REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL NO. E003 OF 2026

DAVID LEI SOIT ……. APPELLANT

=VERSUS=

REPUBLIC ……. RESPONDENT

Coram: Justice R. Nyakundi

Ms Sidi for State

Mr. Tarigo Advocate for the Applicant

RULING

1. Before Court is an application dated 4th February 2026 brought under Certificate of Urgency. The Applicant has moved this court seeking the following orders:
   (a) This Honorable Court be pleased to certify this application extremely urgent and service thereof be dispensed with in the 1st instance.
   (b) This Honorable Court be pleased to admit the Appellant to bail/bond terms pending hearing and determination of the instant appeal
   (c) The cost be in the cause.
2. The application is made on the following grounds:
   (a) That the Appellant/Applicant had been charged in Eldoret Chief Magistrate's Court Criminal Case No. E1487 of 2021 with the offence of forgery contrary to Section 351 of the Penal Code in Count I and in Count II; making a public document without authority

contrary to Section 347(a) as read with Section 349 of the Penal Code.

(b) That the Court convicted and sentence the Appellant/Applicant herein on 11th December 2025 and 3rd February 2026 respectively to serve a five (5) years imprisonment, without an option to fine.

(c) That the Appellant/Applicant herein has since filed an appeal against the said conviction and sentence of the trial Court.

(d) That the Appellant's/Applicant's appeal is arguable and with high chances of success.

(e) That the Appellant/Applicant herein is the sole bread winner for his family.

(f) That the Applicant has young children who are still in school and dependent on him for school fees.

(g) That the Applicant may suffer prejudice if he continues to serve his sentence in prison and in the event his appeal is allowed.

(h) That the appeal might take long to be processed due to the delay of typing of proceedings, hence the need to grant the Appellant/Applicant bail/bond pending appeal.

(i) That the Appellant/Applicant has always ben co-operative with the investigative agencies, and has always attended court always whenever the matter came up for hearing or mentions without fail.

(j) That the Appellant/Applicant is willing to abide by the bail/bond terms pending appeal, that might be set by this Honorable Court, as he is not a flight risk and he beliefs in justice.

(k) That it is in the interest of justice that Applicant be admitted to bail/bond pending the appeal.

(l) That humbly pray that this Honorable Court admits the Appellant/Applicant to bail/bond terms pending the hearing and determination of the appeal, as per the conditions that this Honorable Court deems fit and just.

(m) That the Appellant/Applicant will suffer injustice in the event he is not granted bail/bond pending appeal, and eventually his appeal succeeds at the end of the day.

(n) That no party will suffer prejudice should this application be allowed as prayed.

(o) That this application has been brought promptly, and it is only fair that the same be allowed as prayed.

3. The application is supported by an affidavit sworn by the applicant who deposes as follows:

(a) That I had been charged in Eldoret Chief Magistrate's Court Criminal Case No. E1487 of 2021 with the offence of forgery contrary to Section 351 of the Penal Code in Count I and in Count II; making a public document without authority contrary to Section 347(a) as read with Section 349 of the Penal Code.

(b) That the trial court convicted me on 11th December 2025 and subsequently sentenced me serve five years imprisonment without an option to fine.

(c) That having been aggrieved by the conviction and the sentence of the trial court I have opted to appeal against the same.

(d) That I have filed Memorandum of Appeal through my lawyers M/S Tarigo Kiptoo & Co. Advocates who have advised me and whose advice I belief to be true that my instant appeal is arguable and has overwhelming chance of success.

(e) That my Advocate Mr. Tarigo have advised me and whose advise I belief to be true that I have it is important to file this application for bail/bond pending appeal to enable this honorable court to consider granting me the same, and evert instances where I will suffer injustice if I was to handle the appeal while in jail, and the appeal becomes a success at the end of the day.

(f) That I have been co-operative with the investigative agencies and I have always attended court for all the mentions and hearing without

failing, as I was granted bail of Kshs 100,000/= (Kenya Shillings One Hundred Thousand) Only by the trial Court.

(g) That I am willing to abide by the terms/conditions that this honorable court might set for me, regarding my application for bail/bond pending appeal.

(h) That I am the sole bread winner for my family as I have to provide the school fees and other basic needs for my children, wife and my aging mother.

(i) That I urge this honorable court to consider, the fact that I have an appeal which is arguable and with high chances of success and it will be quite prejudicial to me to serve my sentence, and/or part of it and for the appeal to be allowed later on.

(j) That I am also aware that the typing of proceedings might take time and end up delaying my instant appeal.

(k) That I humbly urge this Honorable Court will all the humbly to exercise its own discretion by allowing me to and/or admitting me to bail/bond pending the appeal.

(l) That it is only fair, just and in the interest of justice that my present application be allowed as prayed.

(m) That I make this affidavit in support of my application now before court.

(n) That no party will prejudice sound this application be allowed.

