



REPUBLIC OF KENYA



**Njihia v Republic (Criminal Appeal E44 of 2021)
[2022] KEHC 3187 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E44 OF 2021
TM MATHEKA, J
APRIL 28, 2022**

BETWEEN

JAMES MATHENGE NJIHIA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellant/ applicant was charged with an offence of defilement contrary to section 8(1) as read with section (3) of the [Sexual Offences Act](#) and in the alternative with an offence of indecent Act with a child contrary to section 11(1) of the [Sexual offences act](#) in Molo CM Criminal case No. 2094 of 2014.
2. He was found guilty of the offence, convicted and sentenced to 15 years' imprisonment in absentia on November 14, 2019. His sentence however began to run upon his arrest on 11th June 2011.
3. The appellant was aggrieved by the said judgement and he has lodged this appeal.
4. Vide an application dated 17th December 2021 brought under Section 357 (1) of the *Criminal Procedure Code* Cap 75 Laws of Kenya, the Applicant seeks to be admitted to bond or bail Pending the hearing and determination of the appeal and for costs of this Application to be in the Cause.
5. The Application is premised on grounds that the pending Appeal has overwhelming chances of Success, that if bail is not granted and there is a delay in determining the appeal, the applicant will be prejudiced and that the Applicant is willing and ready to abide by the bond or bail terms set by this Honorable Court.
6. The Application is supported by an affidavit sworn by the Applicant James Mathenge Njihia on December 17, 2021 in which he reiterates the above grounds.
7. The application is opposed by the DPP through the affidavit sworn prosecuting counsel Ms. Loice Nekesa Murunga on 8th March 2022.



8. She deponed that the Application does not meet the requisite threshold for granting of bail pending appeal as the intended appeal has no chances of success since the evidence tendered by the prosecution was well corroborated, that the long sentence that the appellant is facing make his chances of absconding to be extremely high.
9. Further that the granting of bail pending appeal is an exercise of discretion by the court upon demonstration of peculiar and exceptional circumstances. That in any event currently appeals are heard expeditiously and therefore there is no likelihood that by the time the appeal is heard and determined, the accused would have served a substantial part of his sentence.
10. The issue is whether the application is tenable. It is important to point out that the considerations in an application for bail pending appeal are different from those applicable to an application for bail pending trial.
11. Section 357 of the Criminal Procedure Code provides as follows:
 - “(1) 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”
12. In Somo Vs. Republic [1972] EA. The court observed that in an application for bail pending appeal the presumption of innocence does not apply as the appellant is presumed to have been properly convicted and sentenced until the appellate court determines otherwise.
13. In Mutua v R, [1988] KLR 497 the Court of Appeal stated thus:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”
14. The principles for granting bond pending appeal were laid down in Jivraj Shah v Republic [1986] eKLR 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.



15. In the case of *Chimambhai v Republic* 1971 EA 343 J. Harris made another observation in such an application when he said;

The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one-time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...
16. Under Article 49 of *the Constitution* of Kenya at sub article
 - (h) it states that an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.
17. For bail pending appeal the general principle is that the burden shifts to the applicant to demonstrate inter alia unusual and exceptional circumstances to warrant his release as there is no longer a presumption of innocence.
18. For instance, in *Dominic Karanja vs Republic* (1986) KLR 612, the Court of Appeal stated in alia:
 - 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 an exceptional circumstance 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;
 - (d)
19. The appellant should establish that: -
 - i. His appeal has overwhelming chances of success;
 - ii. There is a likelihood of him having served a substantial part of the sentence by the time his appeal is heard and determined;
 - iii. There is existence of exceptional or unusual circumstances upon which a court of appeal can fairly conclude that it is in the interest of justice to grant bail.
20. The Bail and Bond policy guidelines provides that the burden is on the convicted person to demonstrate that there is an overwhelming chance of success of his appeal
21. The Appellant was sentenced to serve 15 years' imprisonment in 2019. He filed this application in 2022. The record of appeal has since been filed and the lower court file has been forwarded to this court hence there is no likelihood that by the time the appeal is determined the applicant would have served a substantial part of the sentence.
22. No exceptional or unusual circumstances have been demonstrated.



23. The application lacks merit. Appeals are heard and determined expeditiously in this court. The appellant ought to prosecute the substantive appeal.
24. The application is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH APRIL 2022**

Mumbua T Matheka J

CA Edna Applicant

Mr. Orege for Applicant Mr. Kihara for Respondent

