

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CORAM: R. MWONGO, J.
CRIMINAL APPEAL NO. E039 OF 2025

ALEX MAINA MUTHEE.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The Application

1. The applicant's notice of motion dated 30th June 2025 is premised on the grounds on its face and in the supporting affidavit thereof, and seeks orders as follows:
 - a. Spent;
 - b. That this Honourable court be pleased to admit the appellant to bail pending hearing and determination of this appeal on the same bond terms similar to the terms ordered by the trial court or on such terms as this court may deem fit;
 - c. That in the alternative to (2) above, this honourable court be pleased to stay and/or suspend the sentence imposed by the trial court pending hearing and determination of this appeal; and
 - d. That costs of this application be provided for.
2. The applicant was convicted and sentenced to 12 months imprisonment for the offence of affray contrary to section 92 of the Penal Code. He had lodged an appeal which, according to him, has great chances of success, which is why he now seeks bail pending appeal. He stated that he is committed to complying with any bail terms that the court will impose.
3. The applicant is apprehensive that bail pending appeal is necessary because by the time the appeal is determined, he will have served a substantial or the whole sentence. He stated that he is employed and is the sole breadwinner of his family which will suffer while the appeal is underway if he is not released on bail.

Grounds of Opposition

4. The respondent filed grounds of opposition stating that the application lacks merit and that there are no disclosed exceptional circumstances that would warrant granting of the orders sought. Further, that there is no weakness in the prosecution's case hence the appeal has no chances of success.

Parties' Submissions

5. In his submissions, the applicant relied on section 357(1) of the Criminal Procedure Code and the cases of **Njagi v Republic [2023] KEHC 3226 (KLR)** and **Joseph Macharia v Republic [2018] KEHC 7672 (KLR)**. He argued that the court is able to suspend the sentence pending hearing and determination of the appeal which has high chances of success.
6. In its submissions, the respondent relied on section 357 of the Criminal Procedure Code and the cases of **Jivraj Shah v Republic (supra)** and **Ibrahim Samon Ali v Republic [2022] KEHC 2905 (KLR)**. It argued that the applicant has not disclosed sufficient proof that their appeal has high chances of success since the prosecution's evidence was sufficient to convict. That the medical evidence adduced does not highlight the applicant's need for immediate specialized medical intervention. Further, that the

Issue for Determination

7. The issue for determination is whether the application has merit.

Analysis and Determination

8. An appellate court can only grant bail pending appeal on discretionary basis according to Article 49(1)(h) of the Constitution which provides that:-

“An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

9. On appeal, the appellant/applicant is no longer awaiting trial but rather, he has already been convicted and sentenced and is awaiting hearing of the appeal, thus invoking the application of Section 357 of the Criminal Procedure Rules which provides:

“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...”

10. This was the position in the case of **Masrani v R [1060] EA 321**, where it was held thus, regarding bail pending appeal:

“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.”

11. The principles guiding consideration of bail pending appeal are set out in the case of **Jivraj Shah v Republic (supra)** as follows:-

“1. The principal contribution 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 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.”
[Emphasis added].

12. Bail pending appeal may be granted where there are exceptional circumstances and even then, it is dependent on the court's discretion. On establishment of exceptional circumstances, the case of **Daniel Dominic Karanja v Republic [1986] KECA 37 (KLR)** offers guidance, where the court labored to explain what exceptional circumstances encompass. There, the court stated:

“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors.” [Emphasis added].

Conclusions and Disposition

13. The reasons given by the applicant in his supporting affidavit to the application disclose no exceptional circumstances that would warrant the granting of bail pending appeal. However, it is in the interest of justice that the applicant prosecute his appeal expeditiously.
14. Accordingly, the application lacks merit and is hereby dismissed. However, it is ordered that the appeal be prosecuted expeditiously given the sentence imposed by the trial court.
15. Orders accordingly.

Delivered, dated and signed at Embu High Court this 29th day of October, 2025.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Appellant Present in Court
2. Kariuki for the Appellant
3. Ms. Nyika for the Respondent
4. Francis Munyao - Court Assistant