



**Andika & 5 others v Republic (Criminal Appeal E247, E255, E264, E267 & E273 of 2024 (Consolidated)) [2025] KECA 1205 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1205 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL E247, E255, E264, E267 & E273 OF 2024 (CONSOLIDATED)  
J MOHAMMED, F TUIYOTT & P NYAMWEYA, JJA  
JULY 4, 2025**

**BETWEEN  
CHRISTOPHER LUMBAZIO ANDIKA ALIAS LUMBA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH  
CRIMINAL APPEAL E255 OF 2024**

**BETWEEN  
SAMUEL KURIA NGUGI ALIAS VISI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH  
CRIMINAL APPEAL E264 OF 2024**

**BETWEEN  
ESTHER NDINDA MULINGE ..... 1<sup>ST</sup> APPLICANT  
RUTH WATAHI IRUNGU ALIAS ATLANTA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH**



**CRIMINAL APPEAL E267 OF 2024**

**BETWEEN**

**PAUL WAINAINA BOIYO ALIAS SHEKI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**CRIMINAL APPEAL E273 OF 2024**

**BETWEEN**

**ANDREW KARANJA WAINAINA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Applications to be admitted to bail, pending the hearing and determination of the appeal and intended appeals against both conviction and sentence of the High Court of Kenya at Nairobi (R. Lagat Korir, J.) dated 19th April 2024 in HCCRC NO. 8 OF\_\_ 2014)*

**RULING**

**Background**

1. The above-cited consolidated notices of motion for consideration by this Court are expressed to be brought under Section 379 (4) of the *Criminal Procedure Code*, Rule 5(2)(a) of the Court of Appeal Rules, Article 49 of *the Constitution* and all enabling provisions of the law. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> applicants' Notices of Motion are dated 18<sup>th</sup> July 2024, 2<sup>nd</sup> July 2024, 15<sup>th</sup> July 2024, 31<sup>st</sup> July 2024 and 25<sup>th</sup> July 2024 respectively.
2. The applicants seek orders:
  - i. spent
  - ii. That this Court be pleased to admit and/or grant the applicants bail/bond pending the hearing and determination of the appeal and intended appeals on terms as the Court sees fit;
  - iii. That upon the granting of prayer (ii) above, this Court grants stay of execution of the conviction and sentence of the impugned judgment pending the hearing and determination of the appeal and intended appeals herein.
3. The applications are based inter alia on the following grounds: that the applicants were convicted on 19<sup>th</sup> April 2024 for the offence of murder of George Thuo M'Mbutiti (the deceased) contrary to Section 203 as read with Section 204 of the *Penal Code* and consequently sentenced on 25<sup>th</sup> June 2024 to 15 years imprisonment; that the applicants are aggrieved by the conviction and sentences meted



out by the trial court; that the 1<sup>st</sup> applicant has filed an appeal while the 2<sup>nd</sup> to 6<sup>th</sup> applicants have filed notices of appeal against the impugned judgment.

4. The applicants' grounds of appeal are inter alia that the appeal and intended appeals have high chances of success as the convictions and sentences were founded on wrong principles of the law as the prosecution failed to satisfy the ingredients of murder; that the applicants are likely to serve a substantial part of their sentences before hearing and determination of the appeal and intended appeal hence will render the appeal and intended appeals nugatory; that there are no compelling reasons to deny bail or bond to the applicants; and that the applicants will be prejudiced if the orders sought are not granted.
5. The applications were supported by the affidavits of the applicants which reiterate their respective notices of motion

