



Waititu Babayao v Republic (Anti-Corruption and Economic Crimes Appeal E006 of 2025) [2025] KEHC 12694 (KLR) (Anti-Corruption and Economic Crimes) (17 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12694 (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 OF 2025
LM NJUGUNA, J
SEPTEMBER 17, 2025**

BETWEEN

FERDINAND NDUNGU WAITITU BABAYAO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellant/applicant has moved this court by way of the Notice of Motion dated the 20th August, 2025 under Section 58 of Part 4 of the Judiciary Criminal Procedure Bench Book and Section 28 of the Penal Code, Cap 63 Laws of Kenya, Articles 20,49, 50 ,51 & 159 of *the Constitution* of Kenya, and all enabling provisions of the laws. Through the application, the applicant has sought the following orders;
 1. Spent.
 2. That a finding and Order be made that Section 58 of the Judiciary Criminal Procedure Bench Book and Section 28 of the Penal Code, Cap 63, Laws of Kenya, commend that imprisonment in default of payment of any fine of Kshs.50,00.00 or above must not exceed 12 months, and consequently, the 12-year prison sentence imposed against the Applicant in default of payment of a find of Kshs.53,500,000.00 in ACC No. 22 of 2019 Republic V Ferdinand Ndungu Waititu Babayao is illegal and is hereby reduced to 12 months' imprisonment from the date of conviction, in default of the fine of Kshs.53,500,000.00
 3. The question of the correctness, legality, merit or otherwise of the conviction of the Appellant/ Applicant in ACC No.22 of 2019 Republic V Ferdinand Ndungu Waititu Babayao proceeds



to full hearing and determination in accordance with the procedure for the hearing and disposal of appeals.

4. That such further or other orders are appropriate for the effective and fair administration of justice be issued.
2. The application is premised on the following grounds:
 - a. On the provision of Section 58 of the judiciary Criminal Procedure Bench Book which provides that when imposing a fine, the court should specify a term of imprisonment to be served in default of payment which must be within the scale set out in Section 28 (2) of the Penal Code.
 - b. That in terms of Sections 58 and 28 aforesaid, imprisonment in default of payment of any fine of Ksh. 50,000 or above must not exceed 12 months.
 - c. That the said Sections are couched in mandatory terms and the court does not have a discretion in the circumstances.
3. The applicant relied on the following cases to support his position;
 - a. HCREV 210 Of 2029 (Francis Kinyua Maina Vs Republic
 - b. Nyakio & Another Vs Attorney General & 2 Others (2023) KEHC 19373 (KLR)
4. From the foregoing, he has averred that the court has the power to correct the obvious illegality in the sentence meted out to the applicant at this preliminary stage, whilst the rest of the issues raised in the main Appeal (whether the finding of guilt and the conviction thereof was legally sound) awaits the conclusion of the Appeal.
5. The applicant did not file a supporting affidavit in support of the application.
6. The respondent filed a replying affidavit sworn by Faith Mwila, a Principal Prosecution Counsel, in which she has stated that the applicant was charged, tried and lawfully convicted on four counts of corruption and thereafter sentenced pursuant to Section 48 of the ACECA vide Anti-Corruption Case No. 22 of 2019 R Vs Ferdinand Ndung'u Waititu Babayao & others.
7. That the applicant was convicted and sentenced with offences under the *Anti-corruption and Economic Crimes Act*, a specialized Statute on matters corruption, and as such, the Provisions of the Penal Code on sentencing are not applicable in so far as sentence is concerned.
8. The respondent avers that the applicant therein filed an appeal against both the conviction and the sentence, which appeal is still pending hearing and determination before this Honourable court, and in the appeal, the applicant has challenged the sentence as being harsh and excessive.
9. That since the question of sentence is one of the substantive grounds of appeal expressly raised by the applicant in the Amended Petition of appeal, it ought properly to be canvassed and determined within the main appeal, and any attempt to isolate it for interlocutory determination is irregular and amounts to an abuse of the appellate process. Further that, the issue of reduction or alteration of sentence is not a preliminary matter capable of being determined at an interlocutory stage, but is one of the substantive issues reserved for consideration and determination upon the hearing of the appeal.
10. That this Honourable court, being seized of the appeal, is vested under the law with the powers to reverse the conviction and/or reduce, enhance or otherwise alter the nature of the sentence imposed upon the appellant/applicant, and therefore, the applicant is bound to pursue matters concerning the



conviction and the sentence within the appeal as the revisionary jurisdiction of this court cannot be invoked concurrently over the same matter.

