



**Egesa v Republic (Criminal Appeal E021 of 2023)
[2023] KEHC 27329 (KLR) (8 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 27329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E021 OF 2023
SN MUTUKU, J
AUGUST 8, 2023**

BETWEEN

EVANS EGESA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant, Evans Egesa, has filed this Notice of Motion dated 18th April 2023 seeking bail pending the hearing and determination of the Appeal filed herein. Alternatively, he seeks an order of stay and/or suspension of execution of the sentence in Ngong SO No 42 of 2019 pending the hearing and determination of the instant appeal.
2. The Appellant was tried for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was tried and found guilty of the alternative charge. He was sentenced to a jail term of 10 years. He is aggrieved by the conviction and sentence and has preferred to file this appeal.
3. In support of the Notice of Motion, the Applicant has advanced the grounds that the intended appeal raises weighty arguable points of law; that the Applicant was a student at [Particulars Withheld] Technical Institute prior to his conviction; that if bail pending appeal is not granted, the Applicant's life will be wasted away in incarceration with long-term psychological and physical damage and that the Applicant was admitted to bail during the trial by the lower court and had maintained good conduct until delivery of judgment.
4. In his affidavit in support of the application, the Applicant has deposed that there is a risk that his studies may be discontinued at Bumbe Technical Institute if he is not admitted to bail pending the appeal and that he will cooperate with the court and will not abscond.



5. The application was vehemently opposed by the Respondent. Mr. Imbali for the Respondent submitted on five points, firstly that the judgment of the lower court is well-reasoned and that the trial magistrate critically analyzed the evidence and arrived at a balanced and reasoned conclusion; secondly, that the trial magistrate did not make any errors in sentencing the Appellant because the penalty section of the *Sexual Offences Act* in respect of the offence of indecent act with a child is 10 years and therefore the trial magistrate meted out the minimum sentence provided under the law; thirdly, that the Appellant will not be adducing new evidence during the appeal stage and that the trial magistrate exercised her discretion fairly; fourthly, that the Appellant has not adduced any evidence to show that he is a student as he claims and finally, that the circumstances facing the Appellant are different that what faced him during the trial stage; that he is now convicted and no longer enjoys the presumption of innocence and that he is a flight risk.

I have considered this application. Parties did not cite any authorities. I have had the opportunity to consider some of the authorities on granting bail pending appeal. In *Somo v R* (1972) EA 476 , the court stated as follows:-

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”

6. In *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR, it was held that:-

“The right to bail is provided under Article 49(1) of the *Constitution* but is at the discretion of the court and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court’s discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah v R* [1966] KLR 605, the principal considerations for granting bail pending appeal were stated 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 face 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.”

7. It is clear to me, after reading the above cited cases and many others, that the thread running through these authorities is that the circumstances applicable to an accused person awaiting trial in the first instance change upon conviction. While at the first instance an accused person enjoys the presumption of innocence and the right to bail under Article 49 (1) (h) of the *Constitution*, even though that right is not absolute, these circumstances change upon conviction. The convicted person does not enjoy presumption of innocence. He is a convicted person, and the sentence starts to run immediately upon conviction.
8. It is for the above reason, in my view, that the applicant for bail pending appeal must demonstrate 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 (emphasis added).
9. I have read the judgment of the trial court. I did not have the benefit of reading the entire record of the trial court. However, I have followed the reasoning of the trial magistrate and considered the grounds the applicant has advanced in support of this application, I have not been persuaded that the applicant has demonstrated exceptional or unusual circumstances upon which this court, being the appellate court, can fairly conclude that it is in the best interests of justice to grant the applicant bail pending the hearing and determination of the intended appeal.
10. It is my finding, therefore, and I so hold that the applicant has failed to persuade this court why he should be granted bail pending his intended appeal. Consequently, the Notice of Motion dated 18th April 2023 is hereby dismissed. The appellant is at liberty to fast track the appeal by filing the record of appeal to pave way for this court to issue directions on how the appeal will be handled.
11. The Appellant shall continue serving the sentence meted out by the trial court pending the hearing and determination of the appeal. He is allowed 30 days to file and serve the record of appeal.
12. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF AUGUST 2023.

S. N. MUTUKU

JUDGE

