



Nyanje & 4 others v Republic (Miscellaneous Criminal Application E188 of 2025) [2025] KEHC 11254 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CRIMINAL APPLICATION E188 OF 2025
RM MWONGO, J
JULY 30, 2025**

BETWEEN

**KASSIM MBOGAP NYANJE 1ST APPLICANT
ALFRED MUSAU MUTUA 2ND APPLICANT
SHUGULI SULEIMAN SALIM 3RD APPLICANT
FESTO KITSESWA MATIANYI 4TH APPLICANT
JOSEPH CHEGE NJUGUNA 5TH APPLICANT**

AND

REPUBLIC RESPONDENT

RULING

1. The 1st applicant, on his own behalf and on behalf of the other applicants, filed a notice of motion dated 27th March 2025 premised on the grounds on its face and in the supporting affidavit thereof, seeking the following orders:
 1. Spent;
 2. That the honourable court be pleased to admit the applicant to reasonable bail/bond terms pending hearing and determination of the intended appeal;
 3. The honourable court do admit the appeal filed out of time; and
 4. That the court do issue production orders.
2. The applicants were convicted and sentenced for the offence of vandalism of telecommunication infrastructure contrary to section 32 of the *Kenya Information and Communications Act*. They stated that the investigating officer misadvised them to believe that if they pleaded guilty they would be fined



only Kshs.5,000/= . When they pleaded guilty, they were sentenced to 2 years imprisonment or a fine of Kshs.200,000/= each. They are apprehensive that by the time the appeal is heard and determined, they will have served a substantial part of their sentences. They seek bail terms because their families live in Mombasa and they depend on them.

Grounds of Opposition

3. The respondent filed grounds of opposition stating that the application lacks merit and that there are no disclosed exceptional circumstances that would warrant granting of the orders sought. Further, that there is no weakness in the prosecution's case hence the intended appeal has no chances of success.

Written Submissions

4. The applicants submitted that considering remission, their sentences will be 16 months, 4 of which they have already served. It is probable that their incarceration ends in July 2026 and by the time the appeal is heard and determined, they will have served a substantial part of their sentence. They relied on the cases of *Jivraj Shah v Republic* [1986] KECA 36 (KLR) and *Mwaura v Republic* [1986] KLR 600 in support of their claim.
5. In its submissions, the respondent relied on section 357 of the *Criminal Procedure Code* and the cases of *Jivraj Shah v Republic* (*supra*) and *Ibrahim Samon Ali v Republic* [2022] KEHC 2905 (KLR). It argued that the applicants have not disclosed sufficient proof that their appeal has high chances of success. It also relied on section 348 of the *Criminal Procedure Code* and argued that following the applicants' guilty plea, the only appeal that should be allowed is on legality of the sentence.

Issue for Determination

6. The issue for determination is whether the application has merit.

Analysis and Determination

7. An appellate court can only grant bail pending appeal on discretionary basis. Article 49(1)(h) of the *Constitution* provides for bail as follows:

“An accused person has the right ...

- (h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

8. On an appeal in a criminal case, the appellant/applicant is no longer awaiting trial. Rather, he has already been convicted and sentenced and is awaiting hearing of the appeal, thus invoking the application of Section 357 of the *Criminal Procedure Rules* which provides:

“After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal...”



9. This was the position in the case of *Masrani v R* [1060] EA 321, where it was held thus, regarding bail pending appeal:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

10. The principles guiding consideration of bail pending appeal are set out in the case of *Jivraj Shah v Republic* (*supra*) as follows:

- “1. The principal consideration in an application for bond 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.
2. 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.
3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose 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 to be argued.”

11. On establishment of exceptional circumstances, the case of *Daniel Dominic Karanja v Republic* [1986] KECA 37 (KLR) offers guidance, where the court labored to explain what exception circumstances encompasses. The court stated:

“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors.” [Emphasis added]

12. In the instant case, the applicants pleaded guilty and they were sentenced to pay fines of Kshs.200,000/ = or spend 2 years in prison. They wish to challenge the fact that their guilty plea was not unequivocal and that the sentences were unfair. When a party pleads guilty, the provisions of section 348 of the *Criminal Procedure Code* come into play, and provide that such person can only appeal on the legality of the sentence imposed. From a reading of section 32 of the *Kenya Information and Communications Act*, the sentences prescribed are set out.

13. The applicants also seek an order that the appeal be admitted out of time but no reasons have been given for the delay. Section 349 of the *Criminal Procedure Code* permits this court to exercise its discretion in enlarging time to appeal for good cause. This provision is as follows:

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the



appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”

14. It is not clear to the court why there has been a delay in appealing against the decision of the trial court. Even though the time for appealing may be enlarged at the court’s discretion, the law is strict about how this discretion is to be applied. In the case of *Samson Owiti Otambo v Republic* (2018) eKLR the court stated:

“The Jurisdiction of this Court to hear and determine the appeal is determined by the appeal being filed within the statutory period or within the enlarged period of time with leave of Court.”

15. The applicants have stated that their time in prison will end in July 2026 and that it may be too long before the appeal is heard and determined. The applicants have not given reasons why the court should exercise its discretion in their favour.

Disposition

16. Ultimately, for the foregoing reasons, I am of the view that the application lacks merit and should be dismissed. It is hereby so dismissed.
17. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 30TH DAY OF JULY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. All Applicants Present at Mwea Prison
2. Muchangi G for Applicant 1 - 5
3. Ms. Nyika for the Respondent
4. Francis Munyao - Court Assistant