11. That the application seeks that the question of the correctness, legality and merits of his conviction in ACC No. 22 of 2019 Republic Vs Ferdinand Waititu & others be deferred to the full hearing of the appeal, while urging this Honourable court to determine the issue of sentence at this interlocutory stage, yet, the conviction and the sentence are irreparable components of a judgment, and the court cannot be called upon to determine the legality of the sentence in isolation without also addressing the correctness or otherwise of the conviction, which can only be done at the full hearing of the appeal.
12. That in the absence of any admission by the applicant that his conviction was lawful and proper, the issues of conviction and sentence can only be heard and determined contemporaneously at the full hearing of the appeal, and not in isolation at this interlocutory stage.
13. That the respondent will be greatly prejudiced if the matter proceeds in the manner suggested by the applicant, given that the respondent has also filed a cross-appeal which directly impacts the nature of the sentence. That the instant application is misconceived, incompetent, and constitutes an abuse of the appellate process and that the matters raised therein including the legality of the sentence, are properly reserved for determination in the substantive appeal pending before the court.
14. The applicant indicated that he did not wish to file submissions but he sought leave to file a rejoinder on points of law to respond to the respondent's submissions.

Respondent's Submissions

15. The respondent isolated one issue for determination as follows;
 - a. Whether this Honourable court should entertain the issue of sentence in isolation from the issue of conviction before the hearing of the substantive appeal.
16. The respondent submitted that the applicant herein was charged, tried and lawfully convicted with one count of conflict of interest contrary to Section 42(3) as read with Section 48 of the ACECA, and 3 counts of dealing with suspected stolen property contrary to Section 47 (2) as read with Section 48 of ACECA in Anti-Corruption Case No. 22 of 2019. That the applicant filed an appeal against the judgement whereas the respondent herein filed a Cross-appeal.
17. The respondent further submitted on Section 362 of the Criminal Procedure Code that empowers the High court to call for and examine the record of any criminal proceedings in order to satisfy itself as the correctness, legality, or propriety of any finding, sentence, or order, and the regularity of the proceedings. That Section 364(1) of the CPC sets out the remedies available where such illegality, impropriety, or irregularity is established, including the power to reverse, alter or reduce a sentence.
18. It was also submitted that revisionary powers are properly invoked only where there is evidence of a miscarriage of justice, an error of law, excess of jurisdiction, or abuse of power and that, in this case, no such defect has been demonstrated, in that, the sentence imposed upon the applicant by the trial Magistrate was firmly grounded in Section 48 of the *Anti-corruption and Economic Crimes Act*, and the Trial court therefore acted strictly within the law.
19. The respondent distinguished the cases of Francis Kinyua Vs Republic (2020) eKLR and that of Nyakio & another Vs Attorney General & 2 others (2023) KEHC 19373 (KLR) and submitted that both of them are inapplicable in the case herein as the facts and circumstances are very different, in that both cases did not concern corruption offences.



20. Submitting on the limitations of revisionary powers, the respondent relied on the case of Republic Vs Antony Thuo Karimi (2016) eKLR and averred that the applicant having filed an appeal cannot seek to exercise revisionary powers as a revision should not be a substitute for an appeal. Reliance was also placed on the case of Samuel Sagon Kegocha Vs Republic (2021) eKLR in which the court held that Revision should not be a substitute for an appeal.
21. It is also the respondent's submission that the procedure adopted by the applicant in seeking to defer the question of conviction while isolating the issue of sentence at an interlocutory stage is fundamentally flawed, in that, conviction and sentence are inseparable components of a judgment and the legality of one cannot be interrogated in isolation of the other. That in absence of any concession by the applicant that his conviction was proper and lawful, the issues of conviction and sentence must necessarily be heard and determined together at the hearing of the substantive appeal.
22. The respondent has urged the court to find that the application is misconceived, irregular and an abuse of the court process and dismiss the same.

