

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL CASE NO E086 OF 2025

TYSON

OTIENO

ALIAS

JOSH-----APPELLANT/APPLICANT

VERSUS

REPUBLIC -----PROSECUTOR/

RESPONDENT

RULING

1. The applicant filed a notice of motion application dated 26th November 2025 seeking the following orders;
 - a) *THAT this application be treated as urgent and heard exparte in the first instance. (spent)*
 - b) *THAT the execution of the sentence affecting the appellant /applicant be suspended and he be granted bail/bond pending the hearing and determination of his appeal herein.*
 - c) *THAT the bail/bond set by the Hon. Court be lenient considering the applicant's humble background, his poor health that persistently drained him financially, survival on a special diet and requiring constant medical attention to survive.*
 - d) *Any other or further orders deemed necessary to grant in the interest of justice.*

2. The Application is premised on the grounds set out on its face and on the supporting affidavit sworn by the applicant who states that on 8/9/2025, the court sentenced him to 15 years' imprisonment for the offence of defilement and claims that as a first time offender the sentence was excess given the fact that the case against him was not proven to the required standard of proof.
3. He now asserts that he has poor health as he is suffering from a chronic stomach ulcer and needs urgent medical attention, medicine and a special diet, which is not accessible to him in prison.
4. He seeks bail/bond, which is lenient pending the hearing and determination of the appeal, which he contends has a high chance of success.
5. The court directed that the appeal be canvassed by way of written submission; however, at the time of writing the ruling, none of the parties had filed their submissions.

Analysis and determination

6. The main issue for determination is whether the applicant should be granted bail as prayed pending the hearing of his appeal. The grant of bail pending appeal is not an automatic right under the Constitution of Kenya, 2010, as the presumption of innocence under Article 50(2)(a) ceases upon conviction. Unlike bail pending trial, Article 49(1)(h), bail pending appeal is discretionary and must be exercised judiciously under Sections 356 and 357 of the Criminal Procedure Code.

7. The courts have developed settled principles to guide this discretion, emphasising that a convicted person is presumed guilty until the appeal is determined otherwise.
8. In the locus classicus case of **Jivraj Shah v Republic [1986] KLR 605**, the Court of Appeal outlined the primary considerations the granting of bail ; (a) the existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail; (b) a prima facie likelihood that the appeal will succeed on a substantial point of law; and (c) a high probability that the sentence or a substantial part thereof will have been served by the time the appeal is heard and determined.
9. In **Mutua v Republic [1988] KLR 497**, the Court of Appeal reiterated that bail pending appeal should be granted sparingly, only where the appeal is not frivolous and exceptional circumstances exist.
10. Regarding health grounds, courts have consistently held that ill health alone does not automatically constitute an exceptional circumstance if adequate medical facilities are available in prison. **In Dominic Karanja v Republic [1986] KLR 612**, the Court of Appeal stated that "***ill health per se would not constitute an exceptional circumstance where there exist medical facilities for prisoners.***" However, where the condition is severe, requires specialised treatment unavailable in custody, or poses a risk to life, it may qualify as exceptional. In **Karanja v Republic (Criminal Appeal E018 of 2025) [2025] KEHC 8765 (KLR)**, bail

was considered on medical grounds where the applicant provided evidence of a chronic condition requiring ongoing external care.

11. On the likelihood of success, the court does not conduct a trial but assesses if the appeal raises arguable points with overwhelming prospects. In **Nyambura v Republic (Criminal Appeal E103 of 2022) [2023] KEACA 12 (KLR)**, the Court of Appeal granted bail where the conviction relied on circumstantial evidence with evident gaps, holding that such raised a substantial point of law.

12. Applying these principles, the Applicant avers that he suffers from a chronic stomach ulcer, requiring urgent medical attention, medication, and a special diet inaccessible in prison. He has attached his medical report to support his case. I find this constitutes an unusual circumstance justifying bail in the interest of justice. Continued denial of appropriate care could irreparably harm the Applicant's health, violating Article 43(1) of the Constitution (right to the highest attainable standard of health). However, this is conditional upon verification inter parties.

13. Secondly, on the likelihood of success, the Applicant contends that the case was not proven beyond a reasonable doubt, the sentence was excessive for a first-time offender, and the appeal has high chances. The offence of defilement carries a minimum sentence of 15 years under Section 8(3) of the Sexual Offences Act if the complainant is aged 12-15 years. The merits of this case will be determined at the appeal stage.

14. Accordingly, the application succeeds, and this court makes the following orders:

- a. The Applicant is admitted to bail pending appeal on the following lenient terms, considering his humble background and health: bond of Kshs. 200,000/= with one surety of like amount.
- b. Right of Appeal within 14 days explained.
- c. Mention 25.5.2026 for directions on the main appeal.
- d. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA
21ST DAY OF JANUARY, 2026.**

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a/Nekesa

Ms Mwaniki for the ODPP present online.

Mr. Motokaa for the Appellant/ Applicant absent though aware of the ruling date and time.

Applicant also absent.

The court Assistant to upload the ruling on the CTS forthwith.