



**Ngui v Republic (Criminal Appeal E035 of 2022)
[2022] KEHC 15766 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E035 OF 2022
MW MUIGAI, J
NOVEMBER 24, 2022**

BETWEEN

DENNIS NGUI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment and sentence of Hon. Martha Opanga(SRM)
delivered on 18th August, 2022 in Kangundo SPMC Criminal S.O. No.24 of 2022)*

RULING

Background

1. The appellant herein Dennis Ngui was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act No 3 of 2006. The particulars being that on the June 4, 2018 at [Particulars Withheld] in Matungulu Sub-County, intentionally caused his penis to penetrate the vagina of RKM, a child aged 14 years.
2. In the alternative the Appellant herein was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual offences Act No 3 of 2006. The particulars being that on the June 4, 2018 at [Particulars Withheld] in Matungulu Sub-County, intentionally touched the vagina of RKM, a child aged 14 years with his penis.

Trial Court Proceedings

3. The Prosecution called a total of five (5) witnesses in support of its case and the Trial Court made a Ruling on case to answer on September 16, 2020 and placed the accused person on his defence.
4. The accused person gave sworn testimony and called one witness in support of his case.



5. The Trial Court delivered its judgment on August 17, 2022 and convicted the accused person to serve Ten (10) years imprisonment.

Petition Of Appeal:

6. Aggrieved by the conviction and sentence of the Trial Court Dennis Ngui (the Appellant herein) filed his petition of Appeal dated September 5, 2022.

Notice Of Motion

7. The Appellant/Applicant herein filed his Notice of Motion dated October 24, 2022 seeking the following orders;

1. (Spent)
2. That this Court be pleased to stay sentence and admit the appellant herein on bail pending the hearing and determination of his Appeal.

8. The application is based on the following grounds:

1. That the Applicant is currently serving a ten (10) year sentence in Machakos Prison following a conviction by the Kangundo Senior Resident Magistrate court in Sexual Offence Case No 24 of 2020.
2. That the said conviction is based on P3 Form that was doctored/edited after full hearing.
3. That the Applicant has filed an Appeal against the conviction and the said appeal raises substantial grounds with an overwhelming chance of success as against the conviction and sentence.
4. There is real apprehension that the pending appeal may take long before it is heard and determined and if the Applicant is not admitted or released on bail he will be prejudiced and his constitutional rights violated as the Judge who had the conduct of the matter has since assumed the office of a Judge of appeal and a replacement has not been posted yet.
5. That the Applicant is a father of three (3) children and the sole breadwinner of his family. His continued stay in prison is occasioning unforeseen difficulties on his family.
6. That the Applicant's wife, Fridah Munene Mugambi is facing murder charges in the High Court of Kenya at Machakos hence the Applicant's stay in prison will affect the children tremendously as they will have no one to be left with as their mother is facing Murder charges in the High Court at Machakos.
7. That the Applicant's mother is aged and sickly and solely depends on him for her medical care and expenses.
8. That the Applicant in the proceedings at Kangundo law courts was out on a cash bail of Kshs 30,000/- and has never failed to attend Court.
9. That the Appeal has overwhelming chances of success.
10. That the Applicant's Appeal would be rendered nugatory in the event that this application is not allowed and the appeal becomes successful.

