



Mohammed & 2 others v Republic (Criminal Appeal 117 of 2014 & 104 & 105 of 2017 (Consolidated)) [2025] KEHC 11695 (KLR) (Crim) (22 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 117 OF 2014 & 104 & 105 OF 2017 (CONSOLIDATED)
GL NZIOKA, J
JULY 22, 2025**

BETWEEN

**ABDIMAJID YASSIN MOHAMMED 1ST APPELLANT
OMAR ABDI ADAN ALIAS SALMAN ABDI 2ND APPELLANT
MUSHARAF ABDALLA ALIAS SHUKRI ALIAS SHARIFF ABDALA ALIAS
MUALIM ALIAS RASHID SWAITAN ALIAS ALI BONIE 3RD APPELLANT**

AND

REPUBLIC RESPONDENT

RULING

1. On 13th June, 2025 this court delivered a judgment herein whereby the 2nd and 3rd appellants were acquitted of the charges they were convicted of and the sentence imposed set aside accordingly.
2. Subsequently the State (herein “the applicant”) through an oral application applied for stay of execution of the judgment and the release of the 2nd and 3rd appellants, pending the hearing and determination of the intended appeal.
3. The court ordered that the application be disposed of vide filing of submissions. The applicant filed submissions dated 17th June 2025, and argues that the court has inherent jurisdiction to hear and determine the oral application by dint of; Article 165(3) Constitution of the Republic of Kenya, 2010, (herein “the *Constitution*”) which confers upon the High Court the jurisdiction to determine matters involving the interpretation and application of the *Constitution*, as well as to ensure the protection of fundamental rights and freedoms and meet the ends of justice.
4. That, the present application is founded on a sincere effort to protect and promote the purposes, values and principles of the *Constitution*, including the rule of law, public interest, and the fair administration



of justice, and therefore, procedural barriers should not hinder the Court from considering and granting the orders sought.

5. Further that, the court has inherent jurisdiction to issue orders necessary for the preservation of the subject matter of an intended appeal, particularly in circumstances where failure to do so would render the appeal process nugatory or ineffectual. That Article 159(1) of the Constitution, vests judicial authority in the courts and obliges them, to administer justice without undue regard to procedural technicalities, and to ensure that justice shall be done to all, irrespective of status.
6. The applicant relied on the case of; Kenya Power & Lightning Company Limited v Benzene Holding Limited t/a Wyco Paints (2016) eKLR where the Court of Appeal in discussing the extent of inherent powers of the court quoted from Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14 and held that; "This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice."
7. The applicant further relied on the case of; Board of Governors, Moi High School, Kabarak and Another v Malcolm Bell (2013) eKLR where the Supreme Court of Kenya stated that, interlocutory applications seeking injunction and stay of execution are made within the substantive matter, and the court has jurisdiction to hear and determine such interlocutory injunctions having regard to the special circumstances of each case.
8. That the Supreme Court further stated that, excluding interlocutory injunctions as a necessary step to preserve the subject matter of an appeal would diminish its capability to arrive at a just decision on the merits of the appeal and held that, the Supreme Court is empowered to exercise its inherent jurisdiction and issue any essential and ancillary order such as safeguarding the character and integrity of the subject matter of appeal, pending the determination of contested issues.
9. The case of; Republic v Mohammed & another (Criminal Application 2 of 2018) [2018] KESC 59 (KLR) (28 September 2018) (Ruling) was also cited where the Supreme Court of Kenya, stated that a court's inherent jurisdiction is neither conferred by statute, nor by any external authority or process but stems from the court's broader and primary power to administer justice, and where satisfied grant an order staying an acquittal pending the hearing and determination of the appeal by the State.
10. The applicant submits that, the present application raises significant questions of law and public interest, thereby constituting a proper instance for the court to exercise its inherent jurisdiction in the interest of justice. Further, the Supreme Court in the case of; Republic v Mohammed & another (Supra) laid down principles for consideration in an application for stay of acquittal pending the hearing and determination of an appeal being as follows: -
 - "(1) The discretion to grant stay of acquittal should be exercised sparingly;
 - (2) The discretion shall be exercised judiciously and not whimsically;
 - (3) The accused person has been found not guilty and acquitted, hence there is a presumption of innocence in favour of the accused;
 - (4) It is in the interest of the Public, the State and the Court before which the appeal has been filed to preserve the integrity of the appeal;
 - (5) It is not automatic that upon the State's filing of an appeal stay will be granted. The onus is on the State (Director of Public Prosecution) to lay a basis to the satisfaction of the Court as to the existence of special circumstances that militates against the release of the acquitted person;



