



**Elsiek & another v Director of Public Prosecutions (Criminal Application  
E012 of 2025) [2026] KECA 641 (KLR) (25 March 2026) (Ruling)**

Neutral citation: [2026] KECA 641 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPLICATION E012 OF 2025  
F TUIYOTT, KI LAIBUTA & GW NGENYE-MACHARIA, JJA  
MARCH 25, 2026**

**BETWEEN**

**OSMAN ERDINC ELSEK ..... 1<sup>ST</sup> APPLICANT**

**SHAHAME AZIZ MWIDANI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(An application for stay of Ruling and Orders of the High Court of Kenya at Mombasa (Micheni, J.) delivered on 26th June 2025 in HC Criminal Revision Application No. E187 of 2024 and Stay of criminal proceedings in Mombasa MCCR No. E569 of 2022)*

**RULING**

1. The 1<sup>st</sup> applicant, Osman Erdinc Elsek, was charged with the main offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* before the Chief Magistrate's Court at Malindi in Sexual Offence Case No. 23 of 2019. The 1<sup>st</sup> applicant faced eight (8) other counts, all making a total of 9 counts. We note that a copy of the charge sheet annexed to the affidavit in support of the application contains only Counts I, VI, VII, VIII and IX. Counts VI, VII, VIII and IX relate to child prostitution, compelling an indecent act and committing an indecent act. The criminal proceedings were later transferred to Kilifi Chief Magistrate's Court and serialised as Kilifi Sexual Offence Case No. E058 of 2021 (the Kilifi Case). The respondent's (prosecution) case proceeded, and at the close thereof by a ruling dated 24<sup>th</sup> March 2025, Hon. James N. Mwaniki, CM acquitted the 1<sup>st</sup> applicant under Section 210 of the Criminal Procedure Code.
2. The record before us is scanty, but it seems that separate criminal proceedings were commenced against both applicants before the Chief Magistrate's Court in Mombasa as Criminal Case No. E569 of 2022. The criminal charges against both applicants were based on allegations that they interfered with witnesses in the Kilifi Case.



3. Aggrieved, the applicants filed an application dated 29<sup>th</sup> May 2024 before that trial court seeking, inter alia, that the court compels the respondent to discontinue the criminal proceedings and prosecution against them; and that, in the alternative, the court issues an order dismissing the criminal case and proceedings. The main grounds on which the application was hinged were that: the applicants were charged in the absence of an initial report of complaint, specific or known, that was recorded in the Occurrence Book (OB) to form the basis of the charges against them; and that, for this reason, the charges against them violated their right to a fair trial.
4. The trial Magistrate dismissed the application, consequent to which the applicants filed an application dated 15<sup>th</sup> July 2024 seeking a revision of the trial court's decision dismissing the application dated 29<sup>th</sup> May 2024 suo moto. We note that we have not been able to trace the application dated the application dated 29<sup>th</sup> May 2024, essence, after dismissal of the trial was to continue as scheduled.
5. Aggrieved, the applicants filed a Notice of Motion dated 22<sup>nd</sup> July 2024 before the High Court in Mombasa, being Criminal Revision No. E187 of 2024 seeking to stay the criminal trial court's proceedings in the Mombasa Chief Magistrate's Court Criminal Case No. E569 of 2022 and their trial pending the hearing and determination of the revision application dated 15<sup>th</sup> July 2024 and filed on 16<sup>th</sup> July 2024. The application was supported by a brief affidavit of the 1<sup>st</sup> applicant sworn on even date.
6. The main grievance of the applicants was that they needed to be heard on whether the criminal charges were proper given that there was no formal report made in an OB in any police station in Kenya, the basis on which the charges against them could be framed.
7. The learned Judge dismissed the applicants' assertion that the absence of an OB entry before the charges were preferred prejudiced them. The Judge held that, even though the Child Protection Unit (the CPU) was not a complainant, and since the issue involved a vulnerable group of persons to wit children, the criminal charges could be sustained. The Judge further dismissed the arguments by the applicants that they were not given a fair trial; that, in any case, they had been vindicated on the initial charges in the Kilifi Case; that the High Court's revisionary jurisdiction under Section 362 of the Criminal Procedure Code and Article 165 (6) and (7) of *the Constitution* was not an avenue for backdoor appeals, but that these provisions were limited to correcting illegality, impropriety or material irregularity on the record; and that she had not noted any error apparent on the face of the record to warrant a revision of the ruling of the learned Magistrate. Accordingly, the application was dismissed.
8. Further aggrieved, the applicants are now before this Court in the instant application dated 8<sup>th</sup> July 2025, which is primarily brought under Rule 5(2) (b) of this Court's Rules seeking: that this Court be pleased to issue ex-parte orders staying the Ruling and Orders of the Court (Micheni, J.) given on 26<sup>th</sup> June 2025 in Mombasa/HCCREV/E187/2024 - Osman Erdnic Elsek & Shahame Aziz Mwidani v Republic and the criminal proceedings against the applicants in Mombasa/MCCR/E569/2022 - Republic v Osman Erdnic Elsek & Shahame Aziz Mwidani pending the hearing and determination of the applicants' appeal filed herein.
9. The application is supported by the affidavit of the 1<sup>st</sup> applicant sworn on 8<sup>th</sup> July 2025. The 1<sup>st</sup> applicant deposed that, after he was acquitted in the Kilifi Case, he and the 2<sup>nd</sup> applicant (jointly as the applicants) were thereafter charged with the offence of interfering with witnesses; that the charge in the Kilifi Case was not supported by a complaint by any of the alleged 5 victims that was recorded in an OB entry in a police station as is procedurally required; that the charge brought against them is on the premise of an anonymous report which is un-procedural and against the tenets of a fair trial; that, based on this ground, they (the applicants) filed two applications dated 6<sup>th</sup> February 2024 and 29<sup>th</sup> May



- 2024 respectively before the trial court seeking that the prosecution discontinues and/or terminates their case since no fair trial could ensue in a matter where a fundamental record of accountability had not been procured/recorded by the police; that the learned Magistrate dismissed the application dated 29th May 2024 for the reason that it was similar to the application dated 6th February 2024; and that no further reasons were given to support this finding.
10. The 1st applicant stated that, being aggrieved by the decision of the trial court, they filed a criminal revision application- Mombasa HCCRREV/E187/2024 questioning the legality of the criminal investigation, the prosecution and the trial on the ground of lack of an OB entry at any police station in Kenya disclosing the nature of the complaint and who the complainants and suspects were; and that, on 26th June 2025, Micheni, J. dismissed their application by which they are aggrieved.
  11. As to the arguability of the intended appeal, the applicants propose that they intend to argue before this Court the grounds as to whether: a letter by the CPU can lawfully and validly constitute a formal complaint and therefore substitute for an entry of a complaint in an occurrence book; the recording of a criminal complaint in an OB is mandatory or optional under the *National Police Service Act* and the National Police Service Standing Orders; the right of an accused to a fair trial can be limited or be ousted by other constitutional provisions; the applications that were dismissed were similar; and whether the court could determine their (the dismissed applications) similarities without delving into the merits of the applications.
  12. As to the nugatory limb, the applicants contend that, if a stay is not granted, they will be prejudiced and subjected to an unfair trial thereby occasioning a miscarriage of justice in contravention of Article 50 of *the Constitution*.
  13. The respondent did not file a response.
  14. At the hearing of the application, learned counsel Dr. Khaminwa led Mr. Wamosa for the applicants while Ms. Nyawinda, learned Prosecution Counsel, appeared for the respondent. Each counsel solely relied on respective parties' written submissions. Those of the applicants are dated 29th July 2025 while of the respondent are dated 12<sup>th</sup> September 2025.
  15. We hasten to observe that, to a large extent, the applicants' submissions delved into what would otherwise constitutes arguments in support of the appeal. For this reason, we shall only highlight those submissions that are relevant in an application under rule 5(2) (b) of this Court's Rules.
  16. As to the arguability of the intended appeal, it was contended that the applicants intend to advance the grounds of appeal as highlighted in paragraph 11 of this ruling, which we need not restate.
  17. On the nugatory limb, the applicants contend that if the trial continues before the appeal is heard and determined, their fundamental constitutional right to a fair trial will have been breached; and that it is only by staying the trial proceedings in the meantime that would militate against abuse of the court process as was upheld by this Court in the decision of Simiyu & Another v Republic (2021) KECA 5 (KLR).
  18. On the part of the respondent, it was submitted that the applicants are challenging the trial court's failure to discontinue/dismiss the criminal case for failure to supply an OB extract; that the applicants' case did not fall within the exception of the decision by the Supreme Court in Joseph Lendrix Waswa v Republic (2020) eKLR, which laid down the circumstances under which an appeal on an interlocutory decision may be allowed; and that the intended appeal herein, being interlocutory in nature, the applicants are circumventing the law by seeking a premature acquittal on the criminal charges.