4. The background of this case is rooted in the judgment of the Court dated 11th day of November 2025 in which the Court pronounced itself as follows:

> *"To prove the charge of forgery against an accused person, there must be proof beyond reasonable doubt that the actus reus, the act of forgery, or an omission resulting in the forgery, was effected specifically by the accused or the accused person jointly with another. From the evidence, there can be no doubt that, as affirmed by PW6, the signature on the letter dated 16/12/2014*

was not that of PW6. This was confirmed by the forensic examination. Thus the document satisfies the criteria for forged document. However, it is not clear from the evidence who forged the document. The accused said he was given the letter by the Ministry of Lands but does not disclose the person who gave him the letter which leads me to conclude that the accused was the one who forged or was privy to the forgery of the said letter. Given that the accused was the one to benefit from the subdivision of the land which were to be carried out by the private surveyor pursuant to the directions contained in that letter I find that the accused person was the one who forged or was privy to the forgery and for that reason I find that the prosecution has proved the offence of forgery contrary to Section 351 of the Penal Code against the accused person beyond any reasonable doubt and I will reject the defence offered and proceed to convict the accused of the charge of forgery contrary to Section 351 of the Criminal Procedure Code. On the charge of making a public document without authority the elements of the offence require that there is proof that the accused person made or signed or executed the document for or in the name of or on account of another person. It must be noted that making a document without authority contrary to Section 347(a) of the Penal Code is not of itself an offence. It is merely the actus reus of the offence of forgery defined in that Section 345. The mens rea is the intent to defraud or deceive mentioned in the definition of forgery under Section 345 aforesaid. Intent to defraud is more particularly explained in Section 348 of the Penal Code. It is axiomatic that mens rea of itself does not constitute an offence and for that reason this Court having found that the accused forged the letter dated 16/12/2014 I will not make any finding on the charge of making a public document without

authority contrary to Section 347(a) as read with Section 349 of the Penal Code and I leave the same in abeyance.

5. The Applicant thereafter was sentenced to five years' imprisonment for one count of forgery while the other count was left in abeyance. From the application he is aggrieved with conviction and sentence and is desirous to exercise his right of appeal to this Court to revisit, examine and evaluate the entire record of evidence with a view to ascertain the legality, regularity, justness, fairness, merit and proportionality of both the entire impugned judgment.
6. Looking to the future the intended Appellant has crafted and shared with High Court a memorandum of appeal dated 4th February 2026 in which he believes, hopes and trusts that the following grounds will find favor so that his appeal can be allowed and the impugned judgment set aside on both conviction and sentence. Thus:
   (a) *The Learned Trial Magistrate erred in law and fact by convicting and sentencing the appellant without considering that the evidence adduced against the appellant did not meet the threshold of beyond reasonable doubt.*
   (b) *The learned Trial Magistrate erred in law and fact by sentencing the appellant for five (5) years without an option of fine, which was too harsh considering the circumstances of the matter.*
   (c) *The Learned Trial Magistrate erred in law and fact in failing to consider the nature of the offence and the judiciary sentencing policy guidelines.*
   (d) *The Learned Trial Magistrate erred in law and fact by failing to consider the evidence adduced by the appellant and his witnesses on merit.*
   (e) *The Learned Trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant.*

(f) *The Learned Trial Magistrate erred in fact and law by failing to consider the mitigation of the appellant before passing his sentence.*

(g) *The Learned Trial Magistrate erred in law and fact by failing to consider the fact that the Appellant the charges against the Appellant were malicious in nature and amounted to witch-hunt.*

Reasons wherefore;-the Appellant has filed the present appeal seeking the following orders/prayers that;

i. *The Conviction and Sentence of the appellant be set aside, varied, discharged, and/or vacated, and the appellant be set at liberty.*
ii. *This appeal-be allowed.*
iii. *In the alternative to prayer (a) and (b) above this Honorable Court be pleased exercise its' discretion and give the appellant a lesser sentence and with an option of fine.*

7. There will be an opportune time to interrogate these questions in the forum of conveniens which is an appellate Court as per law established. As of now, the question to be answered by this Court is whether there is merit to release the Applicant/Intended Appellant on bail pending appeal.

Resolution

8. First and foremost is the legal dictates governing the discretion of this Court on matters of bail pending appeal. The constitutional imperative is still Article 49(1)(h) which provides *inter alia* as follows:

> *"An accused person has the right .....*
> *To be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released."*

9. This provision must also be weighed with other rights coined in our Constitution as fundamental rights and freedoms within the threshold of Chapter 4 of the Supreme Charter of our motherland. This includes but not limited to right to equality and freedom from discrimination under Art 27, right to human dignity in Art 28, right to freedom and security of the person in Art 29, right to fair trial rights in Art 50 and right on Access to justice in Art 48 of the same Constitution.

10. Generally speaking, these plethora of rights save for the right to liberty are expected to be secured and guaranteed even within the correctional facilities in the event any of the citizens finds himself or herself confined in Prisons pending trial or on the other hand serving sentence duly imposed after criminal trial on the merits within our constitutional and statutory provisions governing the Criminal Justice System of this country.

