



REPUBLIC OF KENYA



KENYA LAW
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**Ndakwa v Republic (Criminal Application E112 of 2024)
[2025] KECA 723 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KECA 723 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPLICATION E112 OF 2024
HA OMONDI, LK KIMARU & AO MUCHELULE, JJA
APRIL 25, 2025**

BETWEEN

AYUB MAFUVO NDAKWA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for bond pending appeal from the judgment of the High Court at Migori (R. Wendoh, J.) dated 3rd October 2024 in HCCR No. E008 of 2022)

RULING

1. When an accused is awaiting trial, he is entitled to bail under Article 49(1) of *the Constitution*. This is because he has in his favour the presumption of innocence. Upon conviction and sentence, however, the presumption is that he has been properly convicted and sentenced and therefore he is not entitled to be released on bail. The court to which he has appealed against the conviction and sentence may order his release on bail, while the hearing and determination of the appeal is awaited, if it is demonstrated that the appeal has overwhelming chances of success (see Daniel Dominic Karanja -vs- Republic [1986] eKLR), or that the appeal raises such unusual and exceptional circumstances that denying him his liberty would be against the interests of justice. (See Jivraj Shah -vs- R. [1966] KLR 605). The appeal may raise such a fundamental point of law, or the evidence upon which he was convicted may be so flimsy, that, without a detailed consideration of the merits of the appeal, it will appear that the conviction may be overturned, or the sentence, or a substantive part of it, may be varied, or will have been served by the time the appeal is heard and determined.
2. Where the appellant is, for instance, so sick and the prison medical facilities are incapable of attending to his needs, this may be considered, along with other factors, in the exercise of the court's discretion to allow or not to allow bail. That the applicant was on bail while being tried and did not abscond, would be a minor consideration, but it must be borne in mind that it is the expected civic responsibility of an accused person to obey all the terms attendant to his release on bail.



3. The applicant, Ayub Mafuvo Ndakwa, was jointly with another convicted by the High Court at Migori of the offence of murder under section 203 and section 204 of the *Penal Code*, and each was ordered to serve 10 years in jail, beginning 3rd October 2024. By Motion dated 23rd October 2024, 20 days later, he applied to be released on bail while awaiting the resolution of the appeal which he filed to challenge the conviction and sentence. In the Memorandum of Appeal, he complained that he had been convicted on contradictory evidence; crucial witness had not been called by the prosecution; the witnesses who testified were not credible; the elements of murder had not been proved; the conviction was against the weight of evidence; and that his defence had not been considered by the trial court.
4. In support of the motion, the applicant swore that his appeal had overwhelming chances of success; that he suffers from a chronic disease that prison cannot deal with; he had children in school; and that, while on trial, he had been out of bond and had not gone against the terms of his release. Learned Counsel Mr. Athunga argued the application for his release. He repeated what his client had deponed, without elaboration or substantiation. It was not demonstrated why it was thought that the appeal would likely succeed. There was a note from Malava Boys' High School to say that the applicant had a son in the school, and another note from Kenya Methodist University to show that he had a student there. Then another child is at Egerton University, and, lastly, there is another child at another secondary school. The children's education may be inconvenienced by their father's incarceration, but this alone would not present an unusual or exceptional occasion to warrant the release on bail as is sought by the applicant.
5. The prison authorities have medical facilities that have a referral system, and therefore the applicant's ailment should be handled adequately under the prevailing circumstances affecting other prisoners.
6. Learned Counsel, Ms. Ikol, for the State, conceded the application, saying that the appeal may take a while to be heard. However, she added that the appeal, as it is, did not raise any overwhelming chances of success. This is the major consideration, and, therefore, her concession cannot help the applicant.
7. In conclusion, we determine that the application by the applicant for release on bail pending appeal is not merited. The same is hereby declined.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL 2025

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

This is a true copy of the original.

DEPUTY REGISTRAR

