



**Opee v Republic (Criminal Appeal E061 of 2022)  
[2023] KEHC 81 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 81 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E061 OF 2022  
FN MUCHEMI, J  
JANUARY 19, 2023**

**BETWEEN**

**DALTON OGALO OPEE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application for determination dated 21<sup>st</sup> November 2021 is brought under Sections 123 and 157 of the *Criminal Procedure Code* and seeks for the orders for release on bail pending the hearing and determination of the appeal.
2. The applicant was charged with the offence of attempted defilement contrary to Section 9(1)(2) of the *Sexual Offences Act* and was convicted and sentenced to six (6) years imprisonment on 3/11/2022.
3. The applicant deposes that he filed an appeal against conviction and sentence and that the appeal has very high chances of success. The appellant argues that he shall demonstrate on appeal that the prosecution's case had pertinent contradictions and inconsistencies particularly on the time of the occurrence of the offence. The appellant further contends that he was on bond during the trial and he attended court diligently and that he did not abscond. He therefore urges this court to grant him bail on the same terms he was given by the trial court. The appellant states that he has a young family and by that he is the sole breadwinner.
4. The respondent filed Grounds of Opposition dated 1<sup>st</sup> December 2022 to the effect that the intended appeal has no chances of success due to the overwhelming evidence against the appellant. Furthermore, the respondent states that bail pending appeal is a discretionary remedy which should not be granted in the current case for the appellant has not advanced any compelling reasons nor has he demonstrated



any peculiar or exceptional circumstances. To support his contentions, the respondent relied on the cases of *David Kimani Kuria vs Republic* [2021] eKLR and *Jibraj Shah vs Republic* [1986] KLR 605.

## The Law

### Whether the applicant has met the threshold for granting bail pending appeal.

5. Section 357(1) of the Criminal Procedure Code provides for the granting of bail pending appeal, it states that:-

After 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.

6. The principles for granting bond pending appeal were reiterated in the case of *Jivraj Shah vs Republic* [1986] KLR 605 which laid down the principles as follows:-

- a. 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.
- b. 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.
- c. 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.

7. It is trite law that in considering an application for bail pending appeal, the court has discretion which must be exercised judicially taking into consideration the following factors.

8. The applicant argues that the appeal has a high probability of success as the prosecution's case was full of contradictions and inconsistencies and further that the trial court failed to consider the cross-examination by PW1 but only analysed her evidence in chief which is controverted by the respondent.

9. I have carefully perused the proceedings and judgment and examined the grounds of appeal raised by the applicant. It is my considered view, without pre-empting the appeal, that the said grounds do not demonstrate overwhelming chances of success. This does not mean that the appeal is not arguable as it is. The appellant will still have his day in court to argue his appeal.

10. The applicant was sentenced to six(6) years imprisonment on 3/11/2022. I have perused the record and noted that the Record of Appeal has already been filed. The court diary is accommodative of appeals whereas hearing dates are available in about two (2) months from now. As such, I am of the view that the applicant will not serve a substantial part of his sentence before the appeal is heard and determined.

11. In the case of *Dominic Karanja vs Republic* [1986] KLR 612 the Court of Appeal held:-

- a. 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;



- b. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute exceptional circumstances where there existed medical facilities for prisoners;
  - c. A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;
12. Similarly in *Peter Hinga Ngotho vs Republic* [2015]eKLR it was held that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.
13. The record show that the accused person was a teacher in the school where the complainant was a pupil. He found her fetching water outside the mosque where she had gone to pray at break time. He got hold of her and dragged her into the mosque where he sexually assaulted her using violence. The circumstances under which the offence was committed were degrading to the dignity of the complainant. The applicant used violence on his own pupil. The applicant was a person with authority over the complainant and trusted with the responsibility to discipline and guide his pupils in matters of morality among others but he chose to abuse his position by sexually assaulting his pupil who was still under age. The probation report states that the complainant was and is still greatly traumatised two years after the offence was committed. The circumstances and facts of this case portray the accused as a violent and an insensitive person who should not be released on bail pending appeal.
14. It is my considered view that the applicant has not demonstrated any unusual or exceptional circumstances to warrant release on bail pending appeal. Consequently I find no merit in this application and dismiss it accordingly. The applicant shall remain in custody pending the disposal of the appeal.
15. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT GARISSA THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**F. MUCHEMI**

**JUDGE**

Ruling delivered through videolink this 19<sup>th</sup> day of January, 2023.

