



REPUBLIC OF KENYA



**KENYA LAW**  
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**Hassan v Republic (Criminal Appeal E083 of 2021)  
[2022] KEHC 11618 (KLR) (24 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 11618 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E083 OF 2021**

**A. ONG'INJO, J**

**MARCH 24, 2022**

**BETWEEN**

**ISSA KUSOW HASSAN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant/Appellant herein was convicted for the offence of defilement contrary to Section 8(1) and (3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to serve 20 years imprisonment. Being dissatisfied and aggrieved by the said conviction and sentence he preferred the appeal herein.
2. By an application dated November 3, 2021, the appellant sought that he be admitted to lenient bail/ bond terms pending the hearing and determination of the Appeal against conviction and sentence in Chief Magistrate Court in Mombasa Sexual Offence Case No. 26 of 2019.
3. The Application is supported by the applicants grounds on the face of the application & supporting affidavit shown by the Applicant on November 3, 2021.
4. The grounds supporting the application are that the applicant has one wife and 6 children who depended on him as sole bread winner and that they were currently surviving on handouts from some family members and well-wishers. The applicant said that since he was committed to Shimo La Tewa prison he had developed health complications that are straining the limited resources of the prison facility vis-à-vis the challenges presented by Covid-19 pandemic. The Applicant stated that he faithfully attended his trial while on bond and he will do the same if released on bond pending appeal.
5. The Appellant argued that he was a 1<sup>st</sup> offender with an appeal that has high chances of success owing to the speculative, inconsistent contradictory evidence of the prosecution's case which was premised on suspicion and lacked corroboration.



6. It was also argued that if appellant is not released on bond he would have to spend the vacation in custody because there was huge work load at the typing pool and there was possibility of substantial delay in determining the appeal at the detriment of appellants health.
7. The application was opposed by the Replying Affidavit of P.C. Nelson Ochieng Otieno who averred that the applicant had not demonstrated that the appeal has high chances of success and that the sentence imposed was the minimum provided. The application was canvassed by way of written submissions.
8. The Respondent's submissions were that the applicant had not met the threshold for grant of bond pending appeal as set out in the case of *Jivraj Shab vs Republic* [1986] eKLR and should be dismissed. The Respondent argued that since the Record of Appeal was ready they could not tell whether the appeal had overwhelming chances of success.
9. Whether the hearing of appeal will delay, it was argued that there is no likelihood of applicant serving substantial part of the 20 years Imprisonment before the proceedings are typed.
10. On exceptional circumstances the Respondent argued that same had not been demonstrated and that good character and hardships are not exceptional or unusual circumstances set out in *Dominic Karanja vs Republic* [1986] KLR 6(2). References was also made to *Peter Hinga Ngotho vs Republic* [2015] eKLR where it was held that fact that 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.
11. The Respondent contended that the sentence imposed on the Applicant was the minimum provided and is therefore lenient owing to the nature and gravity of the offence. It was argued that due to the long sentence being served the applicant is likely to fail to attend court proceedings if granted bail pending appeal.
12. The Applicant/Appellant on the other hand filed submissions dated February 7, 2022 and filed an even date and argued that owing to the complicated health status of the Applicant it places him at high risk of contracting Covid-19 and any of its variant if he continues to be exposed to a crowded environment.
13. The Appellant argued that from the Report filed in court on January 27, 2022, it is clear that it is quite involving for the prison authorities to look after and manage the medical condition of the Applicant hence denying other inmates the attention they deserve.
14. It was submitted that the health situation and environment surrounding the Applicant does present an exceptional and unusual circumstance to warrant his admission to bond/bail pending appeal on the ground that appeal has high chances of success. The Applicants counsel faulted the manner in which *voire dire* examination was taken. The finding of the trial Magistrate that the complainant was a truthful witness was also faulted.
15. It was argued that no document was produced to confirm that the Complainant was 12 years old as found by the trial Magistrate as an order for age assessment was not complied with. In the circumstances, it was argued that the sentence against appellant was illegal *ab initio*. It was argued that claim that complainant was 12 years old was a fabrication as Post Rape Case form contradicts the alleged age as it indicates complainant was born on September 20, 2006.
16. It was also submitted that there were gaps and contradictions in the P3 form which the maker doctor Aisha the author ought to have attended to clarify. It was further submitted that the evidence of the complainant PW 2 was not corroborated as required by the law.



17. It was argued that it was not convincing that the Applicant could have defiled PW 2 in an environment which was described to be public in nature owing to its use as a madrassa or school during school hours, and residential with frequent visits from parents and Mama wa Mtaa amongst others. It was also stated that the Madrassa happened to be home to the Applicant together with his wife and four of his 6 children and that PW 1 & PW 2 confirmed that apart from the Applicant there was a second Madrassa teacher.
18. The applicant contended further that evidence of PW 5 was suspect because there was no documentary evidence adduced to prove that the Complainant was attended at Al Aqsa Hospital and PW 5 could not have been the interpreter of Somali to Kiswahili where the Complainant's father PW 3 was present and he understood Swahili.
19. It was also argued that it was suspect that the Complainant was defiled in February 2019 and the alleged discovery was only made in March 2019. It was also argued that makers of the P3 form and the PRC form didn't attend to testify; that in PRC the designation of a doctor has not been checked and there is no name given.
20. That P3 & PRC form failed to confirm the date of the alleged defilement and the suspected blunt object that is alleged to have caused penetration was not zeroed on to the penis to the exclusion of any other blunt object. That is was also not confirmed whether injuries were fresh and old so as to put the claims of defilement in perspective in reference to the month of February 2019.
21. The Applicant argued that having failed to confirm age of the scar it was not ruled out the claim that the hymen was perforated by the grandmother or whoever circumcised the complainant back in Somalia. The Applicant's advocate argued that the Complainant may have been defiled by the other teacher who was hidden away from the investigation offices.
22. In consideration of the prayer for bond pending appeal and in consideration of the submissions by the Applicant and the Respondent and in consideration of the proceedings and judgment of the lower court, the issue for determination is whether the applicant had satisfied the court to grant the orders sought for. The trial Magistrate presided over the trial and had opportunity to listen to the evidence of the prosecution as well as the evidence of the defence and the demeanours of the witnesses. The analysis of the evidence made in the submissions in this case can only be verified once this court goes through the lower court file.
23. For now this court has no reason to find that the applicants appeal will be successful. Allegations that applicants health has deteriorated was not proved. In any case the effect of Covid-19 has drastically reduced and the Ministry of Health Protocols have been withdrawn. It is not true that incarceration of the applicant is impacting negatively on the prison facility. There is no evidence from the prison to that effect.
24. The Applicant was a spiritual instructor to the Complainant and therefore stood in position of loco parentis and from the proceedings no bad blood existed between applicant and family of the Complainant to warrant the Appellant being fabricated. This court finds no merit in the application for release on bond pending appeal and the same is not allowed.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 24<sup>TH</sup> DAY OF MARCH 2022**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**



In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for State/Respondent

Mr. Chacha, Murta Advocate for Applicant/ Appellant

Applicant/ Appellant – present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

Court

Mention – 23/06/2022 for directions. Lower court file to be availed.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

24/03/2022