11. The aspect of personal liberty is a priceless treasure of a human being and is cherished because it is one of the elements which gives each one of them the purpose of existence. For our case it is founded on the bedrock of constitutional rights in Art 29 and accentuated further on human rights discourse. It is basically a natural right and a life wire which oxygenates a purpose driven life for without movement of our humanity there is even impairment of enjoyment or realization of our economic, social and cultural rights. I dare say that no human being will like to lose his or her liberty or even trade it in with any other luxuries of life. If one needs to underscore the right to liberty he or she must look back why the continent of Africa fought so much to be liberated politically and as an ancillary to it is the right to liberty. This so treasured and cherished liberty for individuals is not absolute and for the Applicant it has been withdrawn by dint of the penal sanctions imposed by the trial Court.

12. The fundamental aspects of his application is that the presumption of innocence under Art 50(2)(a) of the Constitution starts

all the way from the trial Court and continues even up to the appellate stage hence the necessity he pleads with this Court to grant him bail pending appeal. This is the Legislative Scheme on this remedy under **Section 357(1) of the Criminal Procedure Code** which 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."*

13. The purposive interpretation of this provision is as illuminated by the Court of Appeal in the case of **JivRaj Shah vs R [1986] KLR 605** which stated 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 itis 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. The decision in Somov Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the*

appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice,41st Edition page 783, paragraph 7-86.

14. The basic rule is that if our criminal justice system was working efficiently Courts being guided with well settled principles on bail pending appeal an aggrieved party against the judgment of an inferior Court should be released on bail unless there are circumstances suggesting the possibility of his or her fleeing from justice or thwarting the cause of justice. When bail is refused on the basis that an Applicant is serving his or her sentence imposed by a competent Court even when he or she has preferred an appeal which might take many years to heard and determined it is a threat to infringement or violation of his or her personal liberty. So there must be a balancing act between the nature and gravitas of the offence and maybe the need to protect the interest of the society can that liberty be curtailed.

15. One other aspect of application of this nature is for the Court to bear in mind the above principles of law and the endeavor on the part of the Court to answer the question as to whether the case presented by the Prosecution and accepted by the trial Court can be said to be a case in which ultimately the convict stands for fair chances of success. This does not mean a case must absolutely succeed on appeal. If the answer to the above said question is to be in the affirmative as a necessary rider one can just say that if ultimately the appeal succeeds at the hands of an appeal's Court, he or she should not be kept behind the bars of the Prison walls for a pretty long time till the conclusion of the appeal. This is what I consider to be interim bail which is defined in the Constitution or the Criminal Procedure Code granted to the Applicant or intended Appellant who mas met the threshold pending

the filing of the record and subsequently having the appeal considered for summary dismissal or the same to be heard on the merits. This also goes without saying that the interim bail pending appeal against the impugned judgment of a trial Court has also the effect of suspension of sentence in the interim basis for the necessary case management of the appeal process to be undertaken and concluded within a reasonable time. The primary purpose of the bail after conviction is to free the convict from restriction put upon him or her by barring him or her beyond the walls of the Prison and also to have him or her released so that he or she can exercise his constitutional right of appeal.

16. In this very legal system the Court of Appeal in **Dominic Karanja v Republic (1986) KLR 612** stated as follows:

> *"The most important issue was that if the Appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether these were exceptional or unusual circumstances. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners; A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, if not sufficient ground for releasing a convicted person on bail pending Appeal*

17. The Superior Courts have also adopted a proactive approach on this issue of bail pending appeal if the principles in **R. vs Kanji [1946] 22 KLR** is anything to go by. Thus:

> "*The appellant's Appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The*

mere fact of delay in hearing an Appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the Appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his Appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect indifferent position from him as regards bail, has been admitted to bail."

18. Although in the legal treatises including the language of the Constitution itself under Article 49(1)(h) the right to bail is not absolute but in my considered view bail remains to be the rule whereas jail is an exception. I have gone through the application and the affidavit by the Applicant/Intended Appellant, there is already a memorandum of appeal and an assurance by the Learned Counsel Mr. Tarigo appearing for the Applicant/Intended Appellant in this matter that the appeal shall be fast-tracked. There is nothing to sway this Court to believe that the Intended Appellant/Applicant is not serious in prosecuting the said appeal. The record also tells a story that the Intended Appellant/Applicant was granted bail during trial and did not attempt to jump bail and for those reasons there is merit to grant the application based on the following conditions:

(a) *That the Intended Appellant/Applicant shall be released on bail pending appeal conditioned at him depositing and executing bond terms of Ksh 500,000/= with a surety of identical amount or in the alternative a cash bail of Ksh 250,000/= or either of each to be deposited with the Deputy Registrar of the High Court at Eldoret forthwith to facilitate execution of the release orders.*

(b) *That the Trial Court record in the form of proceedings and evidence be typed under the supervision of the Senior Court Administrator*

Mr. Omuse for purposes of fast-tracking the appeal so that the inordinate delay does not render the appeal moot.

(c) *That this matter shall be mentioned before the Deputy Registrar of the High Court on the 12th of March 2026 for monitoring and compliance in record preparation so that the Applicant's Appeal can be heard within a reasonable time.*

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 4TH DAY OF MARCH, 2026

.....

R. NYAKUNDI

JUDGE