



REPUBLIC OF KENYA



KENYA LAW
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**Eshitemi v Republic (Criminal Appeal E039 of 2021)
[2022] KEHC 11468 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E039 OF 2021**

**PJO OTIENO, J
JULY 29, 2022**

BETWEEN

ZACHARIA WASWA ESHITEMI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentencing of Hon.
T. A. Odera SPM in Mumias Sexual Offence No. 2 of 2020)*

RULING

1. The Appellant/Applicant was arraigned before the Senior Principal Magistrate at Mumias charged with the offence of defilement contrary to section 8(1)(2) of the [Sexual Offences Act](#) No. 3 of 2006 for defiling a 10-year-old girl. He was convicted and sentenced by the trial court on 1st October, 2021 to serve life imprisonment.
2. Aggrieved by the decision of the trial court, the Appellant lodged this appeal and thereafter filed a Notice of Motion application dated 9th November, 2021 brought under article 49(1)(h), Article 50(1)(2)(q) of [the Constitution](#) of Kenya, 2010 and Sections 356 and 357 of the [Criminal Procedure Code](#) seeking orders that he be granted bail pending the hearing and determination of this appeal.
3. The application is supported by the affidavit sworn by himself and premised on the following grounds:
 - a. The appeal has overwhelming chances of success.
 - b. The application has been made in good faith and within reasonable time.
 - c. The Appellant is ready to abide by any conditions that may be imposed on him by the Honourable Court.



- d. The appeal may be rendered a nugatory if the application is not allowed.”
4. Even though no response was offered by the state on the application by the Directorate of Public Prosecution, the mandate of the Court remains to determine whether the Appellant ought to be granted bail pending the hearing of this appeal.

Analysis

5. The remedy of bail pending appeal is provided by Section 357(1) of the Criminal Procedure Code which stipulates: -
- (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.”
6. The above section thus connotes that the granting of bail pending appeal is at the discretion of the court. The principles for admission of bail pending are enumerated by the Court of Appeal in the case of *JivrajShah-vs- Republic* [1980] KLR 605 as follows: -
- “a) The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.
- b) 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.
- c) 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.”

To this Court on obvious consideration that would stand out as unusual and exceptional circumstance is the prospects of delay in hearing the appeal like where the proceedings will take time to prepare or where the court diary cannot allow timeous disposal while the chances of success are overwhelming.

7. In support of the subject application, it is the submission of the Appellant that the appeal has overwhelming chances of success in that the age of the victim was not ascertained, the evidence of the victim was not corroborated, key witnesses were not called, the sentence was unconstitutional and lastly that the offence of defilement was not proved against the Appellant. At this stage, it would be preemptive to explicitly connect on the chances of success of the appeal.
8. In an application as the one before court, where an accused person has been convicted and acting on the presumption that the accused person was properly convicted, the grant of bail is at the unfettered discretion of the court looking at the circumstances of the case. That discretion like all judicial discretions must be geared towards the ends of justice. For this Court end of justice would be served best if the appeal is fast tracked now that the proceedings have been typed. It is thus never wise to set the Appellant at liberty where he has not placed before the court any material to demonstrate that there



existed exceptional circumstances over and above that his appeal has a high chance of success. This stance has been stated by the Court of Appeal in *Mutua v R*, [1988] KLR 497 where it was held: -

“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 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.”

Rendition and final orders

9. Accordingly, for the reasons set out above, this court finds the Appellant’s Notice of Motion dated 9th November, 2021 lacks merit and is thus dismissed. Let the Record of Appeal be compiled and served on the parties within fourteen (14) days from today. Mention on 21.9.2022.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF JULY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for the Appellant

Ms. Chala for the Respondent

Court Assistant: Kulubi

