



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
(CHERERE-J)
HCCRA E033 OF 2025

BETWEEN

FRANCIS OURU ORUKO.....1ST APPELLANT/APPLICANT
JOB MORARA.....2ND APPELLANT/APPLICANT
KEVIN MOGY THOMAS 3RD APPELLANT/APPLICANT
AND
REPUBLIC RESPONDENT

RULING

1. The Appellants have approached this Court by a Notice of Motion dated 16th September 2025 seeking to be admitted to bail pending the hearing and determination of their appeal.
2. The application is expressed to be brought under sections 123, 123A and 357(1) of the Criminal Procedure Code, Article 49(1)(h) of the Constitution, and the Bail and Bond Policy Guidelines, 2015.
3. The Appeal on which this application is grounded arises from the trial and conviction of the Appellants/Applicants for the offence of robbery with violence contrary to section 296(2) of the Penal Code in Nyamira CMCCR E1144 of 2023 and the subsequent death sentence imposed on 08th September 2025.
4. Aggrieved by both the conviction and sentence, the Appellants lodged an appeal which was admitted out of time by consent, and now seek release on bail pending the hearing and determination of their appeal.

5. The application is supported by an affidavit sworn on 16th September 2025 by Job Morara, the 2nd Appellant/Applicant on his own behalf and on behalf of the 1st and 3rd Appellants.
6. The 2nd Appellant/Applicant avers that the Appellants have been in custody for a prolonged period; that they are youthful first offenders with fixed abodes and family responsibilities; and that they attended court throughout the trial without absconding. He further avers that the appeal raises arguable grounds touching on identification, evaluation of evidence, and credibility of witnesses, and that unless bail is granted, the Appellants risk remaining in custody for a prolonged period while the appeal is pending.
7. These matters were reiterated in written submissions dated 23rd December 2025, filed by Bundi Grace & Company Advocates, urging the Court to find that the appeal raises arguable issues and that the severity of the sentence justifies the grant of bail.
8. Counsel relied on section 357(1) of the Criminal Procedure Code and cited the authorities of **Somo v Republic [1972] EA 476, Jivraj Shah v Republic [1986] KLR 605**, and **Charles Owanga Aluoch v Director of Public Prosecutions [2015] eKLR**.
9. The application is opposed through a replying affidavit sworn on 02nd February 2026 by Faustina Moraa, the Complainant. She avers that the Appellants are convicted persons under sentence of death; that bail pending appeal is discretionary and exceptional; and that the Appellants have not demonstrated any exceptional or unusual circumstances warranting release.

She further avers that the offence was serious and violent in nature and urges the Court to decline the application.

10. These matters were emphasized in written submissions dated 02nd February 2026, filed by Kilonzo & Company Advocates, who relied on **Jivraj Shah v Republic** (supra), **Daniel Dominic Karanja v Republic [1986] KLR 612**, and **Charles Owanga Aluoch v Director of Public Prosecutions** (supra).
11. The Complainant also lodged a Notice of Preliminary Objection dated 16th December 2025, contending that the Court lacked jurisdiction to entertain the application on the ground that the appeal had been filed out of time.
12. The record shows that the appeal was subsequently admitted out of time. In **Somo v Republic** (supra), the Court held that the competence of an appeal is a necessary precondition to the consideration of an application for bail pending appeal. Once an appeal is duly admitted, the appellate court becomes properly seized of the matter and clothed with jurisdiction to entertain any interlocutory applications arising therefrom, including an application for bail pending appeal. The admission of the appeal therefore extinguished the factual foundation upon which the Preliminary Objection was premised, without in any way diluting the stringent and exceptional threshold governing the grant of bail pending appeal.
13. The Preliminary Objection, having been overtaken by events, raises no surviving jurisdictional issue and is accordingly without merit.

14. Consequently, the sole issue for determination is whether the Appellants/Applicants have satisfied the legal threshold for admission to bail pending the hearing and determination of the appeal.
15. The applicable statutory provision is section 357(1) of the Criminal Procedure Code, which vests in the Court a discretionary power to admit a convicted person to bail pending appeal.
16. The governing principles were settled in **Jivraj Shah v Republic** (supra), where the Court of Appeal held that bail pending appeal may be granted only where there exist exceptional or unusual circumstances, or where it appears prima facie that the appeal has overwhelming chances of success.
17. In **Daniel Dominic Karanja v Republic** (supra), the Court emphasized that hardship to family members, previous good character, or a solemn assertion by an applicant that he will not abscond do not constitute exceptional or unusual circumstances warranting the grant of bail pending appeal. These principles have been consistently reaffirmed in subsequent decisions.
18. At the outset, the Court makes it clear that pre-conviction rulings and pre-bail or probation reports prepared before conviction and sentence are not relevant or determinative in an application for bail pending appeal.
19. Upon conviction and sentencing of the Appellants to death on 08th September 2025, their legal status fundamentally changed. The applicable regime is no longer bail pending trial under Article 49(1)(h), but bail pending appeal under section 357(1) of the Criminal Procedure Code.

20. To import pre-trial bail considerations or pre-bail assessments into a post-conviction application would be to collapse two distinct legal regimes and impermissibly dilute the exceptional nature of bail pending appeal.
21. Turning to the substance of the application, the Appellants rely principally on the arguability of the appeal, the length of time spent in custody, and their personal circumstances.
22. Even though the Court has considered the grounds of appeal as filed, it must refrain from delving into their merits at this stage. The grounds largely challenge the evaluation of evidence, identification, and credibility of witnesses. Such grounds are common in criminal appeals and, on the face of the record, do not disclose overwhelming chances of success or a substantial point of law of such weight as would justify release.
23. The Court is also mindful that the Appellants are presently under sentence of death, the gravest sentence known to law. However, the severity of sentence, standing alone, does not constitute an exceptional or unusual circumstance warranting release on bail pending appeal. Further, the personal circumstances advanced by the Appellants, namely youth, family responsibilities, fixed abodes, and a willingness to comply with bond terms, are considerations which do not amount to exceptional circumstances.
24. In the totality of the material placed before the Court, and guided by binding Court of Appeal jurisprudence, the Appellants have failed to demonstrate either overwhelming chances of success in the appeal or the existence of exceptional or unusual circumstances warranting their release.

Disposition

25. The upshot of the foregoing is that the application lacks merit. Accordingly, the Court makes the following orders:

- 1) **The Preliminary Objection dated 16th December 2025, is hereby marked as spent.**
- 2) **The Notice of Motion dated 16th September 2025 seeking bail pending appeal is hereby dismissed**
- 3) **The Appellants shall remain in custody pending the hearing and determination of the appeal**
- 4) **This appeal will be mentioned before the Deputy Registrar on 14th April 2026 to confirm filing and service of record of appeal and submissions on the appeal.**

DELIVERED AT NYAMIRA THIS 12th DAY OF February 2026

**WAMAE.T. W. CHERERE
JUDGE**

Appearances

Court Assistant	- Anita
Appellants/Applicants	- Present
For Appellants/Applicants	- Ms. Bundi for Bundi Grace & Co. Advocates
For Complainant	- Ms. Githinji for Kilonzo & Co. Advocates
For Respondent	- Mr. Chirchir (SADPP)