



**Ochwada v Republic (Criminal Appeal E029 of 2025)
[2025] KEHC 17374 (KLR) (24 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E029 OF 2025
WM MUSYOKA, J
NOVEMBER 24, 2025**

BETWEEN

DAN BENE A OCHWADA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Dan Benea Ochwada has filed 2 appeals, arising from the same conviction and sentence, in Port Victoria SRMCSOC No. E007 of 2024.
2. An application was filed, in Busia HCCRA No. 029 of 2025, dated 12th June 2025, for bond pending appeal. I dismissed it, on 31st July 2025, as the appellant had not attached any papers, to establish that he had been tried, convicted and sentenced, by the lower court, as alleged, for courts do not act in vain, nor blindly, but with certainty. In addition, original trial court records had not been availed, and so there was no telling whether Port Victoria SRMCSOC No. E007 of 2024 even existed.
3. Upon the dismissal of 31st July 2025, the appellant was back in court, with a Motion, dated 4th August 2025, for review of the orders of 31st July 2025. It was urged that the appellant had since obtained a copy of the charge sheet, letter requesting for proceedings and judgement, and certified copies of the proceedings of the trial court. He invited the appellate court to review its decision of 31st July 2025, upon those documents being availed.
4. The application, dated 4th August 2025, was argued orally, on 8th October 2025. It was submitted that the issue that trial court records must be made available to an appellate court, for the purpose of determining bond bail pending appeal applications, was a matter of technicality. It was further submitted that the appellant only accessed the trial court records after the ruling of 31st July 2025.



5. There was opposition, to that application, on grounds that the provisions, on which the application was premised, were not indicated, and the ruling, of 31st July 2025, was determined upon extensive submissions having been made, hence the appellant was seeking to re-litigate the matter.
6. There has been delay in the delivery of this ruling. It can be explained. The application was brought in Busia HCCRA No. E029 of 2025. It was subsequently brought to my attention that the appellant had filed another appeal. There was need for me to access the other appeal file, to avoid the incidence of making orders, in Busia HCCRA No. E029 of 2025, that were in conflict with those, possibly, made in that other appeal. In any event, it was unacceptable that several appeals be initiated, by the same appellant, over the same decision. It is an abuse of process, designed, perhaps, to obtain orders in multiple proceedings, on a pata potea basis.
7. The other appeal file was made available, and it is the one that I have referenced in paragraph 1 above. As it is unacceptable, for the 2 appeals to be entertained separately, I will have to have them consolidated, as I hereby do, and handled as 1, that 1 being Busia HCCRA No. E029 of 2025.
8. Going back to the application, dated 4th August 2025, I pronounce that that application was needless. The law, on the criminal process, the Criminal Procedure Code, Cap 75, Laws of Kenya, does not provide for review of court orders. Instead, it only provides for appeal and revision. Ideally, these 2 are the only options that were available to the appellant, but not review. Review is provided for in the civil process, under the *akn ke act 1924 3 Civil Procedure Act*, Cap. 21, Laws of Kenya., and the Rules made under it, the Civil Procedure Rules.
9. The ruling, of 31st July 2025, dismissed the application, dated 12th June 2025, on a technicality, being that the said application was not supported by evidence. The appellant had allegedly been tried, convicted and sentenced by a Magistrate's Court, and not the High Court. Upon approaching the High Court, it behoved the appellant, to place before the High Court, material to establish that there had been a trial, conviction and sentence at the trial court. The High Court was unaware of those facts, and it had no access to them. It could not act blindly, and make a determination without supporting evidence. It could not take the word of the appellant, or his Advocate, that there had been such a trial, conviction and sentence. Appellate courts do not act in that manner, blindly. The mantra, with respect to both civil and criminal proceedings, is that he who comes to court must prove that which he alleges. It is elementary law. If he claims he was tried, convicted and sentenced, he must establish those facts.
10. Review presupposes an error by the court, on the face of the court record. No error has been demonstrated, on the face of the ruling of 31st July 2025, for no evidence or proof had been tabled, to establish the appellant had been tried, convicted and sentenced by the trial court.
11. Review also presupposes discovery of new evidence, which was unavailable when the order was being made. It was not established that new evidence had been discovered, which was not available on 31st July 2025. The material, in the application, dated 4th August 2025, was available on 31st July 2025, indeed, even on 12th June 2025, which was the date of the initial application. The appellant was aware of his trial conviction and sentence, as at 12th June 2025, when he conceived the application that bore that date. Instead of exercising diligence, to collect or gather that evidence, to support his application, and before he moved to court, he rushed to the appellate court without it, only to be told that that evidence was mandatory.
12. The issue of review, therefore, cannot arise. I should not exercise discretion to review the orders of 31st July 2025, for no evidence was presented, to support the grounds upon which review could be obtained.



13. The dismissal, of 31st July 2025, was on technical grounds, and nothing prevented the appellant from filing another summons for admission to bail bond pending appeal, neither was the High Court prevented from considering a second application for bond bail pending appeal. The argument, that the court became functus officio, upon dismissing the bond bail application, has no legal foundation. See *Republic vs. Diana Suleiman Said & Anor* [2014] eKLR (Muriithi, J). There is room for a review of the order rejecting an application for bond, or the renewing of the application, but it takes the form of filing a fresh application for bond.
14. Should I consider grant of bail bond pending appeal, nonetheless?
15. I do not have an application for bond bail pending appeal before me, for what is sought, in the application before me, is review of the orders of 31st July 2025. Yet, that process, for review, is unavailable, for it is not provided for, in the criminal process, and courts can exercise jurisdiction only where *akn ke act 2010 constitution the Constitution* or statute have granted it. See *In the Matter of Interim Independent Electoral Commission* [2011] eKLR (Mutunga CJ, Baraza DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Ndung'u, SCJJ), *Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR) [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ). I do not see where I get jurisdiction to entertain the review sought. Even if there was such jurisdiction, I do not see proof of an error on the face of the record of 31st July 2025, nor of discovery of new evidential material, that the appellant was not capable of obtaining by 31st July 2025.
16. The appellant asserts his right to bond bail pending appeal. Such bond bail is not a constitutional right, unlike bond bail pending trial. Article 49, at paragraph (1)(h), of *akn ke act 2010 constitution the Constitution*, prescribes bond bail for arrested persons, and it is about arrest and presentation in court for trial. Article 49 has nothing to do with convicted persons and appeals. So, bail bond pending appeal is not an automatic right, akin to what Article 49 of *akn ke act 2010 constitution the Constitution* talks about. Indeed, I reiterate, it is not a constitutional right, for *akn ke act 2010 constitution the Constitution* does not provide for it.
17. Bail bond pending appeal is available, but not as a constitutional right. The principles, upon which it is granted, are different from those upon which that contemplated under Article 49 is granted. See *Chimambhai vs. Republic* [1971] EA 343 (Harris, J), *Francis Kamote Mutua vs. Republic* [1988] eKLR (Platt, Apaloo JJA & Masime, Ag JA), *Arvind Patel vs. Uganda* [2003] UGSC 25 (Oder, JSC) and *Samuel Macharia Njagi vs. Republic* [2013] eKLR (Abuodha, J). The principal grounds for it are existence of an appeal case with chances of success, and the risk that the appellant could serve out his term of imprisonment before his appeal is heard and determined.
18. The appellant did not address me, either on 22nd July 2025 or on 8th October 2025, on the reasons why he believed that his appeal, on conviction, stood a chance of success. His focus was more on the sentence, than on the conviction. Secondly, he was sentenced to serve 25 years in prison. There is no chance that that period would be served out, by the time this appeal is heard and determined, which should not be, in any event, beyond June 2026. No attempt was made, to demonstrate that that sentence was unlawful, in view of *Republic vs. Manyeso* [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ) and *Republic vs. Ayako* [2025] KESC 20 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ).
19. No appropriate case was made out, therefore, for the appellant to be admitted to bond bail pending appeal, in the circumstances.
20. To move the matter forward, I hereby direct the appellant to file a record of appeal, in 30 days. the appeal shall be canvassed, by way of written submissions, to be filed and exchanged within 30 days, of



the record of appeal being filed and served. The matter shall be mentioned, on 27th January 2026, for compliance and further orders and directions.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 24TH DAY OF NOVEMBER 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Otieno, instructed by Masiga Otieno & Associates, Advocates for the appellant.

Ms. Mutella, instructed by the Director of Public Prosecutions, for the respondent.

