



**Waititu Babayao v Republic (Anti-Corruption and Economic Crimes Appeal E006 of 2025)  
[2025] KEHC 11257 (KLR) (Anti-Corruption and Economic Crimes) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11257 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E006 OF 2025**

**LM NJUGUNA, J**

**JULY 31, 2025**

**BETWEEN**

**FERDINAND NDUNGU WAITITU BABAYAO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This court has been moved by way of the Notice of Motion dated the 3<sup>rd</sup> June, 2025 brought under Section 357 (1) of the *Criminal Procedure Code*, Articles 20, 49 (1)(h), 50(2)(a), 51 & 159 of the *Constitution*. It is premised on the grounds set out on the body of the same and it is supported by the annexed affidavit sworn by the applicant, on even date. The applicant has sought the following Orders;
  1. Spent.
  2. That this Hon. Court does review, vary and set aside its Order dated 3<sup>rd</sup> March, 2025, dismissing the Appellant's application for bail/bond pending appeal, and in its place thereof, the Appellant be granted bail/bond pending appeal, upon such terms and conditions as the Hon. Court may determine.
  3. That further and in the alternative, the execution of the sentence of the Appellant in Anti-Corruption Case No. 22 of 2019: *R v Ferdinand Ndungu Waititu Babayao & 12 Others* be suspended pending the hearing and determination of this Appeal.
  4. That during the pendency of the suspension of execution of the sentence in terms of Prayer 3 above, the Appellant be admitted to bail/bond upon such terms and conditions as the Hon. Court may determine.



5. That such further or other orders as are appropriate for the effective and fair administration of justice be issued.
2. It is the applicant's case that, on the 3<sup>rd</sup> March, 2025, the court dismissed the applicant's application dated the 13<sup>th</sup> February, 2025, which application had sought for bail pending appeal. That the application dated the 13<sup>th</sup> February, 2025 was dismissed upon the court finding that it lacked merits whereas the one dated 8<sup>th</sup> May, 2025 was dismissed as the court found that it was *Res judicata* and the court was *functus officio* as the counsel had expressly stated that it was not an application for review.
3. The applicant avers that the right to seek review of earlier orders is an exception to the principle of *Res judicata* in both statutory and case law. That there is a new development respecting the health of the appellant that was not present at the time of the Court's ruling on the 3<sup>rd</sup> March, 2025 which development requires the court's urgent investigation and intervention.
4. That the appellant was rushed to Kenyatta National Hospital on various dates from the 13<sup>th</sup> May, 2025 through to 20<sup>th</sup> May, 2025 when his condition worsened, necessitating admission in Hospital. That the medical condition of the appellant is such that his life is in danger, and neither Kamiti Maximum Security Prison nor, indeed, any other penitentiary within the Republic of Kenya, has the logistical capacity to safely manage the appellant's condition.
5. The appellant states that in addition to the earlier complains relating to diabetes, hypertension and failing sight, the appellant has serious kidney complications and has undergone the first series of surgeries and he is presently using a catheter to excrete waste. This, he contends, is an exceptional and unusual circumstance within the meaning settled in the case of *Jivraj Shah v Republic* (1986) KLR; (1986) eKLR on the basis of which the court may reasonably conclude that it is in the interest of justice to grant bail.
6. The appellant avers that the court's powers to review its decisions is cast in both the statute and case law, and ought not to be confused or negated by misapplication/misapprehension of the Doctrine of *functus officio*. Reliance was placed on the case of *Kiswii v Republic* (2023) KEHC 25494 (KLR), *Yanta v S* (2023) ZAWCHC 23 in which the court adopted the reasoning in the case of *S v Mporofana* 1998(1) SACR 40 and that of *S v Mohammed* 1999(2) which decisions speak to the powers of the court to review its decisions.
7. The appellant avers that he has an arguable appeal with high chances of success which is grounded but not limited to;
  - a. The evidence in court did not support the charge.
  - b. There was no evidence adduced to show that the County Government of Kiambu lost any monies on account of the contract complained of.
  - c. The conviction of the appellant appears to have been inspired by unfounded public theories and politically concocted negative perceptions of him.
  - d. The conviction of the appellant is without basis, both in law and in fact.
8. The applicant contends that for over five (5) years, he faithfully observed the terms and conditions imposed by the trial court and he is therefore not a flight risk. That the balance of convenience tilts in his favour and that no prejudice will be suffered by the respondent if the applicant is admitted to bail or if the sentence is suspended. He urged the court to exercise its discretion and grant him bail pending appeal.