Applicant's Rejoinder On Points Of Law

23. The applicant submitted that it is not the purpose of the criminal law to punish the guilt at all costs. On the two related aspects of public interest which bear on the foregoing, he submitted that public interest in the due administration of justice necessarily extends to ensuring that the court processes are used fairly by the state and the citizens alike and that due administration of justice is a continuous process, not confined to the determination of a particular case. Secondly, that it is contrary to the public interest to allow that confidence by a concern that the court's processes may lend themselves to oppression and injustice. Reliance was placed on the case of Shabahuria Matia Vs Uganda Criminal Revision Cause No. 05 of 1999 (Masaka).
24. On the respondent's argument that consideration of the complaint by the applicant should await the full hearing of the appeal, the applicant contends that the issue before the court is a simple question of law on whether there is a glaring breach of Section 58 of the Judiciary Criminal Procedure Bench Book and Section 28 of the Penal Code, Cap 63, the determination of which should not await procedural mundanities.
25. The applicant further submitted that under Article 23 sub-Article 1, of *the Constitution*, the High court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. He averred that the infringement of his Rights is real and actual, and it is not subject to argument. The applicant contends that the application before the court is not a Revision and termed the respondent's lengthy submissions on the province of Revision as irrelevant to the matter at hand.
26. On whether the applicant should abandon his appeal against the conviction in order to benefit from his right to proper application of the law, it was submitted that Rights are not premised on surrender of other Rights. That the appeal against the conviction is one that is recognized in law, much in the same way as the right to benefit from proper interpretation and application of the law, and that the proposition that the applicant's right to the enjoyment of the rights provided under Section 58 and 28 above, should be subject to a surrender of his right of appeal against a conviction is wrong and unconstitutional. Further submission was made that Section 58 and Section 28 above are couched in mandatory terms and the court does not have discretion in such circumstances.
27. Relying on the Nyakio & another Vs Attorney General & 2 Others and Francis Kinyua (supra), it was submitted that the courts in the two cases set aside the illegal judgement at an interlocutory stage



and directed that the other issues in the Petition be determined after full hearing. And therefore, the argument that the complaint by the applicant may only be addressed at the full hearing, and is not severable from the question of the legality of the conviction is without basis in law.

28. That the court has powers to correct the obvious illegality in the sentence meted out to the applicant at this preliminary stage, whilst the rest of the issues raised in the main appeal awaits the conclusion of the appeal. Reliance was placed on the case of *Kiiza Vs Uganda UGHCCRD* in which the court quoted the Supreme Court in Nigeria in *Amaechi Vs INEC (2008) 5 N.W.L.R (pt1080) 227* at p. 451 in which the court stated that the primary duty of the court is to do justice to all manner of men who are in all matters before it. The court was urged to find the sentence of 12 years imprisonment in default of a fine of Ksh. 53,500,000.00 is illegal and ought to be set aside *ex debito justitiae*.
29. The applicant also filed addendum on rejoinder on points of law and contended that since Section 48 of the ACECA does not have a specific clause in respect of the fines imposed under it, the default may only lawfully conform to Sections 58 and 28 above and they both provide for maximum jail terms of 12 months. That the imposition of a 2- year and 7- year imprisonment in default of fine of Ksh. 1,000,000 and Ksh. 51,249,000.00, respectively, is contrary to the law, and ought to be set aside *ex debito justitiae*. Further, that it is not open to the court to moralize on the letter of the law, and that this being a matter settled by the Statute and case law, the Honourable court has no discretion in the matter.

