



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E064 OF 2021

BETWEEN

RIMITA MUTETHIA RUKUNGA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

RULING

1. **RIMITA MUTETHIA RUKUNGA (Appellant)** was charged in TIGANIA CRIMINAL S.O E9 OF 2020 with attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006 (*the Act*). By a judgment dated 19th March, 2021, Appellant was convicted and sentenced to serve 10 years' imprisonment for the offence.
2. By a Notice of Motion dated 08.04.2021 filed on even date, brought under Section 357 (1) of the Criminal Procedure Code, the Appellant has moved the court for orders that he be admitted to bail pending the hearing and determination of the appeal.
3. The application is mainly based on grounds **THAT**:
 - a. **Appeal has overwhelming chances of success**
 - b. **The prosecution case was not proved beyond reasonable doubt.**
 - c. **Appellant is likely to loose his job if he is not released on bond**
3. The application is supported by an affidavit sworn by the Appellant on 08.04.2021 in which he reiterates the grounds on the face of the application.
4. I have considered the submission filed on behalf of both parties. In criticizing the prosecution case Appellant holds the view that the prosecution case was not proved beyond any reasonable doubt. He particularly argues that penetration was not proved and that his alibi defence was not disproved and on that basis contends that the appeal has high chances of success.
5. Ms. Mbithe, learned counsel for the state opposed the application on the grounds that Applicant/Appellant had was properly convicted and sentenced on the basis of a case that was proved beyond reasonable doubt.
6. I have carefully considered the application in the light of the supporting affidavits, submissions on behalf of both parties and the cited authorities.
7. Section 357 of the Criminal Procedure Code provides: -
 - (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**
8. This court is thus clothed with the power to grant bail/bond with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal. In granting bail pending appeal, the court is obliged to consider the circumstances of

each case so that the discretion is exercised judiciously and not capriciously.

9. In the case of **Jivraj Shah -vs- Republic [1980] KLR 605**, the Court of Appeal set out the parameters to be considered by an appellate court in applications for bail pending appeal 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.**

9. 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 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.”

10. In view of the foregoing, the onus is always on the Appellant to demonstrate to the court that there are good reasons why he/she should not be allowed to continue serving sentence but should be allowed to enjoy his/her liberty pending the hearing and determination of his or her appeal.

11. The Appellant herein has not demonstrated any substantial point of law. The contention that the prosecution case was not proved and the defence of alibi are in my considered view good grounds on appeal and not for bail pending appeal.

12. Further to the foregoing, I also have personal knowledge of the fact that dates for hearing of appeals are open and I am aware that this appeal is likely to be heard in the course of this year.

13. For the foregoing reasons, I have come to the conclusion that the Appellant has not passed the test for grant of bond pending appeal. The Notice of Motion dated 08.04.2021 and filed on even date is not merited and it is accordingly dismissed.

DATED THIS 20TH DAY OF MAY 2021

T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Appellant - Present

For the Appellant -Mr. Kaberia Advocate

For the Respondent - Ms. Mbithe