



**Magara v Republic (Criminal Appeal E015 of 2025)
[2025] KEHC 11480 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E015 OF 2025
RM MWONGO, J
JULY 30, 2025**

BETWEEN

NICHOLAS MBOGO MAGARA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

The Application

1. The applicant filed a notice of motion dated 26th March 2025 premised on the grounds on its face and in the supporting affidavit thereof. He seeks the following orders:
 1. Spent;
 2. Spent;
 3. That the honourable court be pleased to admit the applicant to bail pending hearing and determination of the appeal;
 4. Spent;
 5. That in the alternative, the honourable court be pleased to order stay and/or suspension of execution of the sentence imposed by Hon. R. Njoki Kahara in Siakago MCCR E623 of 2023 pending hearing and determination of the appeal; and
 6. That the court be pleased to issue such orders as may be fair and just to secure the applicant's right, fair and just trial.
2. The applicant was convicted for the offence of grievous harm and sentenced to 5 years imprisonment. He has applied for bail or stay of his sentence on medical grounds. He says that the medical conditions he suffers from need specialized medical care which cannot be provided through the prison medical



facility. He stated that his wife is also unwell and is due for a surgery which requires income which only he can provide from his teaching job. He stated that he also cares for his children and aged mother who need his help. He was apprehensive that his incarceration will jeopardize his chances of getting his retirement benefits since he is nearing retirement. He deposed that he had been released on bail and he did not skip bail at any point.

Grounds of Opposition

3. The respondent filed grounds of opposition stating that the application lacks merit and that there are no disclosed exceptional circumstances that would warrant granting of the orders sought. Further, that there is no weakness in the prosecution's case hence the appeal has no chances of success.

Parties' Submissions

4. The applicant submitted that he is 59 years old; that he is very sickly with a prevailing condition (Hypertension, diabetes mellitus type 1, lumbar neuropathy, gaestrophageal/ reflux, severe back pain, ataxic shoulder) which requires medical attention. Thus, being in custody exposes the applicant to a high risk that could be fatal. He relied on the cases of *Jivraj Shah v Republic* [1986] KECA 36 (KLR) and *Mwaura v Republic* [1986] KLR 600 and *Arvind Patel v Uganda* S.C CR. APPEAL NO. 1 OF 2003 and argued that his medical conditions should be held as exceptional circumstances to grant bail pending appeal. Further reliance was placed on section 357 of the [Criminal Procedure Code](#) and the cases of *Vishram Ravji Halai v. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365 and *Absalom Dova v Tarbo Transporters* [2013] eKLR. The applicant argued that he meets the condition required for granting of bail pending appeal or stay of execution of the sentence.
5. In its submissions, the respondent relied on section 357 of the [Criminal Procedure Code](#) and the cases of *Jivraj Shah v Republic* (supra) and *Ibrahim Samon Ali v Republic* [2022] KEHC 2905 (KLR). It argued that the applicant has not disclosed sufficient proof that his appeal has high chances of success since the prosecution's evidence was sufficient to convict. That the medical evidence adduced does not highlight the applicant's need for immediate specialized medical intervention. Further, that the medical discharge summary states that "the patient presented to facility due to severe back pain, ataxia, should pain and severe headache."

Issue for Determination

6. The issue for determination is whether the application has merit.

Analysis and Determination

7. An appellate court can only grant bail pending appeal on discretionary basis. Article 49(1)(h) of the [Constitution](#) provides for bail for an accused person as follows:

"An accused person has the right ...

- (h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released." [Emphasis added]



8. During an appeal, the appellant/applicant is no longer an accused awaiting trial, but rather, he has already been convicted and sentenced and is awaiting hearing of the appeal. Thus Section 357 of the Criminal Procedure Rules is invoked which provides:

“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...”

9. This was the position in the case of *Masrani v R* [1060] EA 321, where it was held thus, regarding bail pending appeal:

“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.”

10. The principles guiding consideration of bail pending appeal are set out in the case of *Jivraj Shah v Republic* (supra) as follows:

- “1. The principal contribution in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.
2. 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.
3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose 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.” [Emphasis added]

11. On parameters that establish exceptional circumstances, the case of *Daniel Dominic Karanja v Republic* [1986] KECA 37 (KLR) offers guidance, where the court labored to explain what exception circumstances encompass as follows:

“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors.”

12. There are plenty of authorities to the effect that a medical condition is not an exceptional circumstance that warrants granting of bail pending appeal. Courts have held that the correctional system has medical facilities on hand to support inmates suffering from chronic conditions that require continuous medical care. The case is not any different for the applicant. As for the issue of him being a caregiver for his family members, that cannot be held as a special circumstance either. Medical emergencies or



medical conditions that are life threatening or cannot readily be dealt with in the correctional facilities might be considered to warrant bail or bond. From the evidence availed, this is not the case here.

Disposition

13. Ultimately, the applicant has not availed evidence that demonstrates that bail pending appeal ought to be granted.
14. The application therefore lacks merit and is hereby dismissed. The court orders that the appeal shall be prosecuted expeditiously. It is also hereby ordered that the applicant be taken to hospital routinely for his medical needs.
15. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 30TH DAY OF JULY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Appellant Present in Court
2. Ochola (Ms) for Appellant
3. Ms. Nyika for the Respondent
4. Francis Munyao - Court Assistant

