



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 60 OF 2018

JCM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An application for bail pending appeal from the decision of M. Kinyanjui, Senior Resident Magistrate, in S.O. No. 60 of 2018 at Kandara dated 6th November 2018]

RULING

1. The appellant is a *minor*. He was convicted of *defilement* on his plea of guilty. He was committed to *Gitathuru Rehabilitation School* for a term of *three years*.
2. The appellant lodged a *petition of appeal* through counsel on 20th November 2018. A new firm of advocates, *Githiga Kimani Advocates*, lodged an *amended petition* on 24th January 2014 *without leave* of the court.
3. Pending the hearing and determination of the appeal, the appellant prays for *bail*. The notice of motion is supported by a deposition of his new counsel, *Mr. Githiga Kimani*.
4. The appellant contends that the appeal has overwhelming chances of success. The appellant's learned counsel underscored the fact that the appellant is a minor. He said there is a risk that he will serve a substantial part of the sentence before the appeal is determined. Finally, he submitted that the appellant did not flout his bond in the lower court.
5. In a synopsis, the appellant's case is that there are *exceptional* circumstances that warrant grant of bail.
6. The application is *contested* by the Republic. Learned prosecution counsel, *Ms. Gichuru*, blew hot and cold. On the one hand, she submitted that the plea of guilt was *unequivocal*. On the other hand she did *not* contest bail on the ground that the trial court failed to *warn* the minor of the risks of pleading guilty.
7. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj Shah v Republic* [1986] KLR 605-

"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 is Somo v Republic [1972] EA 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."
8. It would be prejudicial to delve deeper into the merits of the appeal. It will be the duty of the first appellate court to *re-evaluate* the record; and, determine whether the plea can be impeached.
9. But I can safely state the following. The *language* used at the time of taking the plea is on the record. The *words* used by the appellant in answer to the *charge* and the set of *facts* are also there.
10. The lower court seems to have called for *age assessment*. The proceedings before me are not clear whether the report was made. The minor said he was born on 6th June 2005. He was to be remanded at Murang'a Juvenile Home awaiting a vacancy at *Gitathuru Rehabilitation School*. A mention date was granted for 20th November 2018. The rest of the record has not been filed.

11. I agree that the points raised in the petition of appeal are *arguable*. But I am not persuaded that there are *exceptional grounds* or that a *substantial point of law or evidence* has been urged to sway the court to grant bail pending appeal.

12. The appellant was committed to *Gitathuru Rehabilitation School* for a term of *three years*. It will again be for the appellate court to determine whether the sentence was lawful considering the provisions of the **Children Act**; and, the fact that the appellant was a *first offender*.

13. On the face of it, the sentence handed down is not *illegal*. I *cannot* also say that a *substantial part* of the sentence *will* be served *before* the appeal is heard and determined. If learned counsel is diligent with filing of the full record, this appeal shall be *fast tracked* in the *best interests* of the child.

14. It is true that the appellant was admitted to bail during his trial. But the *presumption* of innocence no longer holds *pure*. The appellant has been *convicted*. The applicant has not satisfied the yardstick for grant of bail pending appeal.

15. The upshot is that the appellant's *notice of motion* dated 20th January 2019 is *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 27th day of March 2019.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. J. Kimani for the appellant instructed by Githiga Kimani Advocates.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.