- (6) In considering what amounts to special circumstances, the Court shall consider the following:
 - (a) The nature and seriousness of the offence;
 - (b) Whether the absence or non-attendance of the accused person at the hearing of the appeal will render it nugatory;
 - (c) The probability of accused absconding court if released, is he/she a flight risk;
 - (7) A balance has to be struck between the right to individual liberty of the accused and the interest of the public;
 - (8) The length of time which is likely to take for the appeal to be heard.
 - (9) The Court shall expedite the hearing and determination of the appeal.”
11. The applicant further submits that, the central issue in the intended appeal and the instant application is the possibility that the appellants may abscond, rendering the the intended appeal and present application nugatory, and defeating the ends of justice.
 12. Further, the charges preferred against the appellants are of an extremely serious nature, being terrorism related offences comprising multiple counts under various statutes including; the *Explosives Act*, *Firearms Act*, Prevention of Organized Crime Act, *Registration of Persons Act*, *Kenya Citizenship and Immigration Act*, and the Penal Code.
 13. Furthermore, the sentences meted out by the Honourable trial court were severe and reflects the seriousness of the offences, and the danger the appellants posed to national security and public safety. In the circumstances, there is a high likelihood that the appellants may abscond if released.
 14. That, the rights of the aappellants must be weighed against the broader rights of society, particularly the right to life and security of the public. That the present case involves highly dangerous material inter alia explosive vests, grenades, ammunition, and firearms, which may have led to loss of countless lives and widespread destruction of property. Further, the release of the appellants may pose a continued threat to national security and risks the court being construed as condoning or trivializing such acts of terror.
 15. The applicant urges the Honourable court to remain alive to the gravity of national security concerns and the imperative of safeguarding public safety and adopt a strict and cautious approach in matters touching on national security.
 16. That, the appellants were denied bail and remained in lawful custody during the duration of their trial and appeal primarily due to the assessed risk of absconding. That, the court should take judicial notice of the fact that during the pendency of the appeal, the 3rd appellant, Musharaf Abdalla, escaped from lawful custody, was re-arrested and thereafter charged with the offence of escape from custody. That he pleaded guilty and was duly convicted and sentenced. That, the afore conduct underscores the real and continuing risk of flight if the aappellants are released on bond pending appeal, and justifies the present application for stay of acquittal pending the intended appeal.
 17. The applicant further submits that, the appeal is unlikely to be heard soon due to delays in obtaining certified proceedings and existing backlog at Court of Appeal which extends several years back. That, there is no guarantee that the appellants will present themselves for the hearing of the intended appeal



- by the State. Thus it will be in the interest of justice for the court to grant an order for stay of acquittal, pending the hearing and determination of the intended appeal.
18. Furthermore, that the intended appeal raises an arguable and substantial points of law regarding; the proper legal interpretation of “possession” in criminal law, and sentencing principles regarding concurrent vs. consecutive terms. That the appeal will invite the appellate court to clarify the proper legal parameters of constructive and actual possession in criminal law; and to examine the circumstances under which a trial court may direct a convict to serve either concurrent or consecutive sentences, in light of the applicable legal principles and jurisprudence.
 19. However, the 2nd appellant in response submissions dated; 18th June 2025, submits that, in light of the fact that the court ordered the sentence imposed upon the 1st appellant do run concurrently, even if the conviction of the 2nd and 3rd appellants was upheld, they would have already completed their sentences and would have been commuted by the court. As such any further incarcerating of the appellants is greatly prejudicial to them and amounts to double jeopardy.
 20. Furthermore, the present oral application was made on the whim with misguided hope/belief that the Honourable court would act whimsically. That, no affidavit has been presented in support thereof and/or outlining grounds to demonstrate the existence of the special circumstances that warrants the continued detention of the acquitted appellants and/or to invoke the court’s discretionary powers to grant the orders sought.
 21. Further, the timing and manner in which the application was presented was meant to secure a rushed pronouncement from the court without affording the appellants an opportunity to analyse the breadth and depth of the application and authority relied on.
 22. That, the applicant wholly relied on the case of; Ahmad Abolfamhi Mohammed -Assayeed Mansour Mousavi [2018] KLR where the Supreme Court held, inter alia; that the filing of an appeal, in and of itself, will not entitle the State to a stay of acquittal pending the appeal.
 23. Further, that the Supreme Court reiterated that the orders of stay and remand of an acquitted person are discretionary and should be exercised judiciously and not whimsically, and granted only when the prosecution has demonstrated to the court the risk of flight which will likely render the appeal or intended appeal an academic exercise, if the respondent is not remanded.
 24. The 2nd appellant argues that, the applicant not met the threshold set out by the Supreme Court to invoke the exercise of the court’s discretionary power to grant the prayers sought. That, the onus of laying a basis for the grant of the orders rests on applicant who is required to demonstrate existence of circumstances that militate against the released of the appellants.
 25. That, it is not in dispute that the nature of the offences the 2nd appellant was charged with are serious, however the applicant has failed to demonstrate that he is a flight risk and will abscond court if released. Further, there has been no attempt to demonstrate that the absence and/or non-attendance of the appellants at the hearing of the intended appeal will render the appeal nugatory.
 26. That in addition, the applicant has not demonstrated that public interest override and/or outweigh the rights to individual liberties accruing to the appellants under the bill of rights.
 29. The 2nd appellant conceded that, the Court of Appeal has a backlog of cases yet to be heard and determined, and that the applicant’s intended appeal will be on the long waiting list. However, in view of the backlog and the fact that the 2nd appellant has been declared innocent by the court, the scales of justice tilt in his favour of his release during the pendency of the intended appeal.



