



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 32 OF 2018

DANSON NTHIGA NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An application for bail pending appeal from the decision of V. Ochanda, Resident Magistrate, in S.O. No. 1 of 2015 at Murang'a dated 10th May 2018]

RULING

1. The appellant was adjudged guilty of *defilement* contrary to section 8 (1) as read with section 8 (3) of the **Sexual Offences Act**. He was also convicted for *abduction* of the minor contrary to section 259 of the **Penal Code**.
2. He was sentenced to *twenty years imprisonment* for defilement and, *three years* for the abduction. The sentences were to run *concurrently*.
3. The particulars of *defilement* were that on diverse dates between 10th and 15th November 2014 at *[particulars withheld]* within Murang'a County, he caused his penis to penetrate the vagina of JWN *[particulars withheld]* a child aged 14 years.
4. The particulars of *abduction* were that on the same dates at *[particulars withheld]* within Murang'a County, he abducted the minor with intent to cause her to be secretly and wrongfully confined.
5. The appellant has lodged a *petition of appeal*.
6. Pending the hearing and determination of the appeal, he prays for *bail*. the application is supported by his deposition filed on 5th February 2019.
7. The appellant contends that the appeal has overwhelming chances of success.
8. The application is *contested* by the Republic. Learned prosecution counsel submitted that all the elements of the charges were proved beyond reasonable doubt.
9. 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.”
9. I resist the temptation to comment about the merits of the appeal. It will be the duty of the first appellate court to *re-evaluate* the evidence; and, determine whether it was *reliable*.
10. But I can safely state the following: PW1 knew the appellant who was employed in the area. PW2 was the complainant. She testified that the appellant asked him to board a *matatu* to Murang'a town and finally spirited her away to Mulolongo, Machakos County. She was emphatic that the appellant penetrated her on more than one occasion.
11. There is additional evidence from the clinical officer (PW5) and the Investigating Officer (PW6).

12. I have also perused the defence proffered by the appellant. True, the appeal is *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.

13. On the face of it, the sentences handed down are not *illegal*. I *cannot* also say that a *substantial part* of the sentence *will* be served *before* the appeal is heard and determined.

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 considerations for grant of bail at this stage are thus markedly different.

15. The upshot is that there are no *exceptional* circumstances to warrant grant of bail pending appeal. The application is *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 30th day of May 2019.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Appellant (in person).

Ms. Ruth Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.