### **Submissions by Counsel**

6. At the hearing of the applications, by consent of all the counsel for the parties, the five (5) applications were consolidated with Criminal Appeal (Application) No. E247 of 2024 being the lead file.
7. Learned counsel Ms. Khafafa appeared for Christopher Lumbazio Andika alias Lumba (the 1<sup>st</sup> applicant) in Criminal Appeal (Application) No. E247 of 2024 dated 18<sup>th</sup> July 2024. Counsel submitted that the 1<sup>st</sup> applicant was convicted purely on circumstantial evidence as there was no direct evidence adduced by the prosecution linking the 1<sup>st</sup> applicant to the offence; that the 1<sup>st</sup> applicant's appeal raises weighty issues which are meritorious with overwhelming chances of success; that the 1<sup>st</sup> applicant is likely to serve a substantial part of the sentence on the basis of a conviction and sentence which may be ultimately quashed by this Court thereby rendering the appeal nugatory; that the 1<sup>st</sup> applicant was remanded in custody for one year during the pendency of the trial after which he was released on bond terms that he fully honored.
8. Counsel further submitted that the applicant is a single father and the sole breadwinner to a son aged 16 years and a daughter aged 12 years. That the two minor children continue to suffer as the 1<sup>st</sup> applicant is unable to take care of them while in custody while they are in their tender years. Counsel asserted that the intended appeal has overwhelming chances of success and that it will take time before the appeal is heard and determined. Counsel further asserted that the probation pre sentence report was very favourable and recommended that the 1<sup>st</sup> applicant would qualify for a probation sentence of 3 years hence affirming that the 1<sup>st</sup> applicant enjoys good support and is the sole bread winner to his two school going children.
9. Counsel urged that in the circumstances, the 1<sup>st</sup> applicant has demonstrated that he has an arguable appeal with overwhelming chances of success. Further, that the 1<sup>st</sup> applicant has demonstrated the unusual and special circumstances and has therefore satisfied the conditions required for the grant of bond/bail pending appeal. Counsel urged that it would be expedient to grant the 1<sup>st</sup> applicant the orders sought.
10. Learned counsel Mr. Wokabi appeared for Samuel Kuria Ngugi alias Visi (the 2<sup>nd</sup> applicant) in Criminal Application No. E255 of 2024 dated 2<sup>nd</sup> July 2024. Counsel submitted that the 2<sup>nd</sup> applicant was convicted on the basis of circumstantial evidence; that the intended appeal as deduced from the draft memorandum of appeal demonstrates an arguable appeal with overwhelming chances of success; that it is clear that the conviction is unsafe as it is grounded on suspicion; that the trial court noted in the impugned judgment that there was no evidence of ill motive while the deceased sat with amongst



other persons, the 2<sup>nd</sup> applicant; and that the evidence adduced did not show the 2<sup>nd</sup> applicant's direct involvement in the murder of the deceased.

11. Counsel further submitted that the applicant was out on bond for the entire trial period and upon conviction the pre-sentence report was favorable. Counsel further submitted that the State concedes the application in its submissions thereby admitting that the trial court erred in law and in fact in finding that 2<sup>nd</sup> applicant guilty as charged.
12. Learned counsel Mr. Moenga who was holding brief for learned counsel, Mr. Nyasani appeared for Esther Ndinda Mulinge and Ruth Watahi Irungu alias Atlanta (the 3<sup>rd</sup> and 4<sup>th</sup> applicants respectively) in Criminal Application No. E264 of 2024 dated 15<sup>th</sup> July 2024. Counsel submitted that the State has conceded the application; that the application has high chances of success; that there exists exceptional or unusual circumstances upon which this Court can fairly conclude that it is in the interest of justice to grant bail; that there was no factual or evidentiary basis upon which the trial court convicted the 3<sup>rd</sup> and 4<sup>th</sup> applicants herein; that the impugned judgment contains contradictions which render the conviction and sentence unsafe and unjust; that the trial court laid out several possible scenarios in which the deceased's drink was allegedly poisoned but settled on none and proceeded to convict all the six (6) accused persons for the same offence; that during the pendency of the trial the 3<sup>rd</sup> and 4<sup>th</sup> applicants dutifully attended court without fail for the ten (10) years that the matter was in court; and that the 3<sup>rd</sup> and 4<sup>th</sup> applicants complied with all bond/bail conditions.
13. Counsel further submitted that from the presentence report, the 3<sup>rd</sup> and 4<sup>th</sup> applicants are first offenders and have never been convicted of any criminal offence; that at the time of the offence the 3<sup>rd</sup> and 4<sup>th</sup> applicants had stable jobs, cared and provided for their families; that the impugned judgment clearly indicates that no motive was ascertained on the part of the 3<sup>rd</sup> and 4<sup>th</sup> applicants but circumstantial evidence was the basis of their conviction; that the judgment, conviction and sentence was solely based on suspicion rather than evidence; that by the time the intended appeal is heard, the 3<sup>rd</sup> and 4<sup>th</sup> applicants will have served a significant length of jail time considering this Court's busy diary; and that this demonstrates exceptional circumstances deserving of the grant of bail pending appeal to the 3<sup>rd</sup> and 4<sup>th</sup> applicants.
14. Learned counsel Mr. Were appeared for Paul Wainaina Boiyo alias Sheki (the 5<sup>th</sup> applicant) in Criminal Application No. E267 of 2024 dated 31<sup>st</sup> July 2024. Counsel pointed out that the State has conceded the application; that mens rea was not proved; that none of the six (6) applicants had the intention of meeting the deceased on the material day; and that there is no evidence that the 5<sup>th</sup> applicant was involved in the murder of the deceased.
15. Counsel further submitted that there was no conclusive evidence as to who may have committed the alleged act of poisoning; that no prejudice will be occasioned if the instant application is allowed; and that there was a report from South Africa which was concealed from the applicants and was not considered by the trial court, despite the trial court being aware of the said report. Counsel further submitted that it is upon this Court to balance all the issues to ensure that the 5<sup>th</sup> applicant whose intended appeal, which is likely to succeed, is not denied bail before exhausting his right of appeal. Counsel urged that the instant application should be allowed in view of the concession by the State; that the 5<sup>th</sup> applicant is not a flight risk and complied with all directions which were issued by the trial court; and that the probation officer's report with respect to the 5<sup>th</sup> applicant was positive.
16. Learned counsel Mr. Ongoya appeared for Andrew Karanja Wainaina (the 6<sup>th</sup> applicant) in Criminal Application No. E273 of 2024 dated 25<sup>th</sup> July 2024. Counsel asserted that the State conceded the application. Counsel asserted that the applicant was convicted on the strength of four distinct and