30. That any attempt to restrict the appellants constitutional right to freedom of movement is an affront to the administration of justice, is oppressive and amounts to double jeopardy. The 2nd appellant referred the court to the case of; Ahmad Abolfamhi Mohmmmed -Assayeed Mansour Mousavi (Supra) where the Supreme Court in allowing the application to stay the acquittal, noted that the respondents therein were Iranian nationals whose country did not have an extradition treaty with Kenya and therefore, if they were repatriated, it would be difficult to secure their presence in Kenya.
31. That, in the present case, the appellants are Kenyan citizens and will at all times remain within the jurisdiction of the court Further, the court is vested with adequate power to ensure that they are able to attend court as and when required.
32. The 1st appellant filed a “rejoinder” which was adopted by the counsel who filed “rejoinder to the prosecution’s application for stay of execution” dated 2nd July, 2025. The appellants argued that, the application herein is not only legally untenable but also unjust, oppressive and contrary to the principles of trial and finality of litigation.
33. That the 1st appellant was convicted of terrorism-related offense and sentenced on multiple counts, initially to run consecutively. That upon filing an appeal, the Hon. Judge upheld the conviction but substituted the sentence to run concurrently citing the Sentencing Policy Guidelines 2023, which emphasize proportionality, rehabilitation and avoidance of excessive punishment.
34. Consequently, the 1st appellant has since served the full term of the concurrent sentence. And the applicant now seeks to stay the execution of the judgment to allow time to file an appeal, citing fear that the appellant may abscond if released.
35. That the application amounts to a veiled attempt to frustrate the appellant’s liberty and delay the enforcement of a lawful judgment. Further the fears expressed are speculative and unsupported by any evidence. That the appellants have already paid their debt and continued incarceration will amount to double jeopardy, violating Article 50(2)(0) of the Constitution, which guarantees the right not to be tried or punished again for an offence for which one has already been convicted or acquitted.
36. That, Kenyan courts have consistently held that stay of execution should not be granted where it would result in manifest injustice or where the applicant has not demonstrated exceptional circumstances. That in Kenya Hotel Properties Ltd Vs Attorney General & 5 Other [2020] KESC 6 (KLR), the Supreme Court of Kenya emphasized that delay alone is not a sufficient ground for stay, and that the interest of justice must be balanced against the prejudice to the respondent.
37. Further in Supreme Court petition No. 29 (E033) of 2022, the court declined to grant stay of proceedings where the applicant failed to demonstrate that the appeal would be rendered nugatory or that exceptional circumstances existed.
38. Furthermore, the principle of finality in litigation is a cornerstone of justice. That the appellants have a legitimate expectation that the judgment of the appellate court will be implemented without undue delay. That continued detention after serving the sentence is not only unlawful but also a violation of the appellants’ right to liberty under Article 29 of the Constitution.
39. That the principle to stay orders in criminal matters are granted sparingly and only where there is clear evidence of injustice, irreparable harm or exceptional circumstance. Therefore, mere dissatisfaction with a judgment or speculative fears of absconding are insufficient.



