



REPUBLIC OF KENYA



KENYA LAW
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**DO v Republic (Criminal Appeal E193 of 2024)
[2025] KEHC 2641 (KLR) (Crim) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E193 OF 2024**

K KIMONDO, J

MARCH 6, 2025

BETWEEN

DO APPELLANT

AND

REPUBLIC RESPONDENT

(Application for bail pending appeal from the decision of A. W. Macharia, Principal Magistrate, in S. O. Children's Case No. E011 of 2022 at Nairobi dated 29th October 2024)

RULING

1. The appellant was adjudged guilty of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*. He was committed to [Particulars Withheld] Institution for three years.
2. The particulars were that on 7th May 2022 at [particulars withheld] within Nairobi County, he intentionally penetrated the vagina of CMA [particulars withheld] a child aged 7 years.
3. Being aggrieved, he lodged a petition of appeal dated 13th December 2024 challenging both the conviction and sentence.
4. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion of even date pleading for bail. It is supported by his deposition. Considering that the appellant is a minor, it remained highly doubtful that he has capacity to swear the affidavit. Doing the best that I can and in the interests of justice, I will adopt it purely as a statement.
5. The appellant's learned counsel, Mr. Mwinzi, submitted that the appeal has overwhelming chances of success. He argued that penetration was not proved or corroborated; that the prosecution's evidence was unreliable or contradictory; that the age of the victim was not established; and, that the defence put forward was disregarded.



6. He attacked the sentence as too punitive in the circumstances. He implored the court to keep in mind the best interests of the minor now aged 16 years and in Form III. According to learned counsel, the incarceration at the Borstal home will affect the minor's preparation for his final examinations or he may miss it altogether.
7. I was also implored to take into account that a substantial part of the sentence may be served before the hearing and determination of the appeal.
8. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail. Reliance was also placed on a list and bundle of authorities filed on 27th July 2020.
9. The application is contested by the Republic through grounds of opposition dated 21st January 2024. Learned prosecution counsel, Ms. Awino, submitted that there was overwhelming evidence in support of the charge; and, that the committal to the Borstal home will afford the accused the best opportunity for rehabilitation and to sit for his national examinations. In a word, the Republic's position is that the appeal is hopeless and called for dismissal of the present motion.
10. 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.

11. I decline the invitation to interrogate the full merits of the appeal. That will be the true province of the first appellate court to re-evaluate the veracity of the evidence; and, to consider whether the sentence was deserved.
12. But I can safely state the following: The victim (PW2) was emphatic that the appellant lured her into his house, put her on a seat and penetrated her with his "kijiti". Her mother (PW1), who was away on a trip to Eldoret, learnt of the daughter's ordeal when the latter complained of feeling pain while passing urine.
13. According to the examining doctor (PW3) the victim's hymen was torn days before the hospital visit. I say all that very carefully, and without making a finding.
14. I have also perused the defence proffered by the appellant (DW1) and his five witnesses. The appellant had raised an alibi, principally that he was away in school at the material time. He stated that the evidence by PW1 was a pack of lies. His witnesses who included his parents, two teachers and a neighbour fortified that stance and vouched for his good conduct. Again I say that very carefully as the appeal is still pending.
15. 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.
16. Regarding the sentence, I am alive that Article 53 (2) of the [*Constitution*](#) as well as the [*Children Act*](#) 2022 provide that a child's best interests are of paramount importance in every matter concerning the child.



17. In this case, the appellant is a minor in Form III. The lower court for a pre-sentencing report and concluded that in view of the offence and family ties, a non-custodial sentence was inappropriate. It stated-

It is upon this background that the court rules that there is need for the subject to be rehabilitated in a place where he will reflect his act, change his ways and come out a better person before he gets into adulthood.

18. Committal to a Borstal home is one of the sentences provided under the *Children Act* 2022. I have no evidence that merely by being held there, the appellant will not be able to register or sit for his final examination.

19. 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.

20. In the interests of justice, I direct that the appeal be fast-tracked. In that regard, the Deputy Registrar shall ensure that the original record and certified transcript of the lower court are placed before the High Court at the earliest for admission of the appeal or directions on its disposal.

21. Lastly, it may be 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.

22. The upshot is that there are no exceptional circumstances to warrant grant of bail pending appeal. The application dated 13th December 2024 is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH 2025.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. Mwinzi for the appellant instructed by Mwenda Mwinzi & Associates Advocates.

Ms. Awino for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

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