Analysis And Determination

30. The court has considered the application, the respondent's replying affidavit and the submissions, and the rejoinders by the applicant. In my considered view, the only issue for determination is whether the application has merits.
31. The applicant herein was charged, tried and convicted with one count of conflict of interest contrary to section 42(3) as read with section 48 of the *Anti-corruption and Economic Crimes Act* (herein ACECA), and three counts of dealing with suspect property contrary to section 47 (2) as read with section 48 of the ACECA in Anti –Corruption Case No. 22 of 2019 (Republic Vs Ferdinand Ndung'u Waititu & Others.
32. Upon conviction, the applicant was sentenced as follows;
 - a. Count I... A fine of Ksh. 1,000,000 in default to serve 2 years imprisonment and a mandatory fine of Ksh 51,249,000
 - b. Count II...A fine of Ksh 500,000 and in default to serve 1 year imprisonment
 - c. Count III..... A fine of Ksh 500,000 in default to serve 1 year imprisonment
 - d. Count IV.....A fine of Ksh 500,000 and in default to serve 1 year imprisonment.
33. Being dissatisfied with the conviction and the sentence, the applicant lodged an appeal challenging both the conviction and the sentence. Similarly, the Director of Public Prosecutions filed an appeal, and both appeals are pending hearing before this court. As early as the month of March, 2025 and more specifically on the 3rd March, 2025 when this court delivered the first ruling on bail pending appeal, both the Record of appeal and the proceedings were ready and the parties were notified as much. This court fixed the matter for mention on the 18th March, 2025 for directions on the hearing of the substantive appeals but since then, nothing much has happened in this appeal as the appellants have resulted to filing numerous applications and this has frustrated the hearing of the substantive appeals to the disappointment of some of the counsel for some of the appellants who have raised their frustrations on several occasions when this matter has come up in court.



34. Whereas this court is alive to the fact that an appellant or even a respondent is at liberty to move the court by way of any application, it is difficult to fathom why a party may not be desirous of having the case heard substantively, and whether it is the prudent use of limited judicial time at the disposal of the courts.
35. The applicant herein has moved the court mainly under Sections 58 of the judiciary Criminal Bench Book and section 28 of the Penal Code and has challenged the legality of the sentence that was meted out to him and has urged the court to have it reduced to 12 months in default of the fine of Ksh. 53, 500,000.00. His other prayer is that the question of the correctness, legality, merit or otherwise of the conviction of the applicant proceeds to full hearing and determination in accordance with the procedure for hearing and disposal of appeals.
36. The respondent on its part has opposed the application and has submitted on the legality of the sentence basing its arguments on Section 362 of the Criminal Procedure Code and Section 48 of the *Anti-Corruption and Economic Crimes Act*.
37. As rightly submitted by the respondent, both the applicant and the respondent exercised their rights of appeal and the appeals are pending before this court. The appeals are against both conviction and sentence. Further, there are other appellants who had been jointly charged with the applicant who also filed their appeals which were all consolidated for hearing by consent of all the parties to those appeals.
38. Among the grounds of appeal in the applicant's Amended Petition of Appeal amended on the 18th day of March, 2025, and in particular paragraph 17, is that the sentence imposed on him is harsh and excessive. In the application, the applicant is not alleging that the applicant ought not to have been sentenced at all and his only contention with regard to the sentence is that the same is illegal in terms of the term of imprisonment and is urging the court to make that finding and reduce the sentence at this interlocutory stage awaiting the hearing and determination of the legality, merit or otherwise of the conviction.
39. The applicant's appeal and the cross-appeal by the respondent are all first appeals. The duty of the court in accordance with the case of *Selle Vs Associated Motor Boat Company (1968) EA* is to analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify. Pursuant to that duty, this court will definitely consider the issue of the sentence that the applicant has raised as one of the grounds of appeal and which he is raising in the application herein. Upon consideration, the court may set it aside and/or vary the same depending on the facts and the law.
40. In view of the foregoing, and considering that there are several appellants in the appeal and a Cross appeal by the respondent, whose grounds of appeal are similar if not the same with those raised by the applicant herein, it is only reasonable that the issue raised in the present application be heard and determined in the substantive appeal as the same issue is a ground of appeal.
41. In the end, and for the reasons that the court has given, the application dated the 20th August, 2025 is hereby struck out as the same is an abuse of the court process.
42. In the interest of expeditious disposal of the appeals, the court makes a further order that all the appeals as consolidated be prosecuted within 120 days from 1st October 2025 failing which, the appeals shall stand dismissed.
43. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 17TH DAY OF SEPTEMBER, 2025



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L.M. NJUGUNA

JUDGE

In the presence of:-

Mr. Mutuku for the applicant/appellant

Mr. Monda appearing together with Faith Mwila for the Respondent

Mr. Njenga Jeremy for the appellant in E008/2025

Court assistant – Adan

