

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT ANTI-CORRUPTION COURT
CRIMINAL APPEAL NO. HCACECA/E008/2025
(Consolidated with HCACECA/E006/2025 and E007/2025)

LUKA MWANGI

WAHINYA.....APPELLAN

T/APPLICANT

VERSUS

REPUBLIC.....

....RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 22nd January 2026 seeking the following substantive orders:

- a) ***THAT the orders made on 4th March 2025 denying the appellant bail pending the hearing and final determination of the appeal be reviewed and/or set aside;***
- b) ***THAT the appellant be admitted to bail on such reasonable terms as this Honourable Court shall deem appropriate.***

2. The application is based on the following grounds:

- i) ***That the Applicant remains incarcerated at Kamiti Maximum Remand Prison;***

- ii) That his wife has been diagnosed with multiple myeloma and requires urgent medical treatment including bone marrow transplant in India;**
- iii) That as head of the family, his presence is necessary for emotional, moral and financial support;**
- iv) That the interests of justice and humanitarian considerations warrant review of the earlier orders.**

3. The Respondent opposed the application through the Replying Affidavit of its Principal Prosecution Counsel at the Office of the Director of Public Prosecutions **Ms. Faith Mwila** who deposes, inter alia, that:

- a) That the Applicant was charged and convicted in ACC No. 22 of 2019 - Republic v Ferdinand Ndung'u Waititu Babayao & others;**
- b) That the Applicant's earlier application for bail pending appeal in HCACECA E008 of 2025 was dismissed on 3rd March 2025;**
- c) That the orders were issued after full consideration of the appeal and surrounding circumstances;**
- d) That this Court expressly found that the Applicant failed to satisfy the established legal principles governing bail pending appeal;**

- e) ***That this Court found that ill health does not constitute exceptional circumstances to warrant grant of bail pending appeal;***
- f) ***That the Applicant has not demonstrated new, exceptional or compelling circumstances to warrant review.***

4. However, at paragraph 16 of the Replying Affidavit, the Respondent deposes as follows:

“16. THAT without prejudice to the foregoing, and in the spirit of fairness, the Respondent does not oppose the Applicant’s admission to bail pending appeal, subject to such reasonable and adequate security or conditions as this Honourable Court may deem fit to safeguard the execution of the sentence, and taking into account that the Respondent lodged an appeal vide HCACECA E.009 of 2025, seeking enhancement of the sentence imposed upon the Applicant, which pending appeal heightens the risk to execution and is a relevant consideration in the exercise of this Honourable Court’s discretion.”

5. The Application was canvassed by way of written submissions.

The Applicant’s Submissions

6. The Applicant submitted that the Respondent has effectively conceded to the grant of bail pending appeal subject to reasonable terms and that the issue for determination is therefore the appropriate terms.
7. It was the Applicant's case that the Court is empowered to review its earlier decision where new circumstances arise. For this argument the Applicant referred to the case of **R vs. Nottingham Justices Ex-parte Davies (1981) QB 38** where the court held:

“The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since the last occasion but also circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused.”

8. It was submitted that the Applicant's wife's deteriorating medical condition and delay in hearing the appeal constitute new considerations. The Applicant refers to paragraph 31 of the earlier ruling denying bail:

“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.”

9. It was submitted that one year has lapsed and the appeal is yet to be heard, thereby justifying reconsideration. Reference was made to the case of ***Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 others*** [2013] eKLR, where the Court of Appeal held:

“An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”

10. The Applicant submitted that his appeal raises arguable points of law and fact. Reliance was placed on the case of ***Williamson Diamonds Ltd & Ano. Vs. Brown*** [1970] EA 1, where the Court held:

“The appellate court when hearing an appeal is not bound necessarily to accept the finds of fact by the trial court below but must consider the evidence and make its own evaluation and draw its own conclusion.”

The Respondent's Submissions

11. The Respondent reiterated that bail pending appeal is discretionary and that the Applicant must satisfy established legal principles. According to the Respondent, ill health does not automatically amount to exceptional circumstances and that conditions imposed must secure attendance and safeguard execution of sentence.
12. The Respondent emphasized the pending appeal for enhancement of sentence (HCACECA E009 of 2025) as a relevant consideration.
13. The Respondent submitted that the applicable test in an application for review of denial of bail is whether there has been a material change in circumstances since the earlier order.
14. Reliance was placed on ***Republic vs. Francis Maina Wairimu [2020] eKLR***, where the Court held:

“In an application for review for denial of bail, the applicant is under a duty to convince the court that there had been change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier orders”.
15. The Respondent submitted that the Applicant's assertion that he is a sole breadwinner was raised in the

initial application dated 18th February 2025 and that the alleged illness of his spouse, without more, does not constitute a material change sufficient to warrant variation of the existing bail order.

16. It was the Respondent's case that the fact that the Applicant's spouse is unwell does not, by itself, amount to a material change in circumstances.

17. It was further submitted that the primary principle governing review of an order granting or refusing bail pending appeal is whether there has been a material change in circumstances since the order was made.

18. The Respondent referred to Article 49(1)(h) of the Constitution, which guarantees the right to bail pending trial unless there are compelling reasons and submitted that the constitutional right to bail primarily applies to an accused person awaiting trial and that upon conviction, the presumption of innocence no longer applies. It was the Respondent's case that bail pending appeal is not a constitutional entitlement but a discretionary remedy.

19. The Respondent cited Section 357 of the Criminal Procedure Code, which provides for bail or suspension of sentence pending appeal and submitted that bail pending appeal lies within the discretionary power of the court and must be exercised judiciously. Reference was made to ***Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] KEHC 5903 (KLR)***, which quoted the case of ***Jivraj Shah vs. R (1986) KLR 605*** on the principles governing bail pending appeal where the court

considered the principal considerations for granting bail pending appeal and held as follows:

i.

“existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.”

ii.

“it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, then, a condition of granting bail will exist.”

iii.

“main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal - being allowed, the particular circumstances and weight and relevance of the points to be argued.”

20. The Respondent submitted that the Applicant’s reliance on his status as sole breadwinner and the ill

health of his spouse does not amount to “exceptional or unusual circumstances” within the meaning of Section 357 and the principles in ***Jivraj Shah vs. R (1986) KLR 605*** and do not meet the threshold for review.

21. On public interest and compelling issues the Respondent submitted that bail pending appeal is discretionary and not a right and that personal health considerations of a spouse, though arousing sympathy, do not override compelling reasons opposing review of bail. The Respondent urged this court to consider broader principles of law and public interest as a guide in the the exercise of discretion.

Issues for Determination

22. From the pleadings and submissions, I find that the following issues arise for my determination:
- a) ***Whether there are new or changed circumstances warranting review of the orders of 4th March 2025;***
 - b) ***Whether the Applicant’s wife’s illness constitutes a relevant consideration;***
 - c) ***Whether delay in hearing the appeal justifies review;***
 - d) ***Whether the appeal raises arguable grounds;***
 - e) ***What terms, if any, would safeguard execution of sentence in light of the Respondent’s appeal for enhancement.***

23. Article 49(1)(h) provides that: -

“An arrested person has the right—

...

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

24. I find that the Respondent correctly submitted that the constitutional right under Article 49(1)(h) of the Constitution primarily applies to an accused person awaiting trial. Upon conviction, however, the presumption of innocence no longer applies and release pending appeal is discretionary.

25. Section 357 of the Criminal Procedure Code empowers the court to grant bail or suspend execution of sentence pending appeal. Bail pending appeal is therefore not a right but a matter of judicial discretion.

26. The Respondent relied on ***Republic vs. Francis Maina Wairimu [2020] eKLR***, where the Court held:

“In an application for review for denial of bail, the applicant is under a duty to convince the court that there had been change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier orders”.

27. Similarly, in ***R vs. Nottingham Justices Ex-parte Davies*** (supra) cited by the Applicant, the court held, in part, that:

“The question is a little wider that ‘Has there been a change?’ It is ‘Are there any new considerations which were not before the court when the accused was last remanded in custody?”

28. The applicable principle is therefore that review is justified where there is material change in circumstances or new considerations not previously before the court.

29. On whether there has been a material change in circumstances, I note that the earlier ruling of 4th March 2025 denied bail pending appeal. The Applicant now relies principally on the deteriorating health of his spouse, diagnosed with multiple myeloma requiring urgent treatment in India and the delay in hearing the appeal. The issue of being a sole breadwinner was previously raised and considered. I however note that the medical diagnosis and subsequent developments constitute new factual material that was not before the Court at the time of the earlier ruling.

30. Applying the test in ***Republic vs. Francis Maina Wairimu [2020] eKLR***, the Applicant was required to demonstrate change of circumstances since denial of bail. The evidence of serious medical deterioration of a spouse requiring urgent specialized treatment amounts to a new

circumstance that did not exist in its current form at the time of the earlier decision.

31. Guided by the decision in ***R-v-Nottingham Justices Ex-parte Davies*** (supra) it is my view that this Court is entitled to take into account the new considerations not previously before it. I find that there has been a material change in circumstances.
32. On whether the Circumstances are exceptional or unusual, under ***Jivraj Shah vs. R (1986) KLR 605***, exceptional or unusual circumstances may justify bail pending appeal.
33. While illness of a spouse does not automatically amount to exceptional circumstances, the evidence presented shows a serious and life-threatening medical condition requiring urgent treatment abroad. The Applicant's presence is shown to be materially relevant in facilitating treatment and family stability.
34. Balancing this against public interest and the seriousness of the offence, the Court finds that the cumulative effect of serious medical emergency of a spouse, delay in hearing the appeal beyond the anticipated timeline and the fact that the appeal has arguable grounds amounts to exceptional circumstances within the meaning of ***Jivraj Shah*** case (supra).
35. On whether the appeal is arguable, it is my view that without pre-judging the appeal, the grounds listed in the Petition of Appeal raise substantial questions of law and fact that are not frivolous.

36. Having carefully considered the pleadings and submissions alongside the cited cases, I am satisfied that the Applicant has demonstrated material change in circumstances and exceptional grounds warranting review of the orders of 4th March 2025. My finding is bolstered by the averments contained in paragraph 16 of the Respondent's Replying Affidavit where the deponent states that she concedes to the application in the spirit of fairness subject to such reasonable and adequate security or conditions as this Court may deem fit to safeguard the execution of the sentence.

37. Accordingly, I make the following final orders: -

a) The orders made on 4th March 2025 denying bail pending appeal are hereby reviewed.

b) The Applicant is admitted to bail pending appeal on the following terms:

i) The Applicant shall execute a cash bail of Kshs. 5 million; OR in the alternative,

ii) Provide two (2) sureties with property security worth not less than Kshs. 10 Million each subject to strict verification by the Deputy Registrar.

iii) The Applicant shall be required to deposit his passport with this court and in the event he requires it for travel, an

application to that effect will be made before this court.

b) The appeal shall be fixed for hearing on priority basis.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MARCH, 2026.

HON. W. A. OKWANY

JUDGE

5/03/2026

FOR APPELLANT NJENGA JEREMY

FOR THE RESPONDENT MS MWILA & MS MWAMBURI

COURT ASSISTANT ADAN