



REPUBLIC OF KENYA



**Gitaka v Republic (Criminal Appeal E158 of 2023)
[2023] KEHC 24751 (KLR) (Crim) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E158 OF 2023**

**LN MUTENDE, J
OCTOBER 31, 2023**

BETWEEN

CHARLES KIMANI GITAKA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Charles Kitaka Gitaka, the Appellant/Applicant, through an application dated 3rd July, 2023, seeks bail pending appeal following his conviction and sentence in Kibera Sexual Offences Case No. E084 OF 2022. The applicant was charged following allegations of having defiled a minor and in the alternative committing an Indecent Act with a child.
2. The trial court considered evidence adduced and concluded that ingredients of the offence of committing an indecent act with a child were proved to the required standard hence returned a verdict of guilty and accordingly convicted the appellant.
3. The instant application is premised on the grounds that: The criminal process does not necessarily end once the trial court has passed a guilty verdict on the offender; the appellant has substantial grounds of appeal with overwhelming chances of success; and, that the facts in favour of the appellant's acquittal are too strong to be plausibly disputed.
4. The application was disposed through written submissions. The applicant submits that Section 357(1) of the *Criminal Procedure Code* (CPC) grants the court power to admit the applicant on bail pending appeal, power that must be exercised judiciously in accordance with laid down principles. He urges that though the court has discretion in granting bail, it must be exercised judiciously. That the applicant bears the burden of proof with respect to the application as provided by the Bail and Bond Policy Guidelines, 2015.



5. Reliance was also placed in the case of *Francis Muratbe v Republic* (2013) eKLR, where the High Court held that:

“The eligibility to be admitted to bail pending the hearing of an appeal must be distinguished from the right to bail pending trial. The right to bail at the trial phase is guaranteed unless the prosecution demonstrates that there are compelling reasons for not granting bail. While the burden is on the prosecution to persuade the court that an accused person should not be admitted to bail pending trial the situation is different once an accused has been convicted and attained, as in the present application, the status of an appellant. As an appellant the burden is upon him to persuade the court that considering the probability of success of his appeal, he should be admitted to bail appeal”

6. Further, it was urged that the applicant is required to prove that his appeal has an overwhelming probability of success if he is to be admitted to bail pending appeal. That the findings of the trial court were more conducive to uncertainties and doubts such that the prosecution did not prove the case beyond reasonable doubt.

7. The Respondent/State did not file a response to the application.

8. I have considered submissions by the applicant and am also guided by the holding in the case of *Odbiambo v Republic* (2008) KLR, where the Court was of a considered view that the court is not obligated to grant an order in favour of the applicant just because the State did not oppose the order being sought.

9. The provisions of Section 357 of the *Criminal Procedure Code enact that:*

I. 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:

10. I must point out that at an appellate stage the court deals with an offender who has been convicted where different principles apply as the person is already convicted; and, in the instant case sentence is being served. (See - *Masrani v R.* (1960) EA 321).

11. An appellate court has discretionary power to grant bail pending appeal as correctly submitted, however, the applicant must demonstrate that his appeal has high chances of success; and, where necessary, his case is exceptional and he is likely to serve the sentence during pendency of the appeal.

12. In the case of *Jivraj Shah v Republic* [1986] eKLR the Court of Appeal laid down the principles 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.”

13. In the instant application the argument is that the appeal has high chances of succeeding. The Bail and Bond policy guidelines provide that: “The burden is on the convicted person to demonstrate that there is an overwhelming chance of success.” (See page 27 paragraph 4.30)

14. In the case of *Dominic Karanja v Republic* 1986 KLR 612 Nyarangi, Platt & Gachuhi JJA held as follows:

“1. The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.”

15. Where there is a likelihood of an appeal succeeding, there would be no reason to deny the applicant bail pending appeal. The case in issue is a sexual offence one, where evidence of a minor of tender age can be relied on to return a verdict of guilty as long as the court believes the child. Notably, Counsel for the applicant delved in the merits of the appeal, which at this stage the court will desist from considering in depth as that will be determined at a later stage.

16. The upshot of the above is that the applicant has not demonstrated grounds for granting bail pending appeal. The application is unmeritorious; accordingly, it is dismissed.

17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 31ST DAY OF OCTOBER, 2023.

L. N. MUTENDE

JUDGE

In the presence of:

Applicant/Appellant

Ms. Bonyo for Appellant/Applicant

Ms. Odour for ODPP