contradictory hypotheses. Further, that the pre-sentencing report was very favorable; and that the intended appeal has high chances of success as it raises substantial issues.

17. Counsel further submitted that the 6<sup>th</sup> applicant complied with pre-trial bail conditions for the 10 years that the criminal case at the trial court was in progress; that there are exceptional circumstances that favour urgent release of the applicant pending the determination of the intended appeal which include that the 6<sup>th</sup> applicant's mother developed health complications associated with diabetes and high blood pressure and has lost her eyesight; that the 6<sup>th</sup> applicant had solely been taking care of his mother and the family; and that the 6<sup>th</sup> applicant is a single father to children who are currently pursuing higher education and his incarceration could jeopardize their quest for knowledge.
18. Counsel further submitted that there is the possibility of substantial delay in the determination of the appeal. That taking into account the fairly busy diary of this Court, by the time the 6<sup>th</sup> applicant's substantive appeal is heard, it is expected that he will have served a significant length of time in jail. Counsel urged that the application be allowed as prayed.
19. Learned counsel Mr. Omondi, the Senior Assistant Director of Public Prosecutions appeared for the State in all the six (6) applications. Counsel relied on his written submissions dated 10<sup>th</sup> December 2024. Counsel submitted that the State does not oppose the applications for bail on the grounds that the appeal and the intended appeals raise very valid, weighty and tangible matters of law regarding conviction ensuing from a case which entirely rests on circumstantial evidence. Counsel submitted that the grounds of the application are decipherable from the application that there is an overwhelming likelihood of success in the appeal since the trial court based the conviction on circumstantial evidence which was founded on mere suspicion rather than proof.
20. Counsel further submitted that this Court has already settled the law applicable in applications of this nature that for an application to be successful the applicant must demonstrate to the court that he has an appeal that has an overwhelming chance of success, or that there are exceptional or unusual circumstances that would justify his release on bail pending appeal.
21. Counsel further submitted that the applicants were convicted on the basis of four sets of circumstances, which were clearly distinct from one another, none of which was firmly established and were thus based on conjecture. Counsel submitted the appeal and intended appeals raised arguable issues. Counsel posed the question: did the prosecution case establish beyond reasonable doubt that the circumstance of the cause of death of the deceased, and that the same cumulatively taken, formed a chain so complete that it would unerringly point at the applicant or any of them as having committed the crime to the exclusion of any other?
22. Counsel further submitted that it is arguable whether it was established that the applicants who were charged and found guilty as joint offenders, had indeed a common intention to perpetuate the impugned act of poisoning the beer which the deceased consumed as provided under Section 21 of the *Penal Code*, so as to consider all of them joint principal offenders in terms of the provisions of Section 20 of the *Penal Code*. Further, that it was arguable whether there was sufficient evidence proving or establishing a linkage between the cause of the deceased's death to all the applicants.
23. Counsel questioned whether the prosecution tendered sufficient evidence proving a premeditated plan to kill or harm the deceased, and if not, whether there was any evidence adduced establishing that the applicants developed a common intention in the course of the unfolding events leading to the death of the deceased. Counsel further submitted that the question whether this was a case of mere strong suspicion and the findings were conjectural will also feature as a legal matter for argument during the hearing of the appeal.



