



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ochieng v Republic (Criminal Appeal E001 of 2025)  
[2025] KEHC 2796 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2796 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL APPEAL E001 OF 2025  
WM MUSYOKA, J  
MARCH 14, 2025**

**BETWEEN**

**ALLAN HOSTEN OCHIENG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from conviction and sentence by Hon. RO Odenyo, Senior Principal Magistrate, SPM, in Busia CMCSOC No. E014 of 2023, of 14th January 2025)*

**RULING**

1. The appellant was convicted, after a full trial, on 14h January 2025. He was sentenced to serve 20 years in jail. The appellant then lodged an appeal herein, on 22<sup>nd</sup> January 2025, by way of a memorandum of appeal, dated 20<sup>th</sup> January 2025, which was subsequently amended on 23<sup>rd</sup> January 2025.
2. What I am invited to consider is an application, dated 24<sup>th</sup> January 2025, for orders that the appeal herein be admitted, the trial court file be called for, and the appellant be admitted to bail/bond pending appeal. The application is founded on grounds, principally, that the judicial officer who convicted and sentenced the appellant had only heard the defence, the prosecution case having been heard by another judicial officer who went on transfer; the appellant was a young adult who had just turned 18 years of age; the appeal had serious and weighty issues of law, which were arguable; no one would suffer prejudice should the appellant be admitted to bond; among others.
3. No document was filed by the respondent in opposition or response to the application.
4. The application was placed before me, on 28<sup>th</sup> January 2025, under certificate of urgency. I directed that it be served, to be heard inter partes on 5<sup>th</sup> February 2025.
5. The application was argued orally, before me, on 5<sup>th</sup> February 2025.



6. Mr. Okutta, for the appellant, argued that the appeal had good chances of success, submitting that the judicial officer, who convicted and sentenced the appellant, did not have the benefit of hearing the prosecution witnesses, having taken the matter over from a judicial officer who was going on transfer, and, therefore, he did not appreciate the weight of the evidence and the credibility of the witnesses. He submitted that there were inconsistencies on the age of the complainant. He summed up that the entire evidence suggested trumped up charges. He further argued that the appellant had been on bond during trial, and he did not abscond, and chances were that, upon being admitted to bond pending appeal, he would similarly be faithful to the terms of the said bond.
7. Mr. Onanda, for the respondent, submitted in opposition. He conceded that the appellant was on bond during trial, and did not abscond. He asserted that there was a higher chance of getting the appeal dismissed. He urged that, should the court be inclined to admit the appellant to bond, strict bond terms ought to be imposed.
8. The appeal herein arises from a decision of a magistrate's court to the High Court. The rules of procedure, for appeals from the magistrate's court to the High Court, are set out in the *Criminal Procedure Code*, Cap 75, Laws of Kenya. The relevant provisions are in sections 356 and 357. The 2 provisions allow the High Court, and the magistrate's court, a wide discretion. Bail may be granted on "such terms ... as may seem reasonable to the High Court or the subordinate court." Under section 356(2), should the appeal be unsuccessful, the appellant would still be liable to serve the suspended sentence, and the period he spent out on bail/bond, or suspension of execution of sentence, shall be excluded from the computation of the term of his sentence.
9. The factors taken into account, for grant of bail pending appeal, were discussed in *Arvind Patel vs. Uganda* [2003] UGSC 25 (Oder, JSC) and *Samuel Macharia Njagi vs. Republic* [2013] eKLR (Abuodha, J), and they are about the appellant being a first offender, the appeal having been admitted, the possibility of substantial delay in the disposal of the appeal, the offence not involving personal violence, the character of the appellant, the appeal not being frivolous and having a reasonable chance of success, and whether the appellant had been on bond at trial and complied with the bond terms there, among others. All these factors need not be present in every case, according to *Arvind Patel vs. Uganda* [2003] UGSC 25 (Oder, JSC).
10. Taking those factors into account, I have made note of the following. Firstly, the appeal herein is yet to be admitted. Secondly, regarding bond/bail at the trial court, the appellant was on bond, and did not abscond. Thirdly, at sentencing, the antecedents of the appellant were not brought out, for the trial court did not call for a pre-sentence report, and the prosecution did not address the court on his previous criminal record, if any. Fourthly, the offence, for which the appellant was convicted, did involve physical violence, for it was about defilement of a minor of tender years. Fifthly, that once appeals are admitted here, at the Busia High Court, they tend to be disposed of quickly, given the light caseload.
11. The discretion given to the High Court, and the magistrate's court, in sections 356 and 357 of the *Criminal Procedure Code*, is broad. Of course, the caution sounded, in *Chimambhai vs. Republic* [1971] EA 343 (Harris, J), must be borne in mind, that the case of an appellant, seeking bond pending appeal, lacks the strongest elements normally available to an accused person seeking bond pending trial, namely the presumption of innocence. There is also the caution, in *Francis Kamote Mutua vs. Republic* [1988] eKLR (Platt, Apaloo JJA & Masime, Ag JA), that an appellant, seeking bail pending appeal, is a convicted person, serving sentence for his crime. It would be open to the court to grant bail/bond, subject to such terms or conditions as the court may deem reasonable, subject to the above cautions.



12. How should I exercise discretion here? The appellant herein is a convict serving sentence. Bail/bond pending appeal, unlike bail/bond pending trial, is not a constitutional right. I note that the sentence imposed, of 20 years, cannot be served out before the appeal herein is heard and determined. Secondly, the offence, for which the appellant was convicted, was committed on a minor of tender years, of 6 or 7 years old to be precise. Section 8(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, under which he was charged, prescribes a mandatory sentence of life imprisonment, upon conviction for defilement of a child under 11 years. The appellant was sentenced to 20 years rather than to life imprisonment. I am alive