



**Waititu Babayao & 2 others v Republic (Anti-Corruption and Economic Crimes Appeal E006, E007 & E008 of 2025 (Consolidated)) [2025] KEHC 3178 (KLR) (Anti-Corruption and Economic Crimes) (3 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3178 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
APPEAL E006, E007 & E008 OF 2025 (CONSOLIDATED)**

**LM NJUGUNA, J**

**MARCH 3, 2025**

**BETWEEN**

**FERDINAND NDUNGU WAITITU BABAYAO ..... 1<sup>ST</sup> APPLICANT**

**CHARLES CHEGE MBUTHIA ..... 2<sup>ND</sup> APPLICANT**

**LUKA MWANGI WAHINYA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**RULING**

1. The Appellants, herein were convicted of various offences and were sentenced to serve 12 years in prison or a fine of Kshs.53.5M, 11 years imprisonment or a fine of Kshs.296,548,110 and 7 years or a fine of Kshs.21,000,000 respectively.
2. Vide applications dated 14<sup>th</sup> February 2025, 17<sup>th</sup> February 2025 and 18<sup>th</sup> February 2025, the Appellants seek to be admitted to bail, pending hearing and determination of their appeals. They all state that they are aggrieved by the convictions and sentences imposed on them by the trial court and have filed the respective appeals challenging both the convictions and sentences.
3. The applications are supported by the grounds set out on the bodies of the respective applications and on the supporting affidavits sworn by the applicants.
4. The applications are opposed. On record are grounds of opposition dated the 20<sup>th</sup> February, 2015 stating the following grounds: -



- i. The Applicants/Appellants have not met the threshold for the grant of bail pending appeal as sought in the applications.
  - ii. The Applicants/Appellants have not established that the intended appeals if any, have any chances of success.
  - iii. The Applicants/Appellants have not demonstrated the existence of any exceptional and/or unusual circumstances to warrant their release on bail pending appeal.
  - iv. That the Applicants/Appellants have not established any basis for the rebuttal of the presumption that their conviction was proper.
  - v. That upon their impugned conviction, the Applicants/Appellants lost their right to the presumption of innocence and thus their entitlement to bail, if any, and the terms thereof accordingly changed.
5. When the applications came up for hearing on the 24<sup>th</sup> February, 2025 they were consolidated and Counsel argued the applications together.
  6. On the part of the Applicants, it was submitted that the appeals raise good grounds and have chances of success as the grounds that are raised are weighty in that they have attacked the evidence and the determination by the trial court on both law and facts.
  7. They stated that their clients are incarcerated and from the way the courts operate, it will take some time before the appeals are heard and determined. Reference was made to the case of *Musa v Republic* Misc. Criminal Application E111/2022.
  8. On whether the appeal has overwhelming chances of success, Mr. Swaka for the 1<sup>st</sup> Applicant stated that some of the Appellants were part of the tender committee who oversaw the tender being awarded to the 1<sup>st</sup> Appellant/Applicant and that the prosecution needed to show that there was a meeting of the minds between the Appellants.
  9. He further submitted that the prosecution had to show that the money that came from Testimony Enterprises Limited was a kick back in that, the account had some other money. That the court erred in coming to the conclusion that the road was constructed as per the tender and no money was lost and that one witness told the court that the County Government of Kiambu still owes the contractor money to date.
  10. Counsel for the Applicants further submitted that the trial court erred in imputing that the tender was advertised by the 1<sup>st</sup> and 3<sup>rd</sup> applicants but to the contrary it was advertised by the County Government of Kiambu. That the court also erred in imputing that the 3<sup>rd</sup> accused was involved in the process of tendering and a clean bill of health was given in instances where he was involved.
  11. On the exceptional circumstances that exist for consideration of the Applicants by the court, it was submitted that they are all having challenges with their health, with the 1<sup>st</sup> Applicant having a history of ailment to an extent of the trial court asking for an enquiry report when the proceedings were ongoing. In that regard, the court was referred to the case of *Moses Lenolkulal Vs Republic* (Criminal Appeal no. E012/2024).
  12. Still on the issue of exceptional circumstances, Mr. Okeyo submitted that his client is of fairly advanced age, he is unwell and is the sole bread winner and with his incarceration, his family has been rendered destitute. He placed reliance on the cases of *Hisbam Vs Republic* (Criminal Appeal No. E087/2021



(Mombasa), Criminal Appeal no. 13/2019 (*Pauline Ruguru & Gitumba Vs Republic*) and that of *Charles Owanga Aluoch v Republic* (Criminal Appeal Case No. 164/2013).

13. In his submissions, counsel for the Respondent relied on his grounds of opposition and highlighted his filed submissions.
14. On whether the Applicants' appeals raise substantial points of law with overwhelming chances of success, he stated that no point of law has been pointed by the applicants to convince the court that there is an arguable point of law in the petitions of appeals filed by the applicants. He relied on the case of *Peter Mukiri Ndirangu Vs Republic* (Criminal Appeal No. E062/2024) to support his contention that, at this juncture, the court should not consider the merits of the appeal as this is the jurisdiction of the court that will hear the appeal.
15. On exceptional circumstances he submitted that ill health is not an exceptional circumstance for the court to grant bail pending appeal. He relied on the case of *Daniel Dominic Karage Vs Republic* (Criminal Application No. 14/1986) in which the court held that ill health per se should not be a consideration to grant bail as there exist medical facilities in the prison.
16. The court has considered the applications, the supporting affidavits, the grounds of opposition and the submissions by the parties. The Applicants herein have moved the court primarily under Section 357 of the *Criminal Procedure Code* for bond/bail pending the hearing and determination of their respective appeals.
17. The *criminal procedure code* provides for bail pending appeal at Section 357 in the following terms:-

“ 357.