9. The respondent opposed the application by way of a replying affidavit sworn by Faith Mwila, on the 5<sup>th</sup> June, 2025 in which she avers that the court had previously heard and dismissed two applications by the applicant, in which, he had sought for bail pending appeal with the application dated the 8<sup>th</sup> May, 2025 having been dismissed for offending the principle of Res Judicata and that the court was functus officio. That there are no medical records that have been provided to proof that the applicant is currently admitted at Kenyatta National Hospital in critical condition.
10. It was contended that the prison authorities are well versed with powers to ensure a prisoner gets adequate medical care at a facility as envisaged in Section 39 of the Prison's Act and it is the duty of the Medical officer in charge of a Hospital in consultation with the officer in charge of prison to ensure the applicant gets access to adequate medical facilities.
11. The respondent averred that Kamiti Maximum Prison has logistical capability to manage the applicant's situation and further that the applicant has not demonstrated a change of circumstances warranting the court to review its orders issued on 3<sup>rd</sup> March, 2025. That the instant application is aimed at causing substantial and unwarranted delays in the hearing and determination of the appeal pending before the court.
12. In addition, the applicant filed Grounds of Opposition dated the 4<sup>th</sup> June, 2025 containing the same contents as the replying affidavit, and it would not serve any useful purpose for this court to reproduce the same here.
13. The application was disposed of by way of written submissions and the parties complied with the directions on filing of the same.

#### **Applicant's Submissions**

14. The applicant has moved this court with an application for review of the orders that this court issued on the 3<sup>rd</sup> of March, 2025, which dismissed the applicant's application for bail pending appeal. The applicant states that the application is based on the existence of new circumstances being the deterioration of the applicant's health which warrants urgent intervention of the court and on account of gravity of the illness, speaks to the heart of the court to exercise mercy and humanity.
15. Counsel for the applicant avers that prior to filing of this application, the appellant had approached the court through an application dated the 29<sup>th</sup> May, 2025, and sought orders for a comprehensive Medical Report on his health and the Prison's capacity to deal with his present condition, which application the court granted and directed that the report be prepared and it be availed to court for consideration and further orders.
16. Based on that report, the applicant now contend that he has presented to court new circumstances within the meaning settled in the *Jivraj Shab's case* (supra) upon which the court may reasonably conclude that it is in the interest of justice to review its earlier decision declining bail, and now grant bail on humanitarian grounds, and in recognition of the universal principles of the court's duty to safeguard and sustain life. The applicant submits that the High court's power to review its decisions is settled both in law statute and case law. He made reference to the case of *Kiswili v Republic* (supra).
17. On the approach to be taken in applications for bail based on new facts, the court in the case of *S v Mpofana* 1998 (1) SACR 40 stated thus;

“in considering an application for bail allegedly brought on the strength of new facts, the court's approach is to consider whether there are, in the first instance, new facts and, if there



are, reconsider the bail application on such new facts, against the background on the old facts.”

