



**Bakari v Republic (Criminal Appeal E096 of 2024)
[2024] KEHC 4051 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E096 OF 2024
M THANDE, J
APRIL 26, 2024**

BETWEEN

THABIT AHMED BAKARI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By an application dated 29.1.24, the Appellant seeks orders That:
 1. Spent.
 2. This Honourable Court be pleased to grant the Applicant leave to appeal out of time against the judgment delivered by Hon. M. M. Wachira (PM) at Lamu on 11th December 2023.
 3. This Honourable Court be pleased to deem the proposed and annexed Petition of Appeal against the judgment of Hon. M. M. Wachira (PM) sitting at Lamu, delivered on 11th December 2023 as properly filed.
 4. This Honourable Court, subject to grant of order 2 herein, be pleased to grant the Appellant/ Applicant bail pending hearing and determination of appeal.
2. The grounds upon which the Application is premised on the grounds that the Appellant's advocate requested a copy of the proceedings and judgment on 11.12.23 but only managed to get the same on 24.1.24. The Appellant has approached the Court without undue delay and he has an arguable appeal with a high probability of success. On the prayer for bond pending appeal, the Appellant averred that he always complied with bond terms in the trial court and never missed a court session while out on bond. He urged that it was in the interest of justice that the Application be allowed.
3. The Respondent opposed the Application vide a replying affidavit sworn on 14.2.24 by Agather K. Mkongo, Senior Prosecution Counsel. She averred that the prosecution is not opposed to the



Appellant being granted leave to appeal out of time. The prosecution however opposed the prayer that the Appellant be granted bond pending appeal. They contended that the intended appeal has no chances of success as the evidence against the Appellant was so overwhelming, well corroborated and sufficient to warrant the conviction. Further that there are no peculiar exceptional circumstances raised by the Appellant to warrant the grant the order sought. Additionally, that the sentence meted was very lenient considering the offence. The Prosecution urged that the Application be declined.

4. The Applicant though given an opportunity to file submissions chose instead to rely on the record. The only submissions on record are those of the Respondent which I have duly considered.
5. The prayer for leave to appeal out of time was not opposed. The pending prayer is that for bail pending appeal.
6. 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.

7. The Orders sought by the Applicant are discretionary. 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.

8. Flowing from the above, 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.



9. The right to bond or bail or bond guaranteed under Article 49(1)(h) of *the Constitution* 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.

10. 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.

11. 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 high probability of success of the appeal and that justice requires that bail be granted. In this regard, all that the Appellant stated was that since his arrest, he has insisted that he did not commit the offence and prays that this Court will be convinced by his appeal and overturn the conviction. With respect, this is not a demonstration that the intended appeal has high chances of success.

12. The Appellant further stated that that if granted bail, he shall abide by the terms thereof and attend court sessions without fail. He also stated that during trial in the court below, he attended all court sessions and missed none.

13. The obligation of an accuse person or a convicted appellant to attend court when required to do so cannot be gainsaid. Merely stating that he was faithful to the bond terms set by the trial court and will attend court when by this Court does not constitute exceptional or unusual circumstances to warrant the grant of bail pending appeal.

14. In the end and in view of the foregoing, I am not persuaded that the Appellant has placed any material before the Court to warrant the grant of bail pending appeal. In the premises, I grant the following orders:

1. The prayer for leave to appeal out of time is allowed.
2. The Petition of appeal is deemed as duly filed.
3. The prayer for bail pending appeal is declined

DATED SIGNED AND DELIVERED IN MALINDI THIS 26TH DAY OF APRIL 2024

M. THANDE

JUDGE