19. As to whether an appeal can be filed against a decision of a trial court where a revision was filed at the High Court, the respondent referred to Section 361(7) of the Criminal Procedure Code which provides that a decision to the High Court in exercise of its supervisory jurisdiction is deemed to be a decision of the High Court in its appellate jurisdiction, hence an appeal on revision is considered as a second appeal which should raise matters of law only, and not fact. It was submitted that neither the OB nor the alleged letter from the CPU is before this Court, and for the Court to determine on its contents, it would require calling evidence to verify the facts, which is not within the jurisdiction of this Court sitting on a second appeal.
20. According to the respondent, and for the foregoing reasons, the intended appeal is not arguable, and neither can it be rendered nugatory if stay is not granted.
21. In conclusion, the respondent submitted that the charges against the applicants are not at all motivated by ill motive; and that the continued trial of the applicants will not infringe their constitutional rights. We were urged to find that the application is unmeritorious and accordingly dismiss it.
22. This being an application under Rule 5(2) (b) of this Court's Rules, we are to determine whether the applicant has satisfied the twin principle under the rule, namely that the appeal is arguable and whether, if stay is not granted, the appeal or the intended appeal will be rendered nugatory. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 others (2013) KECA 378 (KLR).
23. It is trite law that an arguable appeal need not raise multiple arguable grounds. Even a single bona fide ground would suffice as was held by this Court in Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others (2009) KECA 201 (KLR) and Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.
24. As to the arguability of the intended appeal, and mindful that we should not express our views as to the merit of the intended appeal, we are satisfied that, based on the grounds we have highlighted above, the appeal is no doubt arguable. One such arguable matter could be whether a letter by the CPU can lawfully and validly constitute a formal complaint and therefore substitute for an entry of a complaint in an occurrence book and its possible implication of an accused's right to a fair trial. We rest this limb at that.
25. As to the second limb, which is whether if stay is not granted, the appeal or the intended appeal is likely to be rendered nugatory, the question as to whether an appeal would be rendered nugatory depends on whether what is being stayed, if allowed to happen, is reversible or, if not reversible, damages would reasonably compensate the aggrieved party. The Court will also consider whether failure to grant stay is likely to occasion the applicant grave injustice or prejudice. Where like here stay is sought against proceedings of a criminal trial, the Court must also bear in mind the prejudice that the halt of the trial may have on the right of the complainant/s to speedy processing of the complaint. Each case is to be determined based on its own circumstances.
26. The applicants want this Court to stay the ruling in Mombasa HC Criminal Revision Application No. E187 of 2024 as well as the continuation of the criminal proceedings before the trial court in Mombasa Chief Magistrate's Court Criminal Case No. E569 of 2022. For context, what was before the High Court was a revision application. We do agree with the respondent's argument that a revision preferred to the High Court is deemed to be an appeal against a decision of a Magistrate's Court and, therefore, an appeal to this Court is deemed to be a second appeal and will lie on matters of law only as provided under Section 361(7) of the Criminal Procedure Code.
27. The apprehension by the applicants that continuation of the criminal proceedings before the Magistrate's Court will prejudice them is unfounded. We say so because, in the event that they are



found guilty, they would have leeway to appeal to the High Court. Further, should the High Court make a decision against them, and they are aggrieved, they would be at liberty to seek redress in a second appeal to this Court. In the premise, we do not find that proper arguments have been put forth to satisfy the second limb.

28. The upshot. While the intended appeal is arguable, the applicants have failed to demonstrate that it will be rendered nugatory absent stay. Simply put, the applicants have failed to satisfy the conjunctive twin principles under Rule 5(2) (b) of this Court's Rules. Accordingly, the Notice of Motion dated 8<sup>th</sup> July 2025 is hereby dismissed but with no order as to costs.

**DATED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> DAY OF MARCH, 2026.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**F. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

