



REPUBLIC OF KENYA



KENYA LAW
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**Muriuki v Republic (Criminal Appeal E017 of 2021)
[2022] KEHC 441 (KLR) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E017 OF 2021
LW GITARI, J
MARCH 31, 2022**

BETWEEN

PETER KIAMBI MURIUKI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellant/Applicant herein was charged with defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* in Chuka C.M.'s Court Sexual Offence No. 42 of 2020.
2. It was alleged that on diverse dates between 16th March 2019 and 28th July 2020 at Kaare sub-location, the Applicant unlawfully and intentionally caused his penis to penetrate the vagina of FKM, a girl aged 17 years.
3. After full trial, he was found guilty of the offence and convicted. He was subsequently sentenced to serve fifteen (15) years imprisonment.
4. Being aggrieved by the aforesaid conviction and sentence has filed an appeal against the decision of the trial court which is now pending before this court.
5. The Appellant has also moved this court vide the application dated 8th November 2021. He is seeking to be released on reasonable bond and/or bail terms pending the hearing of the appeal.
6. The Application is premised on the grounds That:
 - a. The Appeal has high chances of success.
 - b. The Appellant shall suffer harm and prejudice if the application is not heard and determined.
7. The application is supported by the affidavit of the Applicant sworn on 8th November 2021 in which the Applicant reiterates the grounds listed above. He further depones that he was out on a bond of



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8. The State, through the office of Director of Public Prosecution, has opposed this Application through a Replying Affidavit sworn by Jane K. Maari on 17th November 2021. The Respondent deposed that the grounds of appeal are broad and vague thus the appeal is not arguable and does not have any chances of success. The Respondent also contends that the Applicant has not demonstrated the existence of any special/exceptional circumstance that would warrant the grant of bond/bail pending appeal.
9. The State further contends that the fact that the Applicant had been granted bail in the lower court is not a ground for consideration on granting bond pending appeal. Finally, the State contends that the power to grant bond/bail pending appeal is discretionary and insists that Applicant has neither met nor demonstrated the minimum requirements for the exercise of the discretion in his favour.
10. The court directed that the application be disposed of by way of written submissions.

Appellant's Submissions

11. The Appellant filed his written submissions on 11th February 2022. He submitted that the appeal has high chances of success. He further submitted that he is the sole bread winner of his young family which is bound to suffer if he is not released on bail. It is also his contention that his health has deteriorated since he was incarcerated. Finally, the Applicant submits that he will attend court diligently whenever he is required to.

Respondent's Submissions

12. The Respondent filed its written submissions on 16th February 2022. It is its submission that the Applicant has not demonstrated existence of any special or unusual circumstances. According to the Respondent, the Applicant will not have served a substantial part of his sentence as the main appeal is ripe for hearing. Finally, the Respondent submits that the trial court's decision was well grounded in law hence there is a very low likelihood that the appeal will succeed.

Analysis

13. I have considered the instant Application, the response made against it, and the respective submissions of the parties. I have also looked at the grounds of appeal in the Applicant's Petition of Appeal filed on dated 18th October 2021. The only issue for determination is whether the Appellant should be admitted to bail and/or bond pending the hearing and determination of his appeal.
14. The position of the law on bond pending appeal is provided for under Sections 356 and 357 of the [Criminal Procedure Code](#). Section 356 applies to bond pending entering of an appeal and Section 357 refers to an application for bail after entry of an appeal. Section 357 of the Criminal Procedure Code provides as follows:

“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...”

15. The use of the word “may” indicates that the power to grant bond pending appeal is discretionary. The main factors that this court should consider in exercising that discretion are:



- a. That the appeal has high or overwhelming chances of success;
 - b. Existence of an exceptional or unusual circumstance in the case warranting the release of the Appellant on bond pending appeal.
16. The Court of Appeal in the case of *Daniel Dominic Karanja -vs- Republic* [1986] eKLR held as follows regarding the determination of such an application:
- “The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardships, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see *Somo -vs- Republic* [1972] E A 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.
17. The presumption of innocence does not apply in this case as the Appellant is presumed to have been properly convicted until an appellate court finds otherwise. The sentence meted out against the Appellant is also presumed to be proper unless it can be proved that the same is not backed by law. Thus, the factors considered in an application for bond/bail pending appeal are different from those considered in an application for bond/bail pending trial. See *Jivraj Shah -v- Republic* [1986] eKLR where Court of Appeal stated:
- “ There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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.”
18. Clause 4.30 of the *Bail and Bond Policy Guidelines* (2015) provides as follows with regard to an application for bail pending appeal:
- “With respect to bail pending appeal the burden of proof is on the convicted person to demonstrate that there is an overwhelming probability that his or her appeal will succeed.”
19. In the present case, it is my view that the Applicant has failed to demonstrate how his appeal has a high chance of success. In addition, the Applicant’s allegation that his children will suffer and stand to be sent home for school fees arrears was not substantiated by any evidence. He has also failed to demonstrate how he is likely to suffer if he is not released on bail and/or bond.
20. The upshot of the foregoing, in my view, is that the Applicant has not met the threshold to warrant granting him bail/bond pending appeal. As such, it is my view that the Application dated 8th November 2021 lacks merit and is therefore dismissed.

Dated, signed and delivered at Chuka this 31st day of March 2022.

L.W. GITARI

JUDGE

