

KENYA / JUDGMENT

Leorto & another v Republic

[2026] KEHC 13673 (KLR)

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COURT

High Court

CASE / FILE NUMBER

Criminal Appeal E007 of 2026

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REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT MARALAL CRIMINAL APPEAL NO.
E007 OF 2026 LDIMA LEORTO.....1ST APPLICANT L.
LENTUMUNAI.....2ND APPLICANT -VERSUS-
REPUBLIC.....RESPONDENT

RULING

1. Through a Notice of Motion dated 4th May, 2026, the Applicants (Appellants) seek bail/bond pending the hearing and determination of the appeal. The Applicants were charged with offences thus; Count I Grievous harm contrary to Section 234 of the Penal Code. Particulars being that on the 25th day of November, 2024 at around 1300hrs at Lakira Village, Samburu Central Sub-County within Samburu County, unlawfully did grievous harm to Milton Lekolol. Count II HCCRA E007 OF 2026 (RUL.) Page 1 of 12 Assault causing actual bodily harm contrary to Section 251 of the Penal Code. Particulars being that on the 25th day of November, 2024, at around 1300hrs at Lakira Village in Samburu Central Sub- County within Samburu County, with others not before court assaulted Lesapuk Lenyarua. Count III Assault causing actual bodily harm contrary to Section 251 of the Penal Code. Particulars of the offence being that on the 25th day of November, 2024, at around 1300hrs at Lakira village in Samburu Central Sub-County within Samburu County, with others not before court assaulted Ronald Lenyarua.
2. They were taken through trial, convicted and sentenced as follows; - Count I – eight (8) years imprisonment. - Count II – two (2) years imprisonment. - Count III – two (2) years imprisonment. - (sentences to run concurrently) HCCRA E007 OF 2026 (RUL.) Page 2 of 12
3. Aggrieved, they proffered the instant application which is premised on grounds that the Appellants abided by bond terms in the subordinate court and will similarly abide by conditions imposed by the superior court. That the Applicants are of advanced age, ill health and need to take care of their families as they prosecute the appeal. Also, they require specialized medical attention that cannot be obtained in prison.

4. That Applicants have young families and are apprehensive that their general welfare will be affected by their continued stay in prison hence ought to be considered for non-custodial sentence.
5. Further, that if challenge of the conviction and sentence imposed by the lower court through the appeal restores the presumption of innocence until the appeal is heard and determined on merit and continued languishing in prison without being accorded a hearing at the earliest opportunity will result into the Applicant's liberty being violated contrary to the provisions of the constitution; and that the appeal has overwhelming chances of success. HCCRA E007 OF 2026 (RUL.) Page 3 of 12
6. The application is opposed by the Respondent. Through an affidavit deposed by Anthony Kimani, the Assistant Director of Public Prosecutions in conduct of the matter. It is deponed that the Applicants who were convicted and sentenced by a court of competent jurisdiction should serve the sentence until it is overturned by an appellate court. That the right to presumption of innocence has since been vacated.
7. That for bail pending appeal to be granted, there must exist very special circumstances which are compelling which has not been demonstrated. That the Applicants have not demonstrated that their case presents exceptional circumstances to warrant bail pending appeal and that the appeal has overwhelming chance of success.
8. That the assertion of ill health is not a ground for granting bail pending appeal as inmates have unfettered access to health facilities either within prison or close proximity thereof and specialized treatment can be accessed in level 5 and 6 hospitals. HCCRA E007 OF 2026 (RUL.) Page 4 of 12
9. The application was canvassed through written submissions. I have considered the application, affidavits in support and opposition and rival arguments as well as authorities cited. 10. The application is brought pursuant to Article 25(c) and 50(2)(q) of the Constitution which provides thus; (2)Every accused person has the right to a fair trial, which includes the right— (q)if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. 11. The Applicants who were convicted by a court of competent jurisdiction have a right to challenge the decision reached by the trial court, a right that has been duly exercised in the instant matter through an appeal. 12. Section 357(1)(2) of the Criminal Procedure Code provides thus; (1)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 HCCRA E007 OF 2026 (RUL.) Page 5 of 12 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: Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be

summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers. (2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has HCCRA E007 OF 2026 (RUL.) Page 6 of 12 been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced. 13. The power bestowed upon the court to release an Appellant on bail pending appeal is discretionary. It is averred that in the subordinate court the Applicant did abide with conditions set hence the interest of justice calls upon the court to grant the order sought. At the trial court the Applicants were presumed innocent, a constitutional presumption of innocence. In *Francis Kamote Mutua v Republic* [1987] KECA 106 (KLR) it was stated by the Court of Appeal that; "It must be remembered that a person has been convicted by a properly constituted Court, and is undergoing punishment, because of that conviction, which stands until set aside on appeal. It is not wise to intervene either from the point of view of the welfare of the Appellant or the State, unless there is a real reason why the Court should hold that he should not be deprived HCCRA E007 OF 2026 (RUL.) Page 7 of 12 of his liberty. The best test of that consideration is whether the Appellant can show an overwhelming chance of establishing his right to be set at liberty. If he does not do so, the law should take its ordinary course." 14. In that regard, considering the Applicants were convicted by a properly constituted court, the burden rests on the Applicants to establish circumstances that would move the court to grant orders sought. 15. Principles that are considered in an application for bail/bond pending appeal were stated in the case of *Jivraj Shah v Republic* [1986] KECA 36 (KLR) thus; "1. The principal contribution 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 HCCRA E007 OF 2026 (RUL.) Page 8 of 12 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." 16. On the question of the appeal having chances of success, it is urged that the appeal raises substantial points of law to be argued which could result into the overturning of the judgment; and, that the Applicants have served a portion of the sentence. This court was not granted the opportunity of perusing the judgment which was not annexed to the application therefore this court cannot discern if indeed there is a substantial point of law and that HCCRA E007 OF 2026 (RUL.) Page 9 of 12 merit would persuade the court to overturn the decision of the trial court. As to whether the Applicants will serve a significant portion of the sentence. Notably, they were convicted and sentenced on 17th March, 2026 and the concurrent sentence is eight (8) years imprisonment. Undoubtedly the portion of sentence served so far is not significant. And, the question of the

possibility of the appeal taking long to be heard does not hold water, because matters pending appeal are negligible. 17. On the question of existence of exceptional circumstances, the argument put forth is that the Applicants suffer from medical conditions whose management cannot be done while in custody, as they are old men who relied on traditional herbs as a source of medication. That medication offered by the prison department is not helping but exacerbating their conditions. In *Dominic Karanja v Republic* [1986] KLR 612 the court stated; “a) The most important issue was that if the appeal had such overwhelming chances of success, thus there is no justification denying the HCCRA E007 OF 2026 (RUL.) Page 10 of 12 Applicant of his right to liberty and the minor relevant consideration would be whether there were exceptional circumstances.

- b) The previous good character of an Applicant and the hardships, if any facing him or his family are not exceptional or unusual factors. Ill health per se would not constitute an exceptional circumstance where there existed medical facilities.
 - c) A solemn assertion by the Applicant that he will not abscond if released, even if sureties support it, is not sufficient ground for releasing a convicted person on bail pending appeal.”
18. At the alleged age of 52 years the Applicants cannot be considered senior citizens. They have not even attained the age of 60 years let alone 75 years and age is not an exceptional factor. It has been demonstrated that the 2nd Applicant was treated at Samburu County Referral Hospital on 8th March, 2026. Receiving treatment at medical facility HCCRA E007 OF 2026 (RUL.) Page 11 of 12 once does not mean that an individual has ill health that has persisted. 19. It is also deponed and urged that the 2nd Applicant has a young family whose general welfare will be affected. Hardship that may face a family of a convict/offender is of no consequence. The Applicant having been convicted by a competent court lost liberty. Suffering the consequences cannot move the court to act in a moral capacity because if courts were to consider emotional welfare of accused persons/offenders then there would be no offender incarcerated irrespective of the offence committed.
20. From the foregoing, I find the application bereft of merit. Accordingly, it is dismissed. 21. It is so ordered. Dated, signed and delivered virtually this 18 th September, 2026.
- L.N. MUTENDE JUDGE HCCRA E007 OF 2026 (RUL.) Page 12 of 12

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