



**Mutegi & another v Republic (Criminal Appeal (Application)
100 of 2023) [2025] KECA 942 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 942 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL (APPLICATION) 100 OF 2023
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA
MAY 23, 2025**

BETWEEN

NAHASHON MAUKI MUTEGI 1ST APPLICANT

MOSES MUTHARAKA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for bail pending appeal from the Judgment of the High Court of Kenya at Chuka (L. Gitari, J.) delivered on 21st July 2023 in H.C. CRA No. E003 of 2023 Consolidated with H.C. CRA. No. E002 of 2023)

RULING

1. The application before us is dated 30th of September 2024. It has been brought under Articles 19, 22, 25, 39, 48, 49, 50, 51 and 159(2)(d) of *the Constitution* of Kenya, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law). They seek the following orders:
 2. This Honourable Court be and is hereby pleased to admit the Applicants herein on reasonable bail or bond terms pending the hearing and determination of this humble appeal.
 3. That in the alternative to granting prayer 2 above, this Honourable Court be and is hereby pleased to set this appeal down for hearing at the earliest and most convenient date to the court.
 4. Any other orders that this Honourable Court may deem just and fit in the circumstances.
2. In support of the application the 1st applicant Nahashon Mauki Mutegi deposes that they are currently in lawful custody having been convicted and sentenced on 23rd August 2022 by Hon. Njoki Kahara sitting at the Chief Magistrates Court at Chuka to fifteen (15) years imprisonment for the offence of



manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#). Their conviction and sentence were upheld by L. Gitari, J, sitting at the High Court of Kenya, Chuka on 21st July 2023.

3. We heard this application through this Court's virtual platform on the 18th December, 2024. Present for the applicants were learned counsel Ms. Dorcas Mwae and Mr. Onyango, and for the prosecution was learned Prosecution Counsel Ms. Adhi Chepkwony. Mr. Onyango for the applicants' relied wholly on their filed submissions dated 28th October 2024 and their digest and bundle of authorities of even date. Ms. Adhi relied on the replying affidavit sworn by herself dated 13th December 2024 and the list of authorities dated 16th December 2024. Each highlighted their submissions which we have considered.
4. The grounds for the application are that the applicants have been unequivocally informed by the Registry of this Court that the Court is currently handling appeals filed in 2021 and that their appeal having been filed in 2023 shall be heard and determined after the appeals filed in 2021, 2022 and early 2023 are heard and determined.
5. Mr. Onyango urged the application and submitted that the applicants are apprehensive that there shall be an inordinate delay and or time lapse before they get a date for the hearing and determination of their appeal and that it is in the interest of justice that this Court admits the applicants to reasonable bail or bond terms pending the hearing and determination of the appeal.
6. The applicants are apprehensive that unless this Court entertains this application, they shall continue to be held in lawful custody despite timeously lodging their appeal.
7. We have also considered the supporting affidavit in support of the application. The 1st applicant avers that they wish to challenge the judgment of the superior court on the following reasons:
 - a. The Honourable Judge grossly erred in law by placing reliance on the Prosecution's evidence that was erroneous, contradictory, unreliable, disjointed and failed to appreciate and consider the exonerating evidence produced by the Appellants.
 - b. That the Honourable Judge gravely erred in law by shifting the burden of proof from the Respondent to the Appellants herein.
 - c. That the Honourable Judge misdirected herself and gravely erred in law by making a factual finding that the Respondent had proven their case against the Appellants beyond reasonable doubt as required in Criminal proceedings.
 - d. The Honourable Judge gravely erred in law by dismissing the Appellants evidence and defence without citing any cogent reasons for the impugned dismissal.
 - e. That the Honourable Judge grossly erred in law by upholding the harsh sentence meted out against the Appellants herein without taking cognizance of the disjointed and contradictory evidence relied upon in convicting the Appellants
8. The application is opposed. Learned Prosecution Counsel Ms. Adhi Guyatu Chepkwony, in her affidavit in reply to the application deposes that she is the counsel in conduct of the case at the High Court. She deposes further that the application totally lacks merit and does not meet the legal requisite threshold of the orders that it seeks
9. Ms. Adhi avers that the intended appeal has no chance of success whatsoever as the evidence tendered by the prosecution is overwhelming, well corroborated and sufficient to warrant the conviction arrived at by the two courts below.