18. As a further exposition of the High court’s power to review its orders, in exercise of its powers under the Civil law, the applicant cited the case of *Republic v Public Procurement Administrative Review Board & 2 others* (2018) eKLR and *Pancras T. Swai v Kenya Breweries Limited* (2014) KLR in which the court of appeal cited with approval the case of *Sarder Mohammed v Charan Singh Nand and Another* (1959) EA where the court stated that the law has conferred discretion in the court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.
19. The applicant urged the court not to shy away from exercising the inherent powers conferred upon it both by Statute (including the *Constitution*) of Kenya and case law, to render justice at all times and in particular Article 159 that gives this court the keys to open the gates of justice and admit those who come before it to its eternal benefits. Further, that the cornerstone of justice system is that no one will be punished without the benefit of due process, including the right to exhaust the right of appeal and that incarceration before trial or pending hearing of an appeal goes against this principle. Reliance was placed on the case of *Gerald Macharia Gitbuka v Republic*.
20. The applicant further submitted that no scientific material by way of a proper medical report was presented before the court and other than the one-sentence averment on the said illness, there was nothing to persuade the court on the circumstances of the applicant. That additionally, even assuming that such evidence had been presented before the court then, which wasn’t, the human body is the epitome of volatility and health circumstances can change in the blink of an eye. That the situation of the applicant in March, 2025 isn’t the same now and the very fact of deterioration in health is, doubtless, new circumstance to which the court is invited to delve into.
21. The applicant invited the court to look at the appeal in its totality and especially on the question of whether or not the appellant has an arguable appeal, the key word being arguable, which is grounded but not limited to the grounds set out elsewhere in this ruling.
22. On the persuasive facts, it was submitted that the applicant is not a flight risk, in that for over five years during the trial in the lower court, he faithfully observed the terms and conditions imposed by the trial court and therefore clearly not a flight risk. The court was invited to take judicial notice of the fact that it is handling a case of a civil nature touching on property and life achievements of the applicant –being his entire life work-in Asset Recovery Case No. E001/2020 before the Anti- Corruption court and it would be foolhardy for the applicant not to avail himself before court to fight for his rights.
23. The applicant offered that should the court be so persuaded, to procure an acceptable Bank Guarantee for the payment of the entire fine of Ks. 53, 500,000 to the credit of the court/Judiciary or as may be directed by the court, as a guarantee that the state stands to lose nothing in the event that he is admitted to bail pending the hearing of the appeal. He urged the court to exercise its discretion in his favour.

### **Respondent’s Submissions**

24. The Respondent addressed the court on two issues in its submissions as hereunder;
  - a. Whether the applicant has satisfied the conditions to warrant review of the orders of March, 2025.
  - b. Whether the execution of the applicant’s sentence should be suspended pending hearing and determination of the appeal.