- (1) 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.

- (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.



(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.”

18. As can be seen from this section, one of the prerequisites for one to be admitted to bail pending appeal is filing of the petition of appeal. I noted that the Applicants have complied with this prerequisite and as such, this court can entertain these applications.
19. However, it should be borne in mind that the right to bail pending appeal is not a guaranteed constitutional right and the same ought to be distinguished from bail pending trial as once a trial court has made a determination and found an accused guilty of the offence, he is no longer considered innocent for his guilt has already been established.
20. It is also trite that the right to bail pending appeal is not automatic. The Applicant is enjoined to demonstrate that his appeal has overwhelming chances of success and that there exist exceptional and unusual circumstances which would entitle him bail or bond pending appeal. In the case of *Somo Vs Republic* (1972) EA 476, the court held:-

“But generally speaking, whatever grounds may properly be taken into account in favour of the grant of the application.”

“..... the most important of them is that the appeal will succeed. There is little, if any, point granting the application if the appeal is not thought to have an overwhelming chances of being successful..... I have used the word “overwhelming” Deliberately and for what I believe to be good reason. It seems that when these applications are considered; it must never be forgotten that the presumption is that when the Applicant was convicted he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of this appeal and secure his liberty. Further, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed.

21. Similarly, the court in the case of *Simon Mwangi Kirika v Republic* citing *Jivraj Shah v Republic* also considering the same principles stated: -
  1. The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests 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 relevant of the point to be argued.
22. The *Bail and Bond Policy Guidelines* provide at 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.



23. The Supreme Court of India in the case of *Krishnana Vs The People* enumerated the following conditions to be satisfied in an application for bail pending hearing of an appeal.
1. Bail is granted at the discretion of the court.
  2. The court must be satisfied that there are exceptional circumstances that are disclosed in the application.
  3. 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.
  4. 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.
  5. 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* cases the prospects of success of the appeal are dim.
  6. 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 Applicant to bail, pending appeal.

#### **Issues for determination**

- i. Whether the appeal has overwhelming chances of success; and
- ii. Whether there exists exceptional circumstances to warrant the grant of bail pending appeal

#### **i. Whether the Appeal has overwhelming chances of success**

24. It will be noted from the *Jivraj case* (*supra*) that one of the principles to be considered in determining whether to grant bail pending appeal is that the appeal has overwhelming chances of success on account of substantial point of law to be argued in the pending appeal.
25. The court has perused the petitions of appeal and has considered the Applicants' Counsel's submission on whether the appeal has overwhelming chances of success.
26. Though in his submissions, Mr. Nyaberi alluded to substantial points of law in the petitions of appeal, none was pointed to the court and no submissions were made in that regard.
27. In his submissions, Mr. Owiti Counsel for the Respondent stated that the issues that were raised by the Applicants in their submissions are all matters of facts and not points of law. That no point of law has been pointed by the applicant to convince the court that there is an arguable point of law. On this issue, I cannot agree more.
28. From a review of the record, and the judgment by the trial court, it is my considered view that the analysis of the evidence and the conclusions to be drawn and especially on matters of facts raised by the Applicants should be determined by the appellate court during the hearing of the main appeal after the re-evaluation of the evidence as a whole.



### **Whether there exist exceptional circumstances to warrant the grant of bail pending appeal**

29. As to whether there are exceptional circumstances, the one common ground among all the applicants is that of ill health, the applicants are sole bread winners and their families have been rendered destitute with the continued incarceration of the Appellants. It was further submitted that if not released on bail, at this point, they will have served a substantial part of the sentence by the time the appeal is heard and determined.
30. On the question of ill health, it is trite that the Applicants' ill health does not constitute exceptional circumstances where medical facilities are available for prisoners and where the prison is well equipped to take care of the ill health of the applicants and where if need arises the prisons personnel may seek referral to other medical facilities outside the prison facility. See the cases of *Dominic Karanja Vs Republic* (1986) KLR 612 and *Peter Mwandia Waitbaka Vs Republic* (2019) eKLR.
31. On the question of any anticipated delay in the hearing of the appeal, I am aware that the record of appeal is ready. It therefore means that what is remaining is the admission of the appeal and thereafter the appeal will be given a hearing date. This court can confirm that the diary of the court can accommodate the hearing of the appeals in under two (2) months from now meaning that the appellants would not have served a substantial part of their sentences.
32. Having considered all the above, it is my finding that the Applicants have not met the conditions for grant of bail pending appeal. The applications are hereby dismissed.
33. The appeal shall be heard on priority basis giving that the applicants herein are in custody.  
It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 3<sup>RD</sup> DAY OF MARCH 2025.**

.....

**L.M. NJUGUNA**

**JUDGE**

In the presence: -

Mr. Omari for the 1<sup>st</sup> Applicant appearing with Mr. Nyaberi for the 1<sup>st</sup> Applicant

Mr. Shadrack Wambui also appearing with the 1<sup>st</sup> Applicant

Mr. Njenga Jeremy holding brief for Mr. Swaka for the 2<sup>nd</sup> Applicant

Mr. Njenga Jeremy for the Applicant in E008 of 2025

Court Assistant – Adan

