any unusual circumstances. He has not availed a copy of the judgment of the High Court from which he intends to appeal, nor has he identified any issue of law or demonstrated that he had an appeal with overwhelming chances of success. Although he has stated that he suffers a chronic medical condition which requires specialist regular follow-up, he has not availed any documents in support of the alleged medical condition. In the circumstances, the applicant has failed to demonstrate any exceptional circumstances, nor has he demonstrated that his appeal has overwhelming chances of success. We find no merit in his application and the same is dismissed”

28. The authority that the appellant *Somo vs Republic* rightly puts it:
“..that is why when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed”

29. This has not been proved in this instant application.

30. That despite not having the pleasure of reading the proceedings nor judgment in this matter, the submissions by the applicant as regarding the Charge Sheet and the particulars of the charge sheet can be cured by section 382 of the Criminal Procedure Code and thus the same is not defective. Further the Respondent submit that the prosecution proved its case despite the alleged pieces of evidence not brought before the court of law as alleged.

31. As to whether the ingredients of the offence were proved, the respondent submits that this Court does not have the pleasure of looking at or perusing the judgment or lower court record to ascertain whether the same was proved or not. Further the same

can be canvassed during the hearing of the substantive appeal. Further the averments relating to the summoning of the applicant more than a year after the incident does not hold water as investigations have no timelines.

32. It was further submitted that the applicant has not place before this court evidence that would demonstrate an unusual or exceptional circumstances that would persuade this court to admit the Applicant to bail pending appeal.
33. That the Appellant does mention and provide documentation indicating that he has a medical condition that requires special attention, open heart surgery that is not mentioned at the facility (i.e Machakos Level 5 Hospital). That the Appellant has not been denied his right to health care as enshrined in article 43(1 of the constitution. By the very fact that he has medical documents from Machakos Level 5 Hospital and other hospitals does show that he is being attended to at the prison facility and he is able to access health care. Further, the medical documents do not mention any ailments that require special attention. Further, there is no proof or indication from the prison facilities that they will not be able to take care of him or attend to him in the event he requires specialized care and attention.
34. The respondent argues that, the fact that the applicant mentions that he is also a first offender and of good character and that he was on bail during trial is not an unusual circumstance that should be considered by this court. Reliance was placed on **Nanga v Republic (Criminal Application E008 of 2023) [2024] ICECA 1490 (KLR)** the court held as follows:

“Two other grounds proffered by the applicant are similarly tenuous and do not cogently demonstrate special circumstances. As we pointed out above, the fact that an applicant enjoyed bail pending trial is consequentially irrelevant in our consideration of the question whether he is entitled to bail pending appeal. As for the argument that the applicant should be granted bail pending appeal on medical grounds, the alleged medical conditions have not been demonstrated since no current medical report was attached and neither has it been

demonstrated that the prison facilities are unable to deal with those conditions. Additionally, as the state pointed out, even the claimed medical condition is contradictory diabetes is alleged in the supporting affidavit while hypertension is alleged in the grounds on the face of the application — perhaps a clear indication that the claims are merely pre-textual.

Finally, the applicant argues that he would have served a significant portion of his sentence if bail pending appeal is not granted. It is true where an applicant demonstrates that he is likely to serve the whole of here sentence or a substantial circumstance warranting the grant of bail pending appeal. In the present case, the applicant was sentenced to 15 years imprisonment, we do not think the risk he articulates is credible, objectively aware of our docket, he is unlikely to serve a substantial or the whole of his sentence before his appeal is heard and determined. this court had ordinarily either granted bail pending appeal or expedited appeals where applicants before it were serving shorter sentences, typically under five years. this applicant cannot benefit from that argument.”

35. The respondent submitted that it is crystal clear from the above authorities that the applicant has failed to demonstrate the fundamental requirements for the grant of bond pending appeal and urged this Honourable Court to uphold our submissions on the same and dismiss the applicant's application.

36. Further, the respondent submitted that this court can be in a position to expedite this particular appeal on priority basis. This court was invited to dismiss the applicant's application in its entirety for lack of merit

Analysis and determination

37. I have carefully considered the application for bail pending appeal, the grounds of opposition and the written submissions filed by the parties. The simple issue for determination is whether the applicant ought to be admitted to bail pending appeal.

38. The Court has established the legal principles which govern the granting of bail pending appeal. In **Dominic Karanja v Republic (1986) LKR 612** the Court stated that the twin considerations thus:-

“That the most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor consideration would be whether there were exceptional or unusual circumstances”

39. Being guided by the principles in **Jivraj Shah v Republic (supra)** cited by the applicant’s counsel in their submissions, it is my view that in order to succeed on his application, the applicant needs to demonstrate that his appeal has overwhelming chances of success or to demonstrate special circumstances militating in favour of the grant pending appeal.
40. In the present case, the applicant argues, in the first place, that his appeal has high chances of success. Due to the presumption of validity of a conviction, the applicable test is **“overwhelming chances of success”** of appeal. In deed, it is rare case where the court will grant bail pending appeal on this ground. The ground of appeal being argued has to be droppingly palpable for it to reach this high threshold. This is because the court would, ordinarily, be careful not to engage in a preview of the appeal in the guise of determining an application for bail pending appeal.
41. The other ground proffered by the applicant is that he should be granted bail pending appeal on medical grounds. I observe that the applicant has filed medical reports on his medical condition but has not demonstrated that the prison’s facilities are unable to deal with those conditions.
42. Finally, the applicant argues that he was summoned to the police station more than one year after the alleged robbery incident. He willingly and voluntarily availed himself to the police station without knowing the turmoil that lay ahead of him whereupon he was arrested. That, it is quite telling that the said arrest was done more than a year after the fact considering the gravity in law of the alleged offence. The applicant complied with the terms of bail and bond given by the trial court and as such he has proven to be of good character.

43. I agree with the Respondent that this argument by the Applicant does not constitute an exceptional or unusual circumstance to warrant the grant of bail pending appeal.
44. I have however had the opportunity to keenly peruse through the trial court's proceedings and judgment dated 18th March 2025 delivered by Hon. J. Ombura, SPM which is on record in this appeal. I note that PW1, the Complainant testified **that he asked the applicant why he did not help him when he was being attacked by persons who were not brought before the trial court. The complaint also produced a receipt of the phone before the trial court which lacked the serial number and/or IMEI number of the alleged stolen phone to prove its authenticity.** This goes into whether the ingredient of proof of robbery with violence by the prosecution in the circumstances of this case was proved beyond reasonable doubt.
45. It is the view of this court that the credibility of the evidence of the Complainant was in doubt.
46. While being careful not to delve into the merits and demerits of the Appeal and cautioning myself of the gravity of the offence herein. I am convinced that the chances of the appeal succeeding is overwhelming.
21. In the premises therefore, I am persuaded that the applicant has put forward a case to warrant his release on bail pending appeal as the appeal has overwhelming chances of being successful.

Disposition

22. The upshot is that, I order that pending the hearing and determination of this appeal, the Appellant/Applicant shall be released on a bond of Ksh.200,000/= in the alternative cash bail of Ksh.30,000/= with two contact persons in both instances.
23. Considering that the trial court's typed proceedings are in this appeal file, directions will be taken on the disposal of the appeal.
24. Orders accordingly.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 24TH SEPTEMBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 24TH SEPTEMBER
2025

In the presence of :

In person..... for Appellant/Applicant

Ms. Agatha.....for Respondent

Millygrace..... Court Assistant