9. The application is further supported by the Affidavit sworn by Isaiah Manyanza Munguti deposing as follows;



- a. That the Applicant is already serving his term whereas the Appeal has an overwhelming chance of success giving the probability that the sentence set aside and/or retrial ordered by the Superior Court;
 - b. That there is a likelihood of the Applicant serving part of his sentence by the time the lodged appeal is heard and determined which would thus render his Appeal nugatory.
 - c. That the Applicant is ready and willing to comply with and observe diligently any terms and conditions that this Court shall impose in granting bail pending appeal.
 - d. That the Applicant stands prejudiced and his constitutional rights violated if this application is not allowed.
10. On October 25, 2022 this Court perused the above application and gave the following orders;
 1. The application to be served to the Respondent.
 2. The Respondent to file response with 14 days.
 3. The matter certified urgent due to the application of bail pending appeal.
 4. That further mention for direction fixed on 21st November, 2022.
 11. On November 22, 2022 both parties appeared in Court for directions by this Court as directed on October 24, 2022.
 12. Mr. Langalanga Counsel for the Appellant told the Court that the defense is applying for bond pending Appeal.
 13. Mr. Mwangera ODPP told the Court that they are not objecting to the application.
 14. Mr LangaLanga stated that the Appellant was out on cash bail of Kshs 30,000/- in the Trial Court proceedings. That he attended Court on all occasions. That if released on bond the Appellant will adhere to all conditions for him to attend. He finally prayed for reasonable terms of bond.

Determination

15. This Court is to determine grant of bail pending appeal under sections 356 & 357 of CPC.
16. Section 123 of CPC provides terms of granting bail or bond generally as follows;
 - (1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:
 Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.
 - (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
 - (3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.
17. Section 123A of CPC provides for exception to right to bail;-



- (1) Subject to article 49(1)(h) of the *Constitution* and notwithstanding section 123, in making a decision on bail and bond, the court shall have regard to all the relevant circumstances and in particular—
 - (a) the nature or seriousness of the offence;
 - (b) the character, antecedents, associations and community ties of the accused person;
 - (c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;
 - (d) the strength of the evidence of his having committed the offence;
 - (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—
 - (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
 - (b) should be kept in custody for his own protection.
18. *Peter Hinga Ngatho v Republic* [2015] eKLR, *Rebeca Nabutola v Republic* [2012] eKLR and *Dominic Karanja v Republic* (*supra*), the Court of Appeal set out guiding principles for grant of bail pending appeal as;
- i. 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 minor relevant considerations would be whether there are exceptional or unusual circumstances,
 - ii. The previous good character of the applicant,
 - iii. 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.
19. *Jivraj Shah v Republic* [1986] KLR 605 where the court considered the laid down the principles as follows;-
- i. that the principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which this Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.
 - ii. 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.
 - iii. the main criteria is that there is no difference between overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”
20. The Applicant filed appeal to this Court and the memorandum of appeal contains various grounds of appeal. Among them the Appellant alleges that the Trial Court relied on the P3 form that was



doctored to fit the case before Court. This is a serious allegation by the Appellant to the medical expert(s) that warrants introspection. As to the merits or demerits of the Appeal at this stage this Court can only speculate. Whether the appeal has high chances of success can only be proved at and upon the full hearing of the appeal herein. The appeal is not frivolous, possibility of substantial delay in the determination of the appeal shall be midwived to ensure expedited proceedings and determination of the appeal.

21. The court has considered the issues to be considered before granting bail/bond pending appeal, the applicant/appellant deposed the following;
22. The appellant/applicant has annexed copies of birth certificates of 3 children of less than 10years old. It is also deposed that the appellant's wife is facing murder charges in thee Machakos High Court. The children continue to suffer from prison confinement. The appellant's mother is aged and sickly and solely depends on him. These factors against the charge/offence, the circumstances surrounding the proceedings and judgment pending appeal disclose special, exceptional or unusual circumstances that this court considers and also in light of the fact that ODPP does not oppose grant of bond, grants bail pending appeal on the following terms;
 1. The applicant/appellant shall be released on bond of Kshs 700,000/- with 1 surety of like amount.
 2. The applicant shall not interfere or contact or engage with victim family.
 3. The applicant shall attend court on all dates required.
 4. The appellant shall not leave the jurisdiction of this court.
 5. The appeal is admitted to be prosecuted within 90 days hereof.

DATED, DELIVERED & SIGNED AT MACHAKOS THIS 24TH DAY OF NOVEMBER, 2022 (VIRTUAL/PHYSICAL CONFERENCE).

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

DENNIS NGUI - APPELLANT

LANGALANGA - FOR THE APPELLANT

MWONGERA - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

