



**Onyango v Republic (Criminal Application E011 of 2024)  
[2025] KECA 115 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KECA 115 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPLICATION E011 OF 2024  
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
JANUARY 24, 2025**

**BETWEEN**

**STEPHEN OMONDI ONYANGO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application to be admitted to bail pending hearing and determination of appeal against the judgment of the High Court of Kenya at Kisumu (Kamau, J.) dated 30th March 2022 in HCCRA No. 8 of 2018)*

**RULING**

1. The application for consideration by this Court is the applicant's Notice of Motion application dated 26<sup>th</sup> March 2024, seeking orders that the court be pleased to admit and/or grant Stephen Omondi Onyango, the appellant, bail pending appeal on terms as the court sees fit. The applicant states on the face of the application as well as the supporting affidavit dated 2<sup>nd</sup> April 2024, that he has already filed an appeal which has high chances of success; that he was out on bail during the trial, and he never absconded; is a Kenyan citizen, with a family, thus not a flight risk; and is willing to comply with any terms this Court may impose.
2. The applicant was charged, tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to section (8)(1) and 8(3) of the *Sexual Offences Act* in Senior Principal Magistrate's Court Winam SOA No. 24 of 2018. Being aggrieved by the outcome, he appealed to the High Court in Kisumu HCRA No. 76 of 2019; the appeal was heard and determined on 30<sup>th</sup> March 2022 with the High Court upholding the judgment of the lower court.
3. Again, being dissatisfied with the High Court judgment, the applicant has now appealed to this Court, and urges us to consider granting him bail as he awaits the hearing of his appeal.



4. The applicant, in his memorandum of appeal dated 26<sup>th</sup> March 2024, has raised 10 grounds of appeal, and argues through his counsel Mr. Mwamu, that he enjoys the presumption of innocence and exceptional circumstances, namely that he is a person of exceptional character, a family man and that he cannot abscond if granted bail; that there is possibility of sustained delay in determination of the appeal, that the applicant complied with bond terms in the trial court and that the appeal has high chance of success. In support of his application, the applicant refers us to the Ugandan decision of *Arvind Patel vs. Uganda SC* Criminal Appeal No. 1 of 2023 (UR) where the court listed issues to be considered in granting bail pending appeal to include character; whether the applicant is a repeat offender; a person of violent disposition and whether he complied with the bond terms during the trial. According to the appellant, he meets the threshold.
5. The respondent, on the other hand, through Senior Principal Prosecution Counsel, Mr. Okango, argues that there exists no exceptional circumstances to warrant granting of bail pending appeal; and that just because the applicant was granted bail in the lower court; does not follow that the same should be applied here; and that the applicant no longer enjoys the presumption of being innocent as he has been convicted.
6. On the issue of the appeal having high chances of success, the respondent retorts that this being a second appeal only issues of law will be considered, and that there are no fundamental issues of law that have been raised by the appellant; further that the applicant has not demonstrated how the appeal will be rendered nugatory.
7. Bail pending appeal is discretionary upon the applicant demonstrating the existence of exceptional circumstances. There is no constitutional requirement to grant bail pending appeal. Section 49 of *the constitution* creates entitlement to bail pending trial, on the basis of presumption of innocence until proven guilty, which presumption stops once there is a valid conviction.
8. In *Jivraj Shab vs. R* [196] KLR 605, the Court stated:
  - “ 1. 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'
  2. 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”
  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 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”
9. In *Dominic Karanja vs. Republic* [1986] KLR 612 this Court, differently constituted pointed out that thus:
  - “...that the most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant consideration would be whether there were exceptional or unusual circumstances.



The previous good conduct of the applicant, and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors”

10. The applicant argues that his appeal has high chance of success.

For this Court to grant bail pending appeal on this ground, this Court needs to be convinced of such success, as to engage in a preview of the appeal in the guise of an application for bail pending appeal would potentially embarrass the bench that hears the appeal. Looking at the memorandum of appeal, it is our view that the appeal is arguable, but the applicant has not demonstrated that it has overwhelming chances of success, and it thus does not meet the threshold for grant of bail pending appeal.

11. On the ground of existence of exceptional circumstances, this Court is of the view that no exceptional circumstances have been shown by the applicant to warrant the grant of bail pending

appeal. This Court agrees with the respondent that the fact that the applicant was granted bail pending trial is irrelevant to determine whether the applicant is deserving of bail pending appeal.

12. The upshot is that the application dated 26<sup>th</sup> March 2024 has no merit.

It is hereby dismissed.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF JANUARY, 2025.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

