



**Homba v Republic (Criminal Appeal E020 of 2024)
[2025] KEHC 18590 (KLR) (16 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E020 OF 2024
TW OUYA, J
DECEMBER 16, 2025**

BETWEEN

SIMON NDUNG’U HOMBA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Simon Ndung’u Homba and another were tried and convicted at the lower court with the offence of stealing contrary to Section 268 (1) as read together with Section 275 of the Penal Code; and was sentenced to a term of five (5) years imprisonment.
2. He was aggrieved by his conviction and sentence and proffered an appeal to this court vide a Petition of Appeal filed on the 9th April, 2024. Pending the hearing and determination of his appeal, the applicant approached this court vide an undated Notice of Motion seeking that he be released on bail or bond pending the hearing and determination of his appeal.
3. The application is anchored on the grounds stated on the face of it and on the depositions made in the supporting affidavit sworn by the applicant. In brief, the applicant alleged that he has filed an appeal before this court that has a high chance of success; that he was admitted to bail before the trial court and he did not abscond his trial, rather, he remained adherent to all the conditions that had been set by the said court.
4. The applicant further alleged that he is the bread winner of his young family and they will suffer irreparable harm should he not be admitted to bail; that he has a fixed place of abode at St. Mary’s village, Njoguini Location, Murang’a East sub-county, within Murang’a county which is within the jurisdiction of this court and he is therefore not a flight risk; that he undertakes to obey and adhere to all the terms and conditions that the court deems fit; and that it would be in the interest of justice the he be admitted to bail or bond awaiting the hearing of his appeal.



5. The application was canvassed by way of written submissions. The appellant's submissions dated 28th April, 2025, was filed on his behalf by his learned counsel T.M Njoroge Advocates; while the respondent's submissions dated 20th May, 2025, was filed by Mr. Pithon Mwangi Gachanja, learned prosecution counsel.
6. In his written submissions, the appellant submitted that his appeal has overwhelming chances of success as the evidence tendered by the prosecution fell short of the threshold required in criminal matters; and there is therefore no justification in depriving him of his liberty. He further submitted that he is of good character and he will not abscond should he be admitted to bail pending his appeal.
7. It was the applicant's contention, that under Article 49 (i) of *the Constitution*, bail is a constitutional right as such, this court should exercise discretion and admit him to bail pending appeal. The applicant submitted that the sentence meted out on him was manifestly excessive and that this amounts to exceptional circumstances upon which he should be granted bail.
8. On his part, Mr. Gachanja, learned prosecution counsel, was opposed to the application for bail or bond pending appeal and submitted that Article 49 (1) (h) of *the Constitution* does not apply in this case, as the presumption of innocence has already lapsed. Mr. Gachanja further submitted that the applicant has not met the conditions required for granting bail pending an appeal, as such, he cannot be granted bail or bond pending an appeal.
9. It was the respondent's contention that by the time the applicant's appeal has been heard and determined, he would not have completed serving a substantial part of his sentence; as such, this application is unmerited and should be dismissed.
10. I have carefully considered the application, the judgement by the learned trial magistrate and the rival written submissions by both parties, I find that the only issue for determination is whether the applicant should be admitted to bail or bond pending the hearing and determination of his appeal.
11. The starting point is the law governing the right to bail or bond pending the hearing and determination of an appeal. Section 357 (1) of the Criminal Procedure Code which provides for this right stipulates as follows:

“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.”

12. From the above provision of law, it is clear that bail or bond pending the hearing and determination of an appeal is at the discretion of the court, and the onus is on the applicant to convince the court why the said discretion should be exercised in his favour.



13. The factors that should guide the court when faced with an application for bail or bond pending the hearing of an appeal, were discussed by the Court of Appeal, in the case of *Jivraj Shah v Republic* [1986] KECA 36 (KLR); as follows:

“...the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v Republic* [1972] E A 476 which was referred to by this court with approval in *Criminal Application No NAI 14 of 1986, Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.”

14. Again, in *Daniel Dominic Karanja v Republic* (1986); the Court of Appeal expressed itself as follows:

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see *Somo v Republic* [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.”

15. In this case, part of the reasons advanced by the applicant for seeking to be admitted to bail or bond pending the hearing and determination of his appeal, is that he is of good character and he will not abscond should he be admitted to bail pending his appeal; and also that under Article 49 (i) of *the Constitution*, bail is a constitutional right as such, this court should exercise discretion and admit him to bail pending appeal.
16. I find it important to distinguish that, the above grounds cannot assist the applicant at this juncture, given that during his trial before the lower court, he was merely a suspect who was at that point presumed innocent. Those circumstances have since changed, in that the applicant has since been convicted and the presumption of innocence has been taken away. Furthermore, the fact that the applicant did not abscond his trial at the lower court when he was out on bail, cannot be said to amount to sufficient reasons to release him on bail or bond pending the hearing and determination of his appeal.
17. The other reason advanced by the applicant for seeking to be admitted to bail or bond pending the hearing and determination of his appeal, is that the sentence meted out on him was manifestly excessive and that this amounts to exceptional circumstances upon which he should be granted bail. In my considered view, the sentence meted out on the applicant by the learned trial magistrate does not amount to exceptional circumstances that would make this court grant the applicant bail or bond pending the hearing and determination of his appeal.
18. I say so because, sentencing is a matter that is within the discretion of the trial court, and before a trial court sentences an accused person, the court must first consider both the mitigating and aggravating circumstances before sentencing. Furthermore, where the applicant feels that a sentence is harsh and



excessive, this is a good ground for an appeal or a review but not for admission to bail or bond pending the hearing and determination of an appeal.

19. The applicant has also alleged that his appeal has high chances of success as the evidence tendered by the prosecution fell short of the threshold required in criminal matters. On my part, I have perused the petition of appeal, and I am of the view that it does not raise substantial points of law, but it is rather founded on facts and findings of the trial court, which will require this court to re-evaluate and re-consider the evidence before the trial court. As such, I am at this juncture not convinced that the applicant's appeal has high chances of success as alleged.
20. It notable that at sentencing stage, the trial court took into account the pre-sentence reports which found that the offenders were not suitable for non-custodial sentence. Secondly, the Applicant and his co-accused admitted to being repeat offenders and thus the necessity for a stiffer sentence.
21. I therefore find that the present application lacks in merit, and I hereby dismiss it. I further order that the hearing of the appeal should be fast tracked.

DATED, SIGNED AND DELIVERED PHYSICALLY THIS 16TH DAY OF DECEMBER, 2025.

HON. T. W. OUYA

JUDGE

For Applicant.....Simon Ndung'u Homba (In Person)

For Respondent.....P. Mwangi

Court Assistant.....Brian