25. On the first issue, the respondent submitted that the applicant had filed two previous applications for bail pending appeal, both of which were dismissed by this Honourable court.
26. That for the applicant to succeed in this application, he ought to demonstrate that there has been a change of circumstances to warrant a review of the said orders. It was submitted that the applicant has failed to demonstrate a material change in circumstances warranting this court to review/vary the Orders of 3<sup>rd</sup> March, 2025 denying bail pending appeal. That in the application dated the 14<sup>th</sup> February, 2025, the applicant sought to be released on bail on grounds that he was suffering from violent High blood pressure and Diabetes, but the court on considering the application found that it did not constitute an exceptional circumstance warranting granting of bail pending appeal.
27. The respondent contends that following the court order of 2<sup>nd</sup> July, 2025 Dr. Russel Odegi of Kamiti Maximum Prison prepared a comprehensive medical report on the applicant's health and access to care while in custody and the reports confirms that the applicant's medical needs are met. That on his date of admission to prison on the 13<sup>th</sup> February, 2025, he was examined and found to have known history of type 2 diabetes and hypertension, and was placed on a special diet and since then he has been receiving regular medical reviews and treatment from the prison health facility.
28. That on the 14<sup>th</sup> May, 2025, when he presented with new symptoms he was promptly referred to Kenyatta National Hospital (KNH) for further investigations, during which time, the prison authorities not only booked the special appointments, but also complied with the court order allowing the applicant to access private treatment under his personal physician at KNH private Wing where he underwent a successful surgery on the 29<sup>th</sup> May, 2025 and remains under a follow-up.
29. That the respondent respectfully affirms the Applicant's right to access appropriate medical care and notes that he has indeed been accorded the best treatment at KNH Private Wing, under the management and care of his private doctor, under the supervision of the Kenya Prisons Service and that the details and/or information contained in the comprehensive medical report do not constitute a material change in circumstances. The respondent rejects the applicant's submissions that Kamiti Maximum Security Prison lacks the logistical capacity or medical expertise to manage the applicant's illness.
30. The respondent avers that the medical officer expresses confidence in the institution's ability to continue managing the applicant's condition post- discharge and that no medical opinion has been tendered indicating that the applicant requires release from custody to access medical care, or that the prison system, in conjunction with KNH is incapable of managing his condition. The respondent contests the seeping and alarmist assertions by the applicant's Counsel in his submissions that the applicant is gravely ill as the same are emotive, speculative, and not borne out of the official medical report pursuant to this Honorable Court's Order of 2<sup>nd</sup> July, 2025. That to the contrary, the medical report by the Medical Officer of Kamiti Maximum Prison provides a clear, factual and professional account of the applicant's health.
31. On the second issue, the respondent submits that under Section 357(1) of the *Criminal Procedure Code*, the court's power to suspend execution are discretionary. However, the discretion is not automatic and must be exercised judiciously, upon demonstration of sufficient cause by the applicant. The court must be satisfied that the appeal raises substantial questions of law and that there exist exceptional circumstances to justify deviation from the general rule that a convicted person serves sentence while pursuing an appeal.
32. The respondent further contended that the applicant has consistently demonstrated a lack of genuine interest in prosecuting the appeal and has engaged in a pattern of repetitive and strategically timed



applications solely aimed at securing his release from lawful custody. The respondent avers that the granting of the orders will prejudice it as it undermines the finality of criminal process and that the persistent litigation diverts prosecutorial and judicial resources and impairs the efficient administration of justice and that the delay in prosecuting the appeal erodes public confidence in the justice system.

### Analysis And Determination

33. The court has considered the application and the affidavits, the Grounds of Opposition and the submissions filed by the parties herein. From the application there are two issues for determination;
- a. Whether the applicant has satisfied the conditions to warrant review of the orders made on the 3<sup>rd</sup> March, 2025.
  - b. Whether the execution of the applicant's sentence should be suspended pending the hearing and determination of the appeal.
34. The applicant has moved this court with an application to review the order made on the 3<sup>rd</sup> March, 2025 or in the alternative the execution of the sentence be suspended pending the hearing and determination of the appeal.
35. The applicant first filed an application for bail pending appeal dated the 14<sup>th</sup> February, 2025 which the court dismissed for failing to meet the conditions for grant of bail pending appeal. The other application dated 14<sup>th</sup> March, 2025 was also seeking for bail pending appeal which was also dismissed by this Honourable court on the ground that the court was functus officio and that the application contravened the doctrine of Res judicata. In dismissing the application dated the 14<sup>th</sup> March, 2025 this court observed that the applicant was not seeking to review the orders of the court issued on the 3<sup>rd</sup> March, 2025 but rather it was a fresh application which was similar in all material particulars, to the application dated the 14<sup>th</sup> February, 2024.
36. The present application being one for review, the power of the court to review its decisions is settled both in statute and case law and ought not to be confused or negated by misapplication, misapprehension of the Doctrine of functus officio.
37. The criterion to be followed when considering an application for review of bail were set out in the case of *R v Nottingham Justices Ex parte Davies* (1981) QB38 which was cited in the case of [Samuel Mburu Njenga](#) (2018) eKLR viz;

“The court considering afresh the question of bail is both entitled and bound to take into account not only the 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 justice to the accused. 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 in custody.”