10. Counsel has challenged the contention that the applicants have been unequivocally informed by this Court's registry that their appeal will be heard and determined only after appeals filed between 2021 and early 2023 are resolved is unsupported by evidence, and furthermore that it is an administrative matter which cannot be used as a ground to support the application for grant of bail pending appeal
11. Ms. Adhi opposes the grant of the bond sought, urging that due to the nature of the offence the applicants were convicted of and the sentence imposed, the chances of both absconding are extremely high and that since grant of bail pending appeal is discretionary as the applicants' right to be considered innocent was compromised upon conviction, we are urged not to exercise our discretion in the applicants favour.
12. Finally, counsel deposes that the applicants have not demonstrated any peculiar and exceptional circumstances to warrant grant of the orders sought and prays that the application be dismissed .
13. We have considered this application as well as the sentiments of the prosecution opposing this application. In the applicants written submissions, Messrs. Mwae and associates rely on the case of John Koyi Waluke vs. Republic in Nairobi Criminal Application No. E026 of 2022, urging that this Court, when faced with a similar issue, set forth the criteria that ought to be met for admission on bail pending appeal. He urged that this Court, in the cited case prescribed that to be granted bail pending appeal, the Applicant has to prove the existence of unusual and exceptional circumstances to warrant the grant of bail or that the appeal is likely to be successful; or that the sentence or a substantial part thereof will have been served by the time the appeal is heard and determined.
14. Counsel urged that the applicants have met the set criteria since it is their considered submission that the unusual and exceptional circumstances that plainly manifests itself is the unprecedented backlog of cases before this Court. He also relied on *Jivraj Shah vs. Republic* [1986] KLR 605, where it held that the principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances.
15. The State on its part urged this Court to find that the instant application does not meet the threshold for grant of bail pending appeal as espoused in the cases of *Jivraj Shah vs. Republic* [1986] KLR 605 and *Dominic Karania vs. Republic* [1986] KLR 612. In the latter case, the court found that the fact that one is ailing or was of good character during the pendency of the case and that they complied with their bail conditions during trial do not qualify as unusual or exceptional circumstances.
16. The Bail and Bond Policy Guidelines provide on page 27, paragraph 4.30 that with respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an "overwhelming probability" that his or her appeal will succeed.
17. This Court in *Epungure vs. Republic* (Criminal Appeal E015 of 2021) [2021] KECA 343 (KLR), while discussing the right to bail pending appeal stated that:

“As conceded by the applicant in his written submissions, Article 49(1)(h) provides for the right to bail of an accused person. An arrested or accused person has a right to bail or bond since, as provided under Article 50(2)(a), such a person is entitled to the constitutional right to the presumption of innocence. A convicted person, on the other hand, does not enjoy the right to presumption of innocence since, as the Court observed in *Mary Ngechi Ng'ethe v Republic* [2021] eKLR:

“5. 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.”

18. The usual and exceptional circumstances were expounded in the case of Arvind Patel vs. Uganda S. C. Cr. Appeal No.1 of 2003 to include:
 - a. The character of the offender,
 - b. Whether the Applicant is or not a first offender,
 - c. Whether the offence of which the Applicant is convicted involved personal violence,
 - d. The appeal must not be frivolous and has reasonable chances of success,
 - e. The possibility of substantial delay in the determination of the appeal, and;
 - f. Whether the Applicant complied with bail conditions granted before the Applicant was convicted during the pending of the appeal.

19. In a persuasive authority from The Supreme Court of India, in the case of Krishnan vs. The People [SCZ 19 of 2011], [2011] ZMSC 17 the Court enumerated the following conditions to be satisfied in an application for bail pending hearing of an appeal:
 - “i. Bail is granted at the discretion of the court.
 - ii. The court must be satisfied that there are exceptional circumstances that are disclosed in the application.
 - iii. The fact that the appellant due to delay in determining the appeal may, have served a substantial part of his sentence by the time his appeal is heard, is one such exceptional circumstance. Each case is considered on its merits, depending on what may be presented as exceptional circumstances.
 - iv. It is important to bear in mind that in an application for bail pending appeal, the Court is dealing with a convict, and sufficient reasons must therefore exist before such a convict can be released on bail pending appeal.
 - v. It is not for the court to delve into the merits of each ground. But it suffices that all the grounds are examined, and a conclusion is made that prima facie the prospects of success of the appeal are dim.
 - vi. The fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant to admit an application to bail; pending appeal.” [Emphasis added]

20. In considering all the above-mentioned cases and principles therefrom, it is trite that bail pending appeal is not an outright right but one that is in the discretion of the Court. It is also trite that the applicants do not enjoy the constitutional right of presumption of innocence as they have been convicted by a competent court, and are therefore convicts serving a lawful sentence. As such, sufficient reasons must exist before they can be released on bail pending appeal. Therefore, the applicants have the burden to demonstrate or present unusual or exceptional circumstances in support of their application which can persuade the Court to exercise its discretion in their favour.



- 21. As the learned Prosecution Counsel observed, and considering the application before us, the reasons advanced by the applicants in support of the application are twofold:
 - a. That the Applicants have been unequivocally informed by this Court's registry that their appeal will be heard and determined only after appeals filed between 2021 and early 2023, and they are thus apprehensive that there will be an inordinate delay before they get a hearing date for this Appeal.
 - b. That the Applicants' Appeal has merit.
- 22. We are aware from the application that the applicants have filed an appeal, however as the record of appeal was not availed, we are unable to comment, on a prima facie basis whether the appeal has high chances of success.
- 23. The court must be satisfied that there are exceptional circumstances that are disclosed in the application. The exceptional circumstances relied on is information the applicants allege was given to them by this Court's registry that their appeal will be heard and determined only after appeals filed between 2021 and early 2023, and they are thus apprehensive that there will be an inordinate delay before they get a hearing date for this Appeal. They have not annexed anything to support that allegation.
- 24. Even supposing there may be some delay in hearing their appeal, they are serving a sentence of 15 years' imprisonment there is no likelihood that they will serve a substantial part of their sentence before the appeal is determined. We are not satisfied that this ground meets the threshold of grant of bail pending appeal.
- 25. The result is that the application lacks in merit and is dismissed. We shall make no order as to costs.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MAY, 2025.

J. LESIIT
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JUDGE OF APPEAL
ALI - ARONI

.....
JUDGE OF APPEAL
G. V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
Deputy Registrar

