sREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ITEN

CRIMINAL APPEAL NO. E033 OF 2025

SILAS TUITOEK…………………………………………………………………APPELLANT

VERSUS

REPUBLIC…………………………………………………….…………..RESPONDENT

RULING

1. This Ruling is on the Appellants' Notice of Motion dated 4/11/2025 filed through **Messrs Cheruiyot J. & Co. Advocates**, which seeks orders that the Appellant be admitted/released on bond terms pending hearing of this Appeal.

2. From what I can scarcely gather from the scanty record before me, the Appellant was charged in **Iten Magistrate's Criminal Case E678 of 2025** with the offence of stealing, and was on 30/09/2025 sentenced to serve 3 years imprisonment. Dissatisfied with the decision, the Appellant filed this Appeal, and it is against this backdrop that he has filed this instant Application.

3. In his Supporting Affidavit, the Appellant deponed that he has an arguable Appeal, and that he was on bond throughout the trial and at all times complied faithfully with the terms of the bond and attended Court whenever required. He also deponed that he is not a flight risk and undertook to appear whenever required. He urged further that his family depends on him and his continued incarceration causes them undue hardship. He further urged that unless the Application is allowed, he is likely to serve a substantial portion of the sentence before the Appeal is heard, thereby rendering the same nugatory.

4. The Application is opposed by the State/Respondent by way of the Grounds of Opposition dated 20/01/2026 filed by **Prosecution Counsel Ms. Rachel Mwangi**. The Grounds urged are that the Application is an abuse of the process as the Appellant was properly convicted and sentenced after the case against him was proved beyond reasonable doubt. It was also stated that there are no unusual or exceptional circumstances that the Appellant has shown to warrant the grant of bond pending Appeal, that the offence that the Appellant was convicted of is a serious one with a legally severe sentence already pronounced and therefore, the Appellant is likely to abscond should bail pending appeal be granted. Finally, it was contended that the merits of the Appeal is mainly based on points of fact, and not points of law, and is therefore not guaranteed to succeed.

5. Counsels agreed with the Court that considering the straight-forwardness of the Application, there would be no need to file written Submissions.

Determination

6. The issue that calls for determination in this matter is "**whether the Appellant should be admitted/released from prison, on bond and/or bail pending hearing and determination of his Appeal**".

7. I begin by quoting **Article 49(1)(h)** of the **Constitution** which provides as follows:

> **"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.**

8. On its part, **Section 357(1)** of the **Criminal Procedure Code** provides 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."**

9. The Court of Appeal, in the case of **JivRaji Shah vs. R [1986] KLR 605**, guided that:

> **"There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that 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. The proper approach is the consideration of the**

particular circumstances and the weight and relevance of the points to be argued. It is almost self defeating to attempt to define phrases or to establish formulae. There is a helpful passage in ***Archbold, Criminal Pleading Evidence and Practice,*** **41st Edition page 783, paragraph 7-86.**

10. The Court of Appeal, also, in the case of **Dominic Karanja v Republic (1986) KLR 612** held as follows:

"(a) 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;

(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;

(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending Appeal;

(d) ……………………………………………………………………….."

11. I also cite the case of **Masrani v R [1060] EA 321**, in which it was held that:

"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."

12. Further, **Hon. Lady Justice J. Mulwa J**, in the case of **Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR**, remarked as follows:

"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. …………………

13. From the above guidelines, it is clear that a different test from that applied in bail "***pending trial***" is applied when dealing with Applications for "***bail pending Appeal***". When considering the latter, the Court has discretion which, needless to state, must be exercised

judicially, taking into consideration the factors set out in the above authorities. The Court must also appreciate that the accused has by then become a convicted person, and more caution has to therefore be exercised before deciding whether or not to grant him/her bail.

14. What constitutes "***exceptional circumstances***" was dealt with in the case of **R vs. Kanji [1946] 22 KLR**, in which **De Lestang, Ag. J (as he then was)** held as follows:

> **"The appellant's Appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an Appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the Appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his Appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail."**

15. The rationale for considering the chances of success of the Appeal were set out in **Somo v R [1972] EA 480** in which the Court observed that:

> **"There is little if any point in granting the application if the Appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the Appeal court.**
>
> **I have used the word "*overwhelming*" deliberately for what I believe to be a good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his Appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his Appeal will prove successful, he must show that there is an overwhelming probability that it will succeed."**

16. In the present case, the Appellant has not even alleged that the Appeal has "***overwhelming chances of success***", and has not made any effort to demonstrate the arguable points he has alleged. The generally worded Grounds of Appeal listed in the Memorandum or Petition or

Appeal, alone, without any further demonstration, cannot by themselves be sufficient to demonstrate "***overwhelming chances of success***", and the Applicant in an Application of this nature is required to do more and go further by demonstrating the exact manner in which the grounds alleged actually amount to "***overwhelming chances of success***". In this case, the Applicant has not made any such effort whatsoever, and the Application therefore fails on this ground alone.

17. In any event, the grounds that the Appellant was on bond throughout the trial and at all times complied with the terms of the bond by attending Court whenever required, or that his family depends on him and his continued incarceration causes them undue hardship, do not and cannot by themselves, without more, as was held by the Court of Appeal in the case of **Dominic Karanja v Republic (supra)** necessarily constitute "***exceptional circumstances***". The same also applies to the ground that unless the Application is allowed, the Appellant is likely to serve a substantial portion of the sentence before the Appeal is heard, thereby rendering the same nugatory.

18. Considering the above factors, I find that the Appellant has not satisfied or met the threshold for grant of bail pending Appeal.

Final Orders

19. In the premises, the Appellant's Notice of Motion dated 4/11/2025 is dismissed, but with no order on costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MAY 2026

………………..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Applicant (present virtually from Tambach Prison)

N/A for Advocate for the Applicant

Ms. Mwangi for the State

Court Assistant: Brian Kimathi