



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CRIMINAL APPEAL NO. E020 OF 2020**

**JOSHUA KIARIE NGUGUNA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The appellant herein was charged before the Mavoko Chief Magistrate's Court in Sexual Offence Case No. 19 of 2020 and convicted of the offence defilement contrary to section 8(1) as read with section 8(2) of the **Sexual Offences Act** on 14<sup>th</sup> December, 2020. He was sentenced to 20 years imprisonment.

2. Aggrieved by the said decision he has lodged this appeal. Pending the hearing and determination of the appeal, he seeks that he be admitted to bail. According to him, his appeal has overwhelming chances of success on the ground of identification, the probative value of the *voir dire* examination and the punitive nature of the sentence imposed. The issue of identification is based on the fact that there was no collection of the DNA samples while the *voir dire* examination failed to prove that the minor was of sufficient intelligence and understood the gravity of the issues canvassed.

3. It was contended that there is a possibility of a delay in the disposal of this appeal based on the COVID 19 pandemic hence there is a possibility of the appellant serving the sentence before his appeal is determined. It was further averred that the appellant is the sole breadwinner of his elderly parents and six siblings and that he was engaged in an income generating activity at Kapa Oil Refineries, a job which he is now in jeopardy of losing.

4. It was further deposed that the applicant is scheduled to get married on 20<sup>th</sup> February, 2021 hence his continued incarceration would be prejudicial to his quest to be joined in the holy matrimony.

5. The application was however opposed by the Respondent vide the following grounds of opposition:

**1. THAT the application TOTALLY lacks merit.**

**2. THAT the application does not meet the legal requisite threshold of the orders that it seeks.**

**3. THAT the applicant in facing a long sentence of 20 years for the serious offence of defiling a minor aged three (3) years.**

**4. THAT the intended appeal has no chance of success whatsoever as the evidence tendered by the prosecution is overwhelming, well corroborated and sufficient to warrant the conviction arrived at by the Honorable Court.**

**5. THAT due to the long sentence that the appellant is facing, his chances of absconding is extremely high.**

**6. THAT bail pending appeal is discretionary as the applicant's innocence was compromised upon conviction.**

**7. THAT the applicant has not demonstrated any peculiar and exceptional circumstance to warrant grant of the orders sought.**

8. THAT the sentence imposed by the court is TOO lenient considering the age of the victim and the Section under which the applicant was charged and convicted.

9. THAT the applicant ought to have been sentenced to LIFE IMPRISONMENT as provided by Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.

### Determination

6. I have considered the application and the affidavits both in support thereof and in opposition thereto as well as the submissions made.

7. Article 49(1)(h) of the Constitution provides that:-

**An accused person has the right ...**

**(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.**

8. However, a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the *Criminal Procedure Code* provides as follows:

**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.**

9. It was therefore held in Masrani vs. R [1060] EA 321 that:

**“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”**

10. I therefore agree with the position in Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR where it was held that:

**“The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court’s discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R [1966] KLR 605*, the principle considerations for granting bail pending appeal were stated as follows:**

**1. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.**

**2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.**

**Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.”**

11. This position was restated in Mutua vs. R [1988] KLR 497, in which the Court of Appeal stated:

**“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.”**

12. In Jivraj Shah vs. Republic [1986] KLR 605; [1986] eKLR, the Court of Appeal held that:

**“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. The decision in *Somo v Republic [1972] E A 476* which was referred to by this court with approval in Criminal Application No NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of 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. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”**

13. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the Court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

a. Whether the appeal has overwhelming chances of success. See Ademba vs. Republic [1983] KLR 442, Somo vs. R [1972] EA 476, Mutua vs. R [1988] KLR 497;

b. There are exceptional or unusual circumstances to warrant the Court's exercise of its discretion. See Raghibir Singh Lamba vs. R [1958] EA 37; Jivraj Shah vs. R [1986] eKLR; Somo vs. R (supra); Mutua vs. R (supra);

c. There is a high probability of the sentence being served before the appeal is heard. See Chimabhai vs. R [1971] EA 343.

14. What constitute exceptional circumstances were dealt with in R vs. Kanji [1946] 22 KLR, where De Lestang, Ag.J (as he then was) held that:

**“The appellant’s appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admit to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail.”**

15. According to Trevelyan, J in Somo vs. R [1972] EA 476:

**“...the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance.”**

16. Good character alone, however, it was held in the same case:

**“can never be enough. There is nothing exceptional or unusual in having such a character.”**

17. The rationale for considering the chances of success of the appeal was given in Somo vs. R (supra) at page 480 as follows:

**“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”**

18. In this case, I have considered the grounds of appeal and I am not satisfied that the said grounds disclose the existence of an appeal has overwhelming chances of success. Whereas the appellant may well succeed in urging the said grounds at the hearing of the appeal, I am not satisfied that the chances of the appeal succeeding are overwhelming. The grounds are the usual grounds and there is no ground that stands out as one that is very likely to succeed even before the same is argued based on the state of the record.

19. As regards the exceptional circumstances, it is argued that the appellant's appeal is likely to be determined after the sentence is served. With due respect I do not agree. The appellant was sentenced to 20 years barely a month ago. It is very unlikely that the appeal would be disposed after 20 years. In fact, if the appellant's legal advisers move with speed, considering the fact that the proceedings are available the appeal may well be disposed of in the next few months. Apart from that the appellant contends that he is the sole breadwinner of his family and he stands to lose his job. Those factors even if true, in my view, do not constitute exceptional circumstances otherwise anyone in a gainful employment would be automatically entitled to bail pending appeal. That however, is not the law. As regards the appellant's intended wedding, it is my view that the same may be postponed for the next few months and such postponement does not constitute exceptional circumstances. That option, in my view, is more prudent than giving the appellant a false sense of security in his intended newly found status when, depending on the outcome of his appeal, the same may well be short-lived. It is better that the appellant knows his fate so that when he is entering into the said union, both himself and his bride do not have anxiety that the appellant may later on be incarcerated.

20. In light of the foregoing I find no merit in this application. Let the appellant expedite the process of the hearing of his appeal.

21. It is so ordered.

**Ruling read, signed and delivered in open court at Machakos this 18<sup>th</sup> day of January, 2021.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Mutinda Kimeu for Mr Kaaya for the Appellant**

**Mr Ngetich for the Respondent**

**CA Geoffrey**