



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nanga v Republic (Criminal Application E008 of 2023)  
[2024] KECA 1490 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1490 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPLICATION E008 OF 2023  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**PETER MUMBO NANGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Application to be admitted to bail pending hearing and determination  
of appeal against the Judgment of the High Court of Kenya at  
Homabay (Kiarie, J.) dated 31st July, 2023 in HCCRC No. 8 of 2018)*

**RULING**

1. The applicant, Peter Mumbo Nanga, was arraigned at the High Court sitting in Homa Bay on 5<sup>th</sup> March 2018 and charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). At the conclusion of the trial, the High Court, in a judgment delivered on 31<sup>st</sup> July 2023, acquitted him of the offence of murder but convicted him of manslaughter contrary to section 202 as read with 205 of the [Penal Code](#).
2. The learned Judge subsequently sentenced the applicant to 15 years imprisonment. The applicant is dissatisfied with the conviction and sentence. He has timeously filed an appeal in this Court challenging both. The present application, dated 24<sup>th</sup> October, 2023, is brought under Rule 5(2)(b) of the [Court of Appeal Rules](#) and prays for the applicant to be admitted to bail pending the hearing and determination of his appeal. The application is supported by the affidavit deponed by the applicant on 24<sup>th</sup> October, 2023. Through his lawyers, the applicant also filed written submissions in support of his application.
3. The application is opposed by the State. The Office of the Director of Public Prosecutions, through Mr. Patrick Okango, Senior Principal Prosecution Counsel, filed written submissions in opposition to the application.



4. During the plenary hearing of the application, Mr. Yogo, appearing for the applicant, and Ms. Muema, representing the respondent, informed the Court that they both relied entirely on their written submissions without the need to orally highlight them.
5. The applicant has proffered four grounds for seeking bail pending appeal. In the first place, he argues that his appeal has “high chances of success.” To demonstrate this, the applicant points out that the main witness at his trial was Lavender Maurine Abonyo, who confessed at the witness box to have lied. She gave two versions of events. The applicant also says that the prosecution evidence had “several crevices and gaps that the defence should not be called upon to fill.” In particular, the applicant claims that the trial court never found as a fact that it was the appellant who caused the injuries that led to the death of the deceased. He argues that his appeal would be rendered nugatory if he serves sentence yet he has high chances of overturning the conviction.
6. Second, the applicant says he should be granted bail pending appeal on medical grounds. His affidavit claims that he suffers from diabetes. However, on the grounds on the face of the application, the applicant’s advocate says that he suffers from hypertension.
7. Third, the applicant says that he remained on bond during the pendency of his trial; and there is no good reason why that should not be the case as he awaits the hearing of his appeal.
8. Fourth, the applicant argues that he would have served a significant portion of his sentence if his prayer for bail pending appeal is not granted. It would be impossible to recover some of what would have been lost, should he serve imprisonment and then be acquitted upon appeal, he says.
9. In reply, the State argues that the applicant has not reached the threshold for the grant of bail pending appeal. The State argues that the appeal is, at best, merely arguable, as no overwhelming chances of success have been demonstrated. In particular, the State argues that the reliance on the supposed unreliability of Lavender Maureen Abonyo as the lynchpin of the appeal is misguided because ultimately, the learned Judge found her to be an unreliable witness, ignored her evidence, and relied on other existing evidence. The State also argues that no evidence of the claimed medical conditions has been produced, and, in any event, the claim is contradictory; and the fact that the applicant was out on bail during the pendency of his trial has no bearing on the present application since he has now lost the constitutional presumption of innocence.
10. Our case law has firmly established that bail pending appeal is not an entitlement. Instead, it is generally a matter of the Court’s discretion upon an appellant demonstrating to the Court existence of certain exceptional circumstances. There is no constitutional requirement to grant bail pending appeal. Article 49(i)(h) of the *Constitution* creates an entitlement to bail pending a charge or trial unless there are compelling reasons not to grant one. The libertarian basis for that entitlement is the constitutional presumption of innocence until one is proven guilty. That presumption, however, dissipates upon a valid conviction. At that point, a different presumption kicks in: the presumption of the validity of the conviction and sentence imposed. As this Court has previously said in *Isaac Tulicha Guyo v Republic* (Crim. App. No 16 of 2010):

“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 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. It is not, therefore, surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances.



11. Consequently, this Court has established the legal principles which govern the granting of bail pending appeal. In *Dominic Karanja v Republic* [1986] K.L.R. 612 the Court stated the twin considerations thus:

“That the most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant consideration would be whether there were exceptional or unusual circumstances.”
12. The Court restated these principles in *Jivraj Shah v Republic* [1986] K.L.R. 605 in the following words:

“The Principal consideration in an application for bail pending appeal is the, existence of exceptional on unusual circumstances upon which the Court of Appeal 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist....The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which discloses 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.”
13. In short, in order to succeed on his application, the applicant needs to demonstrate that his appeal has overwhelming chances of success or to demonstrate special circumstances militating in favour of the grant of bail pending appeal.
14. In the present case, the applicant argues, in the first place, that his appeal has high chances of success. Due to the presumption of validity of a conviction, the applicable test is “overwhelming chances of success” of the appeal. Indeed, it is a rare case where the Court will grant bail pending appeal on this ground. The ground of appeal being urged has to be drippingly palpable for it to reach this high threshold. This is because the Court would, ordinarily, be careful not to engage in a preview of the appeal in the guise of determining an application for bail pending appeal. The potential for embarrassment of the bench that eventually hears the appeal is real.
15. After the cursory review of the judgment that is demanded of us in the application of this standard, we can only say that the appeal is eminently arguable. Unfortunately for the applicant, that does not meet the threshold for the grant of bail pending appeal.
16. Two other grounds proffered by the applicant are similarly tenuous and do not cogently demonstrate special circumstances. As we pointed out above, the fact that an applicant enjoyed bail pending trial is consequentially irrelevant in our consideration of the question whether he is entitled to bail pending appeal. As for the argument that the applicant should be granted bail pending appeal on medical grounds, the alleged medical conditions have not been demonstrated since no current medical report was attached; and neither has it been demonstrated that the Prison’s facilities are unable to deal with those conditions. Additionally, as the State pointed out, even the claimed medical condition is contradictory: diabetes is alleged in the supporting affidavit; while hypertension is alleged in the grounds on the face of the application – perhaps a clear indication that the claims are merely pre-textual.
17. Finally, the applicant argues that he would have served a significant portion of his sentence if bail pending appeal is not granted. It is true that where an applicant demonstrates that he is likely to serve the whole of her sentence or a substantial portion of it, that would likely constitute unusual



and exceptional circumstances warranting the grant of bail pending appeal. In the present case, the applicant was sentenced to fifteen years imprisonment. We do not think the risk he articulates is credible: objectively aware of our docket, he is unlikely to serve a substantial or the whole of his sentence before his appeal is heard and determined. This Court has ordinarily either granted bail pending appeal or expedited appeals where applicants before it were serving shorter sentences, typically under five years. This applicant cannot benefit from that argument.

18. The upshot is that the application dated October 24, 2023 has no merit. It is hereby dismissed.

19. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

