



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 42 OF 2014**

**NASSIR RASHID KILANGA ..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

The Notice of Motion application dated the 28th day of February, 2014 and expressed to be brought under Section 357 (1) of the Criminal Procedure Code cap 75 Laws of Kenya and article 49 (1) (h) of the Constitution.

It seeks orders for the Appellant to be admitted to bond pending hearing and determination of his appeal.

The grounds being that the appeal has overwhelming chances of success.

Secondly, owing to backlog of cases the appeal would take a long time to be heard and determined and further that the offence of which the appellant has been Convicted and Sentenced to twenty (20) years imprisonment is bailable.

Further that while out on bond in the subordinate Court the appellant did not abscond.

Mr. Opolu Counsel for the Applicant submits that the evidence that was adduced before the subordinate against the Appellant was circumstantial in nature.

Secondly that the age of the Complainant was not assessed and that the document that the Court relied on to find that the age of the Complainant was assessed had many erasures and the maker of it was not called to testify.

Further that there is an eye Witness who was mentioned in evidence by the prosecution Witness but the police did not record his statement and hence did not present him in Court to testify.

It is contended that though the Appellant was taken for medical examination his P3 form was not produced most likely because it showed that he had no venereal disease whereas the Complainant was

found to have pus cells.

That the Doctor who examined the Complainant did find that her hymen was torn but he could not state when.

Lastly, that there is evidence that there was a running land dispute between the parents of the Complainant and the Appellant.

### **The Law**

In the Court of Appeal decision in **Jivraj Shah –Vs- Republic (1986) KLR 605** at page 606 – 607 it was held,

***“There is not a great deal of local authority on this matter (i.e. grant of bail pending appeal) 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 the granting of bail will exist.***

***The decision in Somo –Vs- Republic 1972 E.A. 476 which was referred to by this Court with approval in Criminal Application No. 14 of 1986 Daniel Dominic Karanja –Vs- Republic where the main criteria was stated to be 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”.***

From the above, the Applicant ought to be in a position to persuade this Court that his appeal is so strong, so meritorious that at the end, the possibilities highly favour an acquittal.

I do not at this stage want to go into the merits or demerits of this appeal. The Appellant was Sentenced to an imprisonment term of twenty (20) years there is no danger that he will serve a substantial part of that term or the whole of the imprisonment term while awaiting the hearing and determination of this appeal. Now that he has filed his appeal he should make haste to ensure that it is ready for hearing.

I find no exceptional or unusual circumstances in this case. The application is dismissed.

**Ruling delivered dated and signed this 18th day of March, 2014.**

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**M. MUYA**

**JUDGE**

**18TH MARCH, 2014**

**Mr. Opullu:** We have already filed our appeal. We urge that the Court do admit the appeal.

**Court:** The appeal is admitted. Same to be heard by a single Judge.

Hearing **19th May, 2014.**

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**M. MUYA**

**JUDGE**

**18TH MARCH, 2014**