38. In a persuasive jurisdiction, in the South African case of [Yanta v S](#) (2023) ZAWHC 23, the judge adopted the reasoning in *S v Mpofana* 1998 (1) SACR 40 in which the court explained the approach to be taken in applications for bail based on new facts as follows;

“In considering an application for bail allegedly brought on the strength of new facts, the court's approach is to consider whether there are, in the first instance, new facts and, if there



are, reconsider the bail application on such new facts against the background of the old facts.”

39. Further, in the case of *S v Mohammed* (supra) cited in the case of *Yanta* (supra) the court stated;

“It seems that any renewed application based on new facts or changed circumstances should only be able to be properly judged with reference to those facts and circumstances which were placed before the court in the first instance.”

40. The applicant herein brought an application dated 29<sup>th</sup> May, 2025 for the Officer in charge of Kamiti Maximum prison or any other facility where he was being held to prepare a comprehensive medical report on his health, and the court granted the application. A medical report dated 8<sup>th</sup> July, 2025 was prepared by Dr. Russel A. Odegi a medical officer. The applicant avers that this report has presented to court new circumstances upon which the court can reasonably conclude that it is in the interest of justice to review its earlier decision declining bail.

41. The court has perused the said report and the doctor has noted that on his committal to prison, the applicant was examined and it was established that he has been on follow up and care for type 2 diabetes and hypertension. He was put on special diet and has been getting his medical reviews from the prison facility, but on 14<sup>th</sup> May, 2025, he presented to prison facility with complaints of headache, inability to pass urine, chest pains, cough and pedal edema, following which he was referred to KNH. At KNH the evaluations revealed a large right kidney cyst that needed specialized and urgent medical attention following which, he was admitted at KNH where he underwent a kidney surgery and is still admitted in the said facility.

42. On the Prison’s facility’s capacity and capability, the doctor states that the facility does not provide specialized care services like in the case of the applicant herein where he needed to have a surgery done on him. That while so admitted, the applicant is under 24 hours security comprising of five (5) officers on early shift and late shift and six officers deployed at night and his continued care at KNH is straining the prison resources. The doctor has further asked the court to consider alternative means of the applicant accessing his continued care at KNH without straining the prison resources.

43. The court has noted the contents of that report and I have also taken into account the comprehensive submissions by the counsel for the respondent. The report dated 8<sup>th</sup> July, 2025 is by a medical Doctor and he has given the court his expert opinion on the medical condition of the applicant and the implication of his continued admission on the prison resources. This court has no reason or any other evidence from the respondent to disprove the report before the court on the medical condition of the applicant, which to this court amounts to new circumstances warranting the court to exercise its decision and review the orders that the court made on the 3<sup>rd</sup> March, 2025.

44. Looking at the submissions by the respondent, the only prejudice that is alluded to, is that granting the application will undermine the finality of criminal process and that persist litigation diverts prosecutorial and judicial process and impairs the efficient administration of justice and that the delay in prosecuting the appeal erodes public confidence in the judicial system. This prejudice weighed against the applicant’s exceptional circumstances of his deteriorating health and the constraints his continued admission at KNH is causing to the prison facility, the latter outweighs the former.

45. In the end, the court finds that the application has merits and make the following orders;

a. The orders made on the 3<sup>rd</sup> March, 2025 are hereby set aside and in its place, the applicant herein is admitted to bail/bond pending the hearing and determination of the appeal on



Condition that he procures an acceptable bank Guarantee for the payment of the entire fine of Ksh.53, 500,000 to the credit of the court /judiciary.

b. Having granted prayer (1), prayers (2) and (3) are spent being in the alternative to prayer (1).

46. It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31<sup>ST</sup> DAY OF JULY, 2025.**

.....

**L. M. NJUGUNA**

**JUDGE**

In the presence of:-

Mr. Mutuku appearing with Mr. Kibe for the appellant

Mr. Monda appearing with Faith Mwila, Linda Mwamuli and Mr. Mwasaru.

Mr. Njenga for the Appellant in E008/2025

Mr. Swaka for the appellant in E007/2025

Court assistant – Wilson

