

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. E049 OF 2025

MOSES

OLE

KOILER.....APPELLANT/APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

- 1.** Moses Ole Koiler, the Applicant, through an application dated 16th December, 2025, seeks bail pending hearing and determination of appeal against the conviction and sentence in **MCCR E009 of 2017.**
- 2.** The application is premised on grounds that the intended appeal is not frivolous and raises substantial points of law and fact with a high probability of success, including and not limited to; the learned Magistrate erred in law and fact by failing to note that the charge of **Robbery with violence** was not proved beyond reasonable doubt; and, by sentencing the Applicant harshly to suffer death which is against **Article 26 of the Constitution, 2010**, which guarantees a right to life to every person and that death has been declared unconstitutional. That the crucial witnesses did not testify.

3. That the Applicant has always attended court throughout trial and is not a flight risk; he is a person of good character with a fixed abode at Kiserian Oloirien Town, Kajiado and is ready to abide by the condition set by the court; he is a small-scale businessman and his continued incarceration will occasion him and his young family undue hardship as he is the sole breadwinner.
4. That the appeal is likely to take considerable time before it is heard and the Applicant will serve a substantial part of the sentence hence rendering the appeal nugatory.
5. The application is supported by an affidavit deposed by the Applicant where he reiterates what is stated in the body of the application and promises to attend court for the hearing of the appeal.
6. The Respondent/ODPP did not file a reply in response.
7. During hearing of the application, Ms. Saitoti learned counsel for the Applicant submitted that the Applicant was admitted on bond during the proceedings and he attended court without fail, therefore he undertakes to comply with everything required. That he is a Kenyan citizen, resides at Ewaso within Kajiado County; and, he is not a flight risk. She called upon the court to invoke **Article 49(1) (h) of the Constitution** and admit the Applicant on bond or cash bail.
8. In response, Ms. Mumbe learned prosecution counsel for the Respondent, submitted that the court is empowered under **Section 357(1) of the Criminal Procedure Code (CPC)**

to admit parties to bond pending appeal, and that **Article 50(2) (q) of the Constitution gives a right of appeal and review.**

- 9.** That jurisprudence has been set in numerous court cases in dealing with bond pending appeal. That in **Jivraj Shah v Republic (1986) KLR** where it is stated that bail pending appeal may be granted where the appeal has chances of success.
- 10.** That the Applicant has given his address hence he has a fixed abode which is within the jurisdiction of the court. That she has perused the lower court record which states the Applicant attended trial throughout and did not abscond. But, she called upon the court to set bail terms that would ensure the Applicant's attendance pending the hearing of the appeal.
- 11.** I have considered the application, affidavit in support, as well as the rival submissions. Bail pending appeal is discretionary. Notably, the Respondent concedes the application on the ground that the Applicant has a fixed place of abode hence not a flight risk and his conduct at trial demonstrated so.
- 12.** It has been held now and again that a court is under no obligation to allow an application simply because the state is not opposed. A court of law is obligated to consider the interest of justice taking into account laid down conditions.

13. Section 357(1) of the Criminal Procedure Code provides thus;

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.

14. In exercising the discretion set out, the court must be minded of the fact that the Applicant is a convict. **Article 49(1)(h) of the Constitution** provides thus;

(1) An arrested 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.

15. The liberty of an accused person is preserved because at that stage he is presumed innocent, a presumption that dictates his release on bond and on reasonable terms. But, the Applicant herein has been convicted. In **Isaac Tulicha Guyo v Republic (Criminal Appeal No. 16 of 2010)** the Court of Appeal stated that;

“The court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by the Constitution and that during the hearing of the pending appeal, the burden would be upon the convicted to show that it is not, therefore, surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances.”

16. In exercising the discretion, the court must also consider the seriousness of the offence. This is a case where the Applicant was convicted of the offence of **Robbery with violence** and sentenced to suffer death as provided in law.

17. That notwithstanding, legal principles that govern bail pending appeal have been settled in various cases. In **Jivraj Shah (supra)** the Court of Appeal stated that;

“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 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.

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.”

- 18.** It has not been suggested by the Applicant that there exist some exceptional circumstances that would warrant orders sought being granted. The question of having not absconded during trial and having an alleged place of abode *per se* cannot be envisaged to be exceptional circumstances as the Applicant is no longer innocent having been convicted.

19. The Applicant has stated that his family will suffer being the sole breadwinner. In **Dominic Karanja v Republic [1980] KLR 612** the Court of appeal 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: 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. 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.”

20. It is urged that the appeal has a high chance of succeeding, and his continued incarceration will render the appeal nugatory. In **Charles Ratemo Matumo v Republic (2021) eKLR** Odunga G.V. J (as he then was) held that;

“The mere fact that the applicant believes that his appeal has chances of success does not necessarily amount to exceptional circumstances since appellants are only expected to lodge appeal where they believed that their appeals

have chances of success. It requires more than such belief to satisfy the court that there are exceptional circumstances.”

21. Without delving into the merits of the case, this is an appeal which cannot be dismissed as one having no merit and unlikely to succeed; the Applicant having been found with the stolen items soon after the robbery. Evidence was adduced which cannot be dismissed as trial until re-evaluation. On the alleged excessiveness of sentence, it is the only sentence provided for the offence in question.

22. Finally, it is urged that the Applicant is likely to serve a substantial amount of sentence before the appeal is heard and determined. In **Epungure v Republic (Criminal Appeal E015 of 2021) [2021] KECA 343 (KLR)** the court stated that;

“From the principles established in the Jivraj case above, the applicant is under an obligation to demonstrate that there is a set of exceptional circumstances that would justify the grant of bail pending appeal by this Court. Further, that the sentence or a substantial part thereof will have been served by the time the appeal is heard. It is not enough, as the applicant has done in this case, to state that an appeal has overwhelming chances of success.”

23. Proceedings have been typed. What is pending is filing of the Record of Appeal and the administrative process of admission of the appeal. This court is geared to expeditious disposition of cases and matters are fast tracked to achieve the objective of efficiency so as to achieve results in reducing cases filed. It is unlikely that the appeal will take long in being heard and determined.

24. The upshot is that the application is bereft of merit. Accordingly, it is dismissed.

25. It is so ordered.

Dated, signed and delivered virtually this 23rd day of February, 2026.

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L.N. MUTENDE
JUDGE