

IN THE COURT OF APPEAL
AT KISUMU
(CORAM: ASIKE-MAKHANDIA, OMONDI & ACHODE, JJ.A)
CRIMINAL APPEAL (APPLICATION) NO. E112 of 2023

BETWEEN
CHARLES ODINGA KHATORO.....APPLICANT
AND
REPUBLIC.....RESPONDENT

(Being an application for bail pending appeal against the judgment of the High Court of Kenya at Kakamega (Musyoka J) delivered on 28th April 2023

in

**HCCR Cause No. 24 of
2025)**

***** RULING OF THE**

COURT

1. The applicant, Charles Odinga Khatoro filed an application dated 26th June 2024 seeking for orders that:
 - i. *The applicant be granted reasonable bail and/ or bond pending the hearing and determination of his appeal against the conviction and sentence on murder charge contrary to **section 204** of the **Penal Code**.*
 - ii. *The sentence imposed on the applicant be suspended pending the hearing and determination of the appeal.*
2. The application is premised on the grounds on its face and

the supporting affidavit of the applicant sworn on 26th June 2024.

The grounds are that the applicant was aggrieved by the conviction for murder and the sentence of thirty years imprisonment rendered at Kakamega High Court, and he therefore, filed an appeal to this Court.

3. The applicant deposes that his appeal raises triable issues that have high chances of success as the evidence adduced in the trial court was insufficient to prove the charges against him. He avers that he was not conclusively identified by the prosecution witnesses at the scene of crime. That he is not a flight risk as he has a physical address and a fixed abode at Mulunyu village in Sichirai Sub-Location, Sheywe Location, within Kakamega County. Further, that he is a family man with seven children, and he is the sole provider for his children and siblings.
4. The applicant deposes that he is ready and willing to abide by whatever terms the Court will set if released on bail and/or bond. That he is not a threat to public order, peace and security and no prejudice will be suffered by the respondent if the orders sought are granted. On the contrary he will be highly prejudiced if the orders sought are not granted.
5. The applicant filed written submissions dated 3rd December 2024 through the firm of Kithi & Company Advocates. He submits that the exceptional circumstances in his case are that he is a family man with seven children, the youngest being four years old, and he is the sole provider for his

children and siblings. As such, his continued incarceration is causing hardship to his family. He also submits that he has reconciled with the victim's family, he is not a flight risk, and he is a first-time offender who is not a threat to public order, peace and security.

6. The applicant asserts that the appeal has high chances of success, since the prosecution did not prove their case beyond reasonable doubt. That the prosecution case was based on circumstantial evidence which, they allege, unequivocally links him to the charge preferred against him. He posits that the case against him was a case of mob justice as suggested in the Investigating Officer's report.
7. The applicant contends that the trial court failed to produce the alleged weapon used in the murder to support their narrative, or any forensic report to ascertain that the cause of death emanated from the applicant. It was added that the testimony of the only witness who purported to place the applicant at the scene of the crime, failed to give a complete chain of events that directly or indirectly incriminates the applicant.
8. In rebuttal, Mr. Busienei learned Prosecution Counsel, filed the submissions dated 26th June 2025 on behalf of the respondent. He relies on the case of **Jivraj Shah v Republic [1986] KLR 605** where the principles of granting bond pending appeal were laid down. He argues that the applicant

has not demonstrated that there exist exceptional circumstances that warrant granting of bail pending appeal. Further, that the assertion that the appeal has a high chance of success alone, without any other exceptional circumstance is not enough to warrant granting of bond pending appeal.

9. When the application came before us for hearing in plenary on 1st July 2025, Ms. Kithi learned counsel appeared for the applicant and made brief oral submissions restating the filed submissions. Mr. Busienei learned Prosecution Counsel appeared for the respondent and relied entirely on their submissions.
10. We have considered the application, the rival submissions and the law and the issue that arises for our determination is whether the applicant has satisfied the conditions for grant of bail/bond pending appeal. That is, whether he has proved that the appeal is arguable with a high chance of success and whether there are exceptional circumstances to warrant the grant of bail or bond.
11. This position was well articulated in this Court's decision in **Charles Owanga Aluoch v Director of Public Prosecutions [2015] KEHC 5903 (KLR)** where it was held that:

***“6. The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute.*”**

Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's

discretion and upon considering the circumstances of the application.

7. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case *Jivraji Shah -vs- R (1986) KLR 605*, the principal considerations for granting bail pending appeal were stated as follows:

(1) existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.

(2) it appears prima facie from the totality of the circumstances, that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.

(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 - being allowed, the particular circumstances and weight and relevance of the points to be argued."

12. In the present application, the applicant contends that the exceptional circumstances are that his family will face financial hardship, that he is not a flight risk, and that he is a

first-time offender. The respondent maintains that the

applicant has not demonstrated that there exist exceptional circumstances that warrant grant of bail pending appeal.

13. This Court in its decision in **Daniel Dominic Karanja v Republic [1986] KECA 37 (KLR)**, held that:

“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...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. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of ill-health arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.”

Placing reliance on the case of **Daniel Dominic Karanja** (*supra*), we agree with the respondent that the applicant has not demonstrated the existence of exceptional circumstances.

14. Regarding the chances of success of the applicant’s appeal, all we can say at this stage is that it may or may not succeed. That cannot be equated to saying that it has overwhelming chances of success. We also observe that the sentence is thirty years and it is unlikely that he will serve a substantial part thereof before the appeal is heard and

determined. Consequently, we are satisfied that the applicant has not

demonstrated that the appeal has overwhelming chances of success, or that there exist exceptional circumstances that would justify an order for bail/bond pending appeal.

15. In the premise the application dated 26th June 2024 is found to lack merit and is therefore, dismissed.

Dated and Delivered at Kisumu this 30th Day of January, 2026

ASIKE-MAKHANDIA

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**.... JUDGE OF
APPEAL**

H. A. OMONDI

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**.... JUDGE OF
APPEAL**

L. ACHODE

.....

**.... JUDGE OF
APPEAL**

*I certify that this
is a true copy of the
original **Signed**
DEPUTY REGISTRAR*