



REPUBLIC OF KENYA



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**Mwanzia v Republic (Criminal Application E038 of 2024)
[2025] KECA 673 (KLR) (11 April 2025) (Ruling)**

Neutral citation: [2025] KECA 673 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPLICATION E038 OF 2024
GWN MACHARIA, KI LAIBUTA & WK KORIR, JJA
APRIL 11, 2025**

BETWEEN

MUTUA MWANZIA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for bail/bond pending appeal from the Judgment of the High Court of Kenya at Mombasa (A. Ong'injo, J.) delivered on 31st May 2024 in HCCR No. 1 of 2017)

RULING

1. The applicant, Mutua Mwanzia, was charged in the High Court of Kenya at Mombasa in Criminal Case No. 1 of 2017 with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Upon his conviction vide the trial court's judgment delivered on 31st May 2024, and on being sentenced on 30th July 2024 to 18 years imprisonment, he intends to lodge an appeal against both conviction and sentence on 11 grounds set out in his undated draft memorandum of appeal.
2. In his Notice of Motion dated 26th September 2024 filed pursuant to rule 5(2) (a) of the Court of Appeal Rules, 2022 and section 357 of the *Criminal Procedure Code*, the applicant prays for, inter alia: that he be admitted to bail/bond pending hearing and determination of his intended appeal
3. The applicant's Motion is premised on 15 grounds set out on its face and more substantively deposed to in his supporting affidavit sworn on 26th September 2024. Relevant among them are: that he had been admitted to bond in the High Court Criminal Case No. 1 of 2017 on 1st March 2017 of Kshs. 500,000 and never absconded court until the matter was determined, and that he is not a flight risk; that, since his incarceration, he developed health complications, which have continued to deteriorate without proper medical attention; that he has a foster mother and sister who depend on him financially; that he is a family man who co-exists with members of his community, is not a threat, and has no



previous criminal record; and that it is in the interest of justice to admit him to bond/bail pending the intended appeal.

4. In support of his Motion, the applicant filed written submissions and a list of authorities dated 15th November 2024 citing 6 judicial authorities five of which are relevant, namely: *Krishnan v the People* [2011] ZMSC 19 in which the Supreme Court of Zambia enumerated the conditions to be satisfied in an application for bail pending hearing of an appeal; *Jivraj Shah v Republic* [1986] KECA 36 (KLR); *Somo v Republic* [1972] EA 476; and *Dominic Karanja v Republic* [1986] KLR 612; where this Court set out the principles to be considered in determining whether an applicant should be granted bail pending appeal.

5. In Addition to the foregoing, the applicant cited the case of *Chimambhai v Republic* [1971] EA 343 where the High Court correctly observed thus:

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.”

6. In opposition to the Motion, the learned Principal Prosecution Counsel, Ms. Ongeti, filed Grounds of Objection and written submissions citing 4 judicial authorities, including the cases of *Dominic Karanja v Republic* (supra) and *Jivraj Shah v Republic* (supra). The remaining two are: *Ademba v Republic* [1983] eKLR in which this Court set out the principles to be considered in an application for bail pending appeal; and the High Court decision in *Charles Owanga Aluoch v DPP* [2015] eKLR where the court held that bail is a constitutional right where one is awaiting trial but that, after conviction, that right is at the court’s discretion

7. The right to bail pending appeal to this Court is provided for in section 379(4) of the *Criminal Procedure Code*, which reads:

379. Appeals from High Court to Court of Appeal

... ..

(4) Save in a case where the appellant has been sentenced to death, a judge of the High Court, or of the Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.

8. In addition to the foregoing, rule 5(2) (a) of the Court of Appeal Rules, 2022 provides that:

5. Suspension of sentence, injunction, stay of execution and stay of proceedings

2. Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

a. 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;



9. With regard to the matters to be considered in determination of an application for bail pending appeal, this Court in *Daniel Dominic Karanja v Republic* [1986] eKLR held that:

“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. The applicant was certified to be fit by a doctor on September 23, 1986 and so no issue of ill health arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country.” [Emphasis ours]

10. In the same vein, this Court in *Jivraj Shah v Republic* [1986] eKLR, held 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] EA 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.”

11. In *Francis Kamote Mutua v Republic* [1988] eKLR, this Court held that:

“It must be remembered that a person has been convicted by a properly constituted Court, and is undergoing punishment, because of that conviction, which stands until set aside on appeal. It is not wise to intervene either from the point of view of the welfare of the Appellant or the State, unless there is a real reason why the Court should hold that he should not be deprived of his liberty. The best test of that consideration is whether the Appellant can show an overwhelming chance of establishing his right to be set at liberty. If he does not do so, the law should take its ordinary course.”

12. Having considered the applicant’s Motion, the grounds on which it is made, the Affidavit in support, the respondent’s grounds of objection, the cited authorities and the law, we reach the conclusion that the appellant has not demonstrated that the appeal has “overwhelming chances of success.” Neither has he demonstrated that there exist exceptional or unusual circumstances upon which this Court can fairly conclude that it is in the interest of justice to grant bail. Moreover, his admission to bond and good conduct prior to conviction and the solemn assertion that he will abide by any conditions that the Court may impose cannot be considered as exceptional or unusual factors to merit bail. Neither



does his foster mother's and sister's dependency on him constitute such exceptional or unusual factors to merit the orders sought. Consequently, the application fails and is hereby dismissed.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

