



REPUBLIC OF KENYA



KENYA LAW
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**Mwagandi v Republic (Criminal Appeal E014 of 2025)
[2025] KEHC 5025 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E014 OF 2025**

**M THANDE, J
APRIL 25, 2025**

BETWEEN

SAID PONDA MWAGANDI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By an Application dated 13.2.25, the Appellant seeks that he be admitted to bail pending the hearing and determination of his appeal.
2. In an affidavit sworn on even date by Elisha Komora Dullu, the Applicant's advocate, it was averred that the Applicant was convicted and sentenced to 5 years imprisonment vide a judgment delivered on 3.2.25 by Hon. Joy Wesonga, Principal Magistrate. Further that the Appeal herein is meritorious and has a high chance of success. Additionally, that the Applicant was granted bail during trial and never absconded including on the day he was convicted. He is a Kenyan Citizen with known permanent residence and family. He is a young teenager who has been assisting his wife and 1 year old daughter. It was further averred that the Appellant is entitled in law, to bail pending appeal. The Applicant urged the Court to allow the Application.
3. The application is opposed by the Respondent, vide a replying affidavit sworn on 6.3.25 by Joseph Mwangi, prosecution counsel. He averred that following the Appellant's conviction and sentence, he lost the right to presumption of innocence as guaranteed by Article 49(1)(h) of *the Constitution*. Further that the Applicant has not annexed the lower court proceedings. As such, this Court cannot establish the veracity of the averments on behalf of the Applicant. It was further deposed that the averments regarding the Applicant's family are not supported by evidence. Lastly that no peculiar or exceptional circumstances have been demonstrated to warrant the orders sought and that being a convict, there are high chances of the Applicant absconding as he can no longer be presumed innocent. He urged that the Application be dismissed.



4. The law empowers this Court to consider and if persuaded, grant bail pending appeal. Section 357 of the *Criminal Procedure Code* makes provision for admission to bail or suspension of sentence pending appeal. Subsection (1) provides as follows:

“After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.”

5. The Orders sought by the Applicant are discretionary. The right to bond or bail or bond guaranteed under Article 49(1)(h) of *the Constitution* is specifically for an arrested person pending a charge or trial. This right is not available to a person convicted and sentenced after trial. This was the holding in *Masrani v R* (1960) EA 321 where the Court of Appeal stated:

Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.

6. In the case of *Jivraj Shah v Republic* [1986] eKLR the Court of Appeal articulated the principles to consider in an application for admission to bail pending appeal as follows:

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.

7. Flowing from the above, it can be seen that there are 3 considerations in an application for bail pending appeal. First, the existence of exceptional or unusual circumstances and that such circumstances lead the court to fairly conclude that it is in the interests of justice to grant bail. Second, conditions for granting bail will exist if it appears prima facie from the totality of the circumstances that the appeal is likely to be successful. Lastly, that the sentence or substantial part of it will have been served by the time the appeal is heard.

8. In cases such as the one before me, where bail is sought after conviction and pending appeal, the onus is on the Applicant to demonstrate the existence of exceptional or unusual circumstances or such circumstances as would lead this Court to fairly conclude that it is in the interests of justice to grant bail. In the affidavit in support of the Application, it was averred that the Applicant is a young teenager who has been assisting his wife and 1 year old daughter. No evidence was however placed before the Court to support this claim. In any event these are not exceptional or unusual circumstances.



9. Further, the Applicant is required to demonstrate the high probability of success of the appeal and why justice requires that he should be granted bail. Other than stating that his appeal is meritorious with high chances of success, the Applicant has not placed any material before the Court to demonstrate this. He has also not shown that justice requires that he should be released on bail. Further, the Applicant's place of abode cannot be ascertained as he did not place any material before the Court to show proof of residence. Additionally, the solemn promise to abide by any conditions that may be imposed as he did in the court below, is not sufficient ground for granting him bail pending appeal. (See Daniel Dominic Karanja v Republic [1986] eKLR).
10. The Applicant was sentenced to 5 years imprisonment on 3.2.25. He has already filed his appeal. By the time the appeal is heard and determined, the sentence or substantial part of it will have not have been served.
11. The critical difference between bail pending trial and bail pending appeal is that a person seeking bail pending appeal lacks the presumption of innocence that is guaranteed under Article 50(2)(a) of *the Constitution*. Such person is already convicted and serving sentence, as in the case before me. A court must therefore consider the risk of a convicted person absconding and strike a balance.
12. In the end and in view of the foregoing, I am not persuaded that there exist any exceptional or unusual circumstances to warrant the grant of bail pending appeal. Accordingly, the Application dated 13.2.25 is hereby declined.

DATED AND DELIVERED IN MALINDI THIS 25TH DAY OF APRIL 2025

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M. THANDE

JUDGE