24. Lastly, counsel submitted that it is against the above background that he concedes the grounds of appeal and that admitting the applicants to bond pending appeal may be appropriate in the circumstances.

### **Determination**

25. We have considered the applications, the submissions, the authorities cited and the law. The applications were brought pursuant to Rule 5(2)(a) of this Court's Rules which provides as follows:

“in any criminal proceedings where a notice of appeal has been given in accordance with rule 61, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal; or Bail pending appeal is discretionary upon the applicant demonstrating the existence of exceptional circumstances. There is no constitutional requirement to grant bail pending appeal. Section 49 of *the Constitution* creates entitlement to bail pending appeal, on the basis of presumption of innocence until proven guilty, which presumption stops once there is a valid conviction.”

26. In *Isaac Tulicha Guyo v. Republic* (Crim. App. No. 16 of 2010) this Court stated as follows:

“The Court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by *the Constitution* and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong. It is not, therefore, surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances.”

27. In *Dominic Karanja v Republic* [1986] KLR 612 this Court established the legal principles governing grant of appeal in the following terms:-

“that the most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant consideration would be whether there were exceptional or unusual circumstances.”

28. These principles were also restated by this Court in *Jivraj Shah v Republic* [1986] KLR 605 as follows:-

“the principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist...the main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which discloses substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points being argued.”

29. This Court in *Epungure v Republic* (Criminal Appeal E015 of 2021) [2021] KECA 343 (KLR) (17 December 2021) (Ruling) stated as follows:

“From the principles established in the *Jivraj* case above, the applicant is under an obligation to demonstrate that there is a set of exceptional circumstances that would justify the grant



of bail pending appeal by this Court. Further, that the sentence or a substantial part thereof will have been served by the time the appeal is heard. It is not enough, as the applicant has done in this case, to state that an appeal has overwhelming chances of success. The appeal pending before this Court being a second appeal, the applicant must show the Court that his appeal is likely to be successful on account of some substantial point of law to be argued.”

30. Counsel for the applicants all assert that the applicants’ appeal and intended appeals have high chances of success. It is notable that the State has conceded the applications and has submitted that the appeal and intended appeals raise substantial and weighty points of law. We think that therein lies the existence of an exceptional circumstance. Without attempting to determine the appeals we think that there is merit in the arguments by the applicants that they were convicted on four different and distinct sets of facts that were purely circumstantial.
31. While there was evidence that four of the applicants shared a table with the deceased on the fateful night, there was no evidence that the four laced the deceased’s drink with poison. This again may not be consistent with the holding of the trial court that there was a fifth person, the waitress, who had access to the drink by virtue of serving the deceased with the beer. Further, as submitted by counsel for the State, these two versions may not be in tandem with a third that the 6<sup>th</sup> applicant bought beer from the counter and handed it directly to the deceased. In addition, again as conceded by counsel for the State, there was no evidence that the applicants hatched a common intention, before or during the commission of the alleged crime, to kill the deceased.
32. For these reasons this Court is inclined to allow the applications as prayed. The upshot is that the applications dated 18<sup>th</sup> July 2024, 2<sup>nd</sup> July 2024, 15<sup>th</sup> July 2024, 31<sup>st</sup> July 2024 and 25<sup>th</sup> July 2024 respectively are hereby allowed as prayed. Each applicant shall be released on a bond of Kenya Shillings one million (Ksh1,000,000.00) with one surety of like amount.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY, 2025.**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

