



**Bisuche v Republic (Criminal Appeal (Application) E019 of 2024)
[2025] KECA 342 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 342 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL (APPLICATION) E019 OF 2024
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
FEBRUARY 21, 2025**

BETWEEN

JOSAM UHURU BISUCHE APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for bail pending determination of an appeal from
the judgment and sentence of the High Court of Kenya at Bungoma
(Ali-Aroni, J) Dated 17th July, 2023 in HCCRA. No. 114 of 2010)*

RULING

1. Before us is a notice of motion dated 12th March, 2024, brought under Articles 49(1)(h) and 50(2) of the Constitution and Sections 356 and 357(1) of the Criminal Procedure Code. The applicant is asking us to release him on bail or bond of such reasonable terms, pending hearing and determination of his appeal from the judgment of the first appellate court.
2. The application, is supported by an affidavit sworn by the applicant, and on grounds set out on the face of the motion. The applicant on the grounds in support of the motion avers that his appeal: has high chances of success; will be rendered nugatory in the event he serves his sentence in full before the appeal is heard and determined; requires critical medical attention as he suffers from cardiac arrest, hypertension and diabetes; his wife died in 2005 leaving behind an infant family with school going children, his elderly mother aged 89 years is the only one left behind to take care of them; he is the sole breadwinner of his family; he is not a flight risk and has a fixed place of abode in Malindi, Kilifi County; and, that the right to be released on bail/bond pending hearing and determination of his appeal is guaranteed under Articles 49(1) and 50(2) of the Constitution.
3. In the supporting affidavit, the applicant deposes that he was charged and convicted of the offence of robbery with violence, contrary to section 296(2) of the Penal Code, before the Senior Resident



Magistrate's Court at Webuye. That upon his conviction, he was sentenced to death, which sentence was later commuted to life imprisonment; that aggrieved by this decision, he lodged an appeal before the High Court of Kenya at Bungoma, where both his conviction and sentence were upheld. He deposed further that he has lodged a second appeal before this Court challenging both conviction and sentence.

4. The application was opposed. Learned State Counsel, Ms. Mwaniki, filed grounds in opposition to the application. She urged that the applicant had not demonstrated that his appeal has overwhelming chances of success, or that there existed any exceptional circumstances to warrant his release on bail pending appeal. She stated that while bail pending trial is a constitutional right, bail pending appeal is discretionary. She was of the view that the grounds advanced by the applicant in support of his application did not constitute exceptional circumstances, and that the applicant gets the required medical attention in prison. She invited us to dismiss the application for lack of merit.
5. The application was dispensed by way of written submissions which were duly filed by the applicant. The applicant, who appeared in person, reiterated the averments contained in the grounds and affidavit in support thereof. He added that the medical facilities available in prison are not equipped to handle his ailments as he requires surgery. He stated that he filed his initial appeal before this Court in 2012, and that it was issued an invalid case number, thereby delaying the hearing and determination of his appeal. It was his submission that he is a law-abiding citizen and has acquired new skills in art and design and sign writing that will enable him improve his lifestyle and that of his family upon his release from prison.
6. The respondent did not file any written submissions. Learned State Counsel, Ms. Mwaniki, told the Court that she wished to rely on her grounds of opposition.
7. We have carefully considered the application, the submissions made by the applicant, the grounds of opposition and the law. Although the application is founded on articles 49(1)(h) and 50(2) of the Constitution which guarantee the right to bail pending trial, due to the constitutional right enjoyed by an accused person to be presumed innocent; the proper provisions of the law that ought to have been cited by the applicant should have been rule 5(2)(b) of this Court's Rules which deals with bail pending the hearing and determination of criminal appeals in this Court. The omission is however not fatal to the application.
8. In this case, however, the applicant is a convicted person and hence he does not enjoy the right to presumption of innocence. This was aptly stated by this Court in Mary Ngechi Ng'ethe v. Republic [2021] eKLR where the Court observed thus:

“However, in exercising such discretion, 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/her by the Constitution and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong and the sentence illegal. Therefore, as it has been stated time and time again bail pending appeal will only be granted in rare and exceptional circumstances.”
9. We are guided by our previous decisions on the discretion to release a convicted person on bail, pending hearing and determination of his or her appeal. In the case of Somo v Republic [1972] EA 476 this Court observed thus:

“Where he (applicant) is undergoing a custodial sentence he must demonstrate, if he wishes to anticipate the result of his appeal and secure his release 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.”

10. Further, in the case of *Daniel Dominic Karanja v Republic* [1986] eKLR, this Court expressed itself as follows on this issue:

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] EA 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.”

11. We were urged to grant the applicant bail pending appeal due to his debilitating health. The applicant attached medical reports which indicated that he has been receiving treatment from various government hospitals while in prison, including Kenyatta National Hospital and Jaramogi Oginga Odinga Teaching and Referral Hospital. This is therefore not an exceptional circumstance as the applicant can continue receiving medical care from prison facilities, and when the need arises, he can be referred to government medical facilities for further specialized treatment.
12. It was the appellant’s submission that his appeal has a high chance of success. What the court considers is whether there exists a substantial point of law to be argued by the applicant in the pending appeal that has an overwhelming chance of success, and whether, when the appeal is finally heard, he will have served a substantial part of his sentence. We are not convinced that the applicant has established this grounds based on the memorandum of appeal annexed by the applicant in the affidavit in support of his application. We further note that the applicant is serving a life sentence. The applicant’s averments that he should be released on bail pending appeal so that he can attend to his family’s needs as the sole bread winner does not constitute unusual or exceptional circumstance.
13. From the foregoing, it is our considered view that from the material placed before us, the applicant has not demonstrated that there is any substantial point of law to be argued in his pending appeal, that would warrant his release on bail pending appeal, and neither does there exist any exceptional circumstance to warrant the same. In the circumstances, we find that the application lacks merit, and it is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

