



**Bohari v Republic (Criminal Appeal E267 of 2023)
[2024] KEHC 15927 (KLR) (Crim) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E267 OF 2023
K KIMONDO, J
DECEMBER 19, 2024**

BETWEEN

JUDE ONYANGO BOHARI APPELLANT

AND

REPUBLIC RESPONDENT

(Application for bail pending appeal from the decision of B. Ochoi, Senior Principal Magistrate, dated 11th September 2023 in Nairobi criminal Case No. E014 of 2020)

RULING

1. The appellant seeks bail pending appeal through a notice of motion dated 21st September 2023. It is supported by a deposition of even date.
2. He was adjudged guilty of committing an indecent act with a minor contrary to section 11 (1) of the *Sexual Offences Act*. The particulars were that on 22nd November 2020 in Nairobi County, he intentionally touched the penis of A.N.O. [particulars withheld] a boy aged 14 years.
3. He was sentenced to 15 years imprisonment. Being aggrieved he lodged a petition of appeal through counsel dated 21st September 2023 and received at the registry on 25th September 2023. Contemporaneously with the petition, he sought release on bail pending appeal.
4. The appellant contends that the appeal has overwhelming chances of success; and, that there is a risk of serving a substantial part of the sentence before the appeal is heard and determined. His learned counsel, Mr. Kariuki, relied on submissions dated 24th September 2023. The key point urged is that the minor's evidence was tainted because it was not corroborated and he suffered from autism. Counsel also submitted that the appellant was out on bond in the lower court and attended court faithfully.



5. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail.
6. The application is contested by the Republic. Learned prosecution counsel, Ms. Awino, relied on grounds of opposition dated 3rd September 2024 and written submissions of even date. The gravamen is that no exceptional grounds have been laid; and, that the main appeal has little or no chance of success.
7. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj Shah v Republic* [1986] KLR 605-

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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is *Somo v Republic* [1972] EA 476 which was referred to by this court with approval in *Criminal Application No. NAI 14 of 1986, Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.

9. It would be prejudicial to delve deep into the merits of this appeal. It will be the duty of the first appellate court to re-evaluate the evidence and reach an independent view on whether the conviction was safe or whether the sentence was appropriate.
10. But I can safely state the following. The lower court file or certified record has not reached the High Court. What I have is only the certified copy of the judgment of the lower court. What this means is that I am unable at this stage to gauge whether the complainant suffered from autism or its effect on the quality of his evidence.
11. But from the summary of evidence, the complainant (PW2) was playing in the field with another minor, D.K.K. (PW3) when the accused asked him to go to his house No. 29 in the estate. He locked the door and started touching his buttocks and the genital region. He asked the complainant to show him his penis but he declined.
12. The complainant reported the matter to his mother (PW1) leading to the complaint to the police. PW3 confirmed that they were playing together with the complainant when the accused summoned him to his house. PW3 did not know what transpired in the house. The examining doctor (PW6) found no physical or genital injuries.
13. Again from the summary by the learned magistrate, the accused gave sworn testimony denying the offence. His main line was that the charge was fabricated. He claimed that he was implicated because his wife had refused to plait the hair of the complainant's mother. He also had a quarrel with the chairman of their estate who now testified against him as PW4. The learned trial magistrate did not believe the accused.
14. It will be for the first appellate court to determine whether the combined evidence of the six witnesses when weighed against the defence proved the charge beyond reasonable doubt. I agree that the points raised in the petition of appeal are arguable. But I am not persuaded that there are exceptional grounds or that a substantial point of law or evidence has been urged.
15. In view of the sentence provided for the offence, it will be for the appellate court to inquire into the severity of the sentence and recent precedents on minimum sentences under the Act. The less I say about it the better.



16. In view of the prison term meted out, I cannot also say that a substantial part of the sentence will be served before this appeal is heard and determined. To be fair to the appellant, I will direct that this appeal be fast-tracked. The Deputy Registrar shall ensure that the lower court file and a certified copy of proceedings and judgment are placed before the High Court at the earliest for further directions.
17. Lastly, it is not contested that the appellant was admitted to bail during his trial. But the presumption of innocence no longer holds pure. The conditions precedent to grant of bail pending appeal are fairly different as discussed in the precedents above.
18. The upshot is that the appellant has not reached the benchmark for grant of bail pending appeal. It follows that the notice of motion dated 21st September 2024 is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

The appellant.

Ms. Awino for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

