

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKADARA**  
**CRIMINAL DIVISION**  
**APPELATE SECTION**  
**CRIMINAL APPEAL NO E190 OF 2025**

**LAWRENCE GACHERU KIBIRA .....**  
**APPLICANT**

**VERSUS**

**REPUBLIC .....**  
**RESPONDENT**

**(Being an appeal from the original conviction and sentence in Criminal Case No E089 of 2025 of the JKIA SPM COURT)**

**RULING**

1. The applicant herein was convicted on the charge of breaking into a building and committing a felony contrary to section 306 of the Penal Code and sentenced to three years' imprisonment on the 30th day of April 2025.
2. Being dissatisfied with the conviction and sentence, he filed this appeal and raised the following grounds of appeal:
  - a) The court erred by convicting the applicant notwithstanding the material inconsistencies in the prosecution evidence.
  - b) The court erred by finding that the applicant placed himself at the scene of the alleged offence.

- c) The trial court erred by relying on the evidence of witnesses who did not identify the applicant at the scene of the alleged offence and in the absence of an identification paraded thereby rendering the purported identification unattainable
  - d) The court erred in convicting the appellant without proper proof of the value of the alleged stolen goods
  - e) The prosecution case was not proved beyond reasonable doubt.
3. By an application dated the 3rd November 2025 the applicant moved the court for an order that the same be released from jail on bond bail pending the hearing of the appeal on the ground that the same had already served more than six months of his sentence and that the same was unwell and requires frequent medical check-ups which could not be adequately met while in custody and that he was an upstanding citizen of good moral standing who had never been charged or convicted of any crime before.
  4. The application was supported by the annexed affidavit sworn by Michael Kibera, the applicant brother in which he deposed that during the trial before the lower court, the applicant was out on bond whose terms he fully complied with and that he was a man with known family ties and established address, therefore not a flight risk.
  5. It was deposed further that the applicant was unwell and requires frequent medical check-ups and treatments which could not be adequately attended to

while in custody thereby endangering his health. It was contended that granting him bond will allow him to receive proper medical attention, maintain family ties, prepare adequately for his appeal while reducing the risk of deterioration in his health.

6. This appeal was admitted for hearing and directions issued on the hearing of the same by way of written submissions which were duly filed and placed on record but on the date set up for hearing of the main appeal, the applicant through his Advocate on record indicated to court that the applicant wished that his application be heard and determined first before the main appeal is heard.
7. Despite the fact that the court had given proper and adequate directions on the hearing of the main appeal in place of the application herein, being alive to the applicants right under Article 47 and 50 of the constitution, the court reviewed the earlier orders on the main appeal hence this ruling, though it is the courts stand that the time spent on this application would have been spent in disposing of the appeal.

### **SUBMISSIONS**

8. On behalf of the applicant it was submitted that the applicant was sentenced to three years out of which he had as at the time the application served six months thereof and that the same required that the appeal be heard while out of prison so as to seek medical attention. It was submitted that during his trial, he was

out on bond. He had his brother who was willing to stand surety and was willing to abide by any terms including reporting to the police station. It was submitted that the same could not get documents from prison to support his health status.

9. On behalf of the respondent it was submitted in the application of this nature, the court has to consider exceptional or unusual circumstances and whether the appeal had an overwhelming chances of success. On the issues of unusual circumstances, it was contended that nothing was placed before the court in support thereof and that there was no evidence that the prison is unable to handle the applicant health conditions. It was submitted further that there will not be any delay in disposing the appeal as the court had given a hearing date.

#### **DETERMINATION**

10. As submitted by the respondent, when faced with the application of this nature the court is required to consider the two limbs: that is whether the appeal has an overwhelming chances of success and whether there are exceptional or unusual circumstances to warrant the applicant being granted bond noting that unlike bond pending trial, the applicant herein has been convicted by a court of competent jurisdiction and until the said judgement is set aside, the same is serving a lawful judgement.

11. This position was stated by the Court of Appeal in the case of **Jivraj Shah versus Republic [1986] KLR 605** as follows;

- a) The principle consideration is 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) If it appears prima facie from the totality of the circumstances that the appeal; is likely to succeed on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by three time the appeal is heard, conditions of granting bail exist
- c) The main criteria are that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal which would result in appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the point to be urged.

**12.** The fact that the applicant did not breach the bail terms in the court below is not an exceptional circumstance as was stated in the case of **Peter Hinga Ngotho versus Republic [2015] eKLR same** as the previous good character of the applicant and ill health per se as was stated in the case of **Dominic Karanja vs Republic [1986] KLR.**

13. In this matter the only issue raised by the applicant is his alleged ill health which as was submitted by the respondent was not supported by any medical report. On the issue of the applicant serving substantial part of his sentence, had it not been the applicant's insistence of having this application heard, this ruling would have been a judgement as the parties herein have duly filed submission which the court would have considered and rendered a determination thereon.
14. On the issue of whether the appeal has overwhelming chances of success, I would leave that to the court that will determine the appeal save that I have looked at the applicant defence before the trial court against the evidence of PW1 and will say no more thereon.
15. I therefore find no merit on the application herein which I hereby dismiss.
16. The appeal shall be fixed for hearing as a matter of urgency before court no 2 noting that the applicant has now served one year of the three years herein.
17. And it is ordered

**DATED SIGNED AND DELIVERED THIS 30<sup>TH</sup> DAY OF APRIL  
2026**

**J WAKIAGA  
JUDGE**

In the presence of:-

Court assistant - Gitonga

Counsel for the state -

MAKADARA CRIMINAL APPEAL NO E190 OF 2025 RULING