



REPUBLIC OF KENYA



KENYA LAW
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**Chesoto v Republic (Criminal Application 292 of 2022)
[2025] KECA 531 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KECA 531 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPLICATION 292 OF 2022
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MARCH 21, 2025**

BETWEEN

VICTOR MASAI CHESOTO APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for bail and bond pending hearing and
determination of the appeal from the judgment of the High Court
of Kenya at Bungoma (Ali-Aroni, J.) dated 26th May 2016 in HC)*

RULING

1. By a Notice of Motion Application dated 30th January 2024, Victor Masai Chesoto, the applicant herein, seeks to be admitted to bail pending the hearing of his appeal against the judgment of the High Court (Aroni, J.) in Bungoma [HCRA No. 78 of 2015](#), in which he was charged, convicted and sentenced to death for the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#); and undisclosed offences for which he was sentenced to serve imprisonment of 10 years and 3 years respectively.
2. Being dissatisfied with the High Court Judgment, the applicant has now appealed to this Court in Kisumu Criminal Appeal No. 292 of 2022; and he is desirous that pending hearing of the appeal, this Court grants him bail. In support of the application, he explains in his supporting affidavit dated 20th January 2024, that since incarceration, he has become weak and frail due to poor medical attention and sleeping on the floor which has worsened his condition, and that he is unable to eat the food offered in prison, thus further weakening him. He is now so apprehensive that he may soon reach his demise under these conditions before his appeal is even heard.
3. The appellant reiterates that the appeal is arguable with high chances of success as the evidence presented at the trial court did not meet the required standard of proof in all the counts.



4. In opposing the application, the respondent through the grounds of opposition dated 24th March 2024, argues that the grounds to warrant the orders sought are not sufficient; that the appellant has not shown that his appeal has an overwhelming chance of success; nor that the appeal will be rendered nugatory. The respondent also points out that the appellant has not provided any records on his medical condition that may cause him to face imminent threat of death.
5. The appellant's main argument is that he is sickly and may die before his appeal is heard and determined. The prosecution on the other hand argues that there exist no exceptional circumstances to warrant granting of bail pending appeal.
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 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. Rule 5 (2)(a) of this *Court's Rules* allows this Court to order the appellant's release on bail or suspension of a warrant of distress in criminal proceedings pending the determination of the appeal. This can only happen when a proper notice of appeal has been given. It provides:

.....In any criminal proceedings where a notice of appeal has been given in accordance with rule 61, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal or.....

There is no constitutional right 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 the case of *Charles Owanga Oluoch vs. The DPP* [2015] eKLR it was held:

“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 consideration the circumstances of the application.”
9. In *Dominic Karanja vs. Republic* [1986] KLR 612 this court stated
 - 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 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.”
10. This Court in the case of *Jivraj Shah vs. R* [1986] KLR 605, set out the principle considerations for granting bail pending appeal as follows:
 1. The principle 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 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.”
11. 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. There is no memorandum of appeal attached to this application for this court to consider whether or not the appeal is arguable or that it has high chances of success. On the grounds of existence of exceptional circumstances, we find that no such circumstances have been shown by the applicant to warrant the grant of bail pending appeal. This court notes that the appellant states that he is sickly and fears he may die soon if bail is not granted. There are no medical reports produced to support this assertion. The appellant has also not shown that the medical facilities at the prisons are not sufficient to treat his ailment.
 12. This Court notes that during the trial the appellant was presumed innocent. Right now, he has been convicted by a court of competent jurisdiction. Thus, Article 49(1) (h) of the *Constitution* does not apply to the applicant. Indeed, in *Peter Hinga Ngotho vs. Republic* [2015] eKLR, it was held that the fact that the applicant did not breach the bail conditions in the court below is not an exceptional circumstance warranting a decision to admit an applicant to bail pending appeal.
 13. The upshot is that the application dated 30th January 2024 has no merit and is hereby dismissed.
It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 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