40. The appellants urged the court to dismisses the application for stay of execution and order the immediate release of the appellants to uphold the sanctity of the appellate judgment and the principles of justice, proportionality and finality.
41. At the conclusion of the arguments by the parties, I note that the application basically seeks for stay of the order acquitting the appellants of the various charges they had been convicted of and/or their subsequent release.
42. In considering the same, I am guided by the decision of the Supreme Court of Kenya in; Ahmad Abolfamhi Mohmmmed -Assayeed Mansour Mousavi (supra) where the court laid down the principles that guide the grant of the orders sought for herein.
43. In that regard, it is noteworthy that, the mere filing of an appeal as herein, does not guarantee a stay of judgement and/or release of the appellant(s). Further, the court has the discretion to grant the orders sought, but the discretion should be exercised sparingly; judiciously and not whimsically.
44. The basis of the aforesaid is that, once acquitted the accused is presumed innocent as guaranteed under Article 50(2)(o) of the *Constitution* and therefore that constitutional right can only be limited where there are special circumstances, which include public, State interest and/or for preservation of the integrity of the court proceeding.
45. The burden of establishing the special circumstances rests with the applicant. In accordance with the special circumstance outlined by the Supreme Court, of Kenya, the charges herein and sentence provided for clearly indicates that, the offences the appellants were charged with are of a seriousness nature.
46. However, the applicant has the duty to prove that the appellants will not attend to the hearing of the appeal if released on bond. The question is; has the applicant proved the same. It is noteworthy that the applicant did not file any affidavit in support of its application and therefore, all that has been said is through its submissions already referred to herein.
47. A consideration of those submissions reveal that, the applicant lays background facts of the matter partly at page (1) and on pages (1) to (5), deals with the legal provisions under Article(s) 159(1) and (2), 165(3) of the *Constitution* and case law that confer upon this court inherent power to determine matters relating to fundamental rights and freedom and/or grant orders sought for herein.
48. At page 6 and 7, the applicant deals with the substance of the matter herein and addresses the principles laid down by the Supreme Court of Kenya in the subject decision referred to herein.
49. In that regard and at the expense of repeating what is already stated herein, I concur with the applicant that the charges herein are serious and are informed by the danger posed to the national security and public safety.
50. However, although the applicant argues that; the release of the appellants may pose continued threat to national security and send the wrong message of condoning or trivializing acts of terror, that the appellants were never granted bail while on trial in the lower court and therefore they should be regarded collectively as a flight risk and that, that during pendency of the appeal, the 3rd appellant escaped from lawful custody and was re-arrested thereafter and charged with offence of escape from custody, there is no evidence in proof of these allegation. The applicant chose not to file a formal application and/or a supporting affidavit and simply addressed the court from the bar, how then can these allegations be substantiated or proved without evidence?



51. Further the applicant argues that the intended appeal is arguable, again how is this court able to determine the same without the grounds of appeal. Furthermore, the applicant concedes that due to work load in the Court of Appeal, the intended appeal may take long to be finalized. The question is; for how long then can the appellants continue to be incarcerated? Consequently, a balance has to be struck between the appellants' right to liberty and public interest.
52. In balancing the afore interest the key issue to consider that the right to bail pending the hearing a criminal case whether at the first instant or appeal is enshrined in the Constitution under Article 49 thereof. The same can only be denied where the State proves that the respondent(s) are inter alia; flight risk or there are compelling reasons, or special circumstances that militate against their release. The key issue remains the need to ensure that the appellants will attend to the hearing of the appeal.
53. From the submissions herein, the applicant has not demonstrated how the appellants are flight risk. The appellants on their part states that, unlike in the Supreme Court of Kenya case of; Ahmad Abolfamhi Mohammed-Assayeed Mansour Mousavi where the subjects were foreigners, they are Kenyans with fixed place of abode in Kenya within the jurisdiction of the court, and entitled to bond as a constitutional right base on the doctrine of presumption of innocence upon acquittal.
54. Further, they have already served ten (10) years in custody and considering that the court has ordered all sentences meted be served concurrently, they should be released as any continued incarceration will be prejudicial and double jeopardy. Finally, that this court has power to ensure they attend court.
55. In final consideration of the matter based on the afore said, I find that the scale of justice tilts in favour of the appellants to be released on bond or bail. In granting the final orders, I have considered factors inter alia; that the appellants were arrested and arraigned in the trial court in the year 2012. Therefore, they have been in custody for a period of about thirteen (13) years. Similarly, the appeal from the decision of the trial court was filed in the year 2017 and therefore has been in court for eight (8) years.
56. Pursuant to the above and in consideration of the backlog of appeals in the Court of Appeal, it is unlikely the intended appeal may be heard and finalized in any period of less than three years.
57. Subsequently, I order that the 2nd and 3rd appellants who have been acquitted of the offences they were convicted of be released on the following conditions;
 - a. Personal bond of Kenya Shillings five hundred thousand (Kshs 500,000).
 - b. Provide a contact person who shall ensure they attend court during the hearing of the appeal.
 - c. Deposit in court any travel documents in their possession;
 - d. Not to leave the jurisdiction of the court without the permission and/or authority of the court.
58. Be that as it were, I hold the view that the appellate court that will hear the intended appeal is well placed to deal with the application of bail or bond pending appeal and/or further release of the appellants. In that regard, the afore order on release of the appellants and conditions thereof shall be valid for a period of three (3) months from the date of this order.
59. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 22ND DAY OF JULY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:



Prof Nadwa and Mr Chacha Mwita for 1st and 3rd appellants

Mr Orlando for the 2nd appellant

Mr Ondimu for the State/Applicant

Ms Hannah; Court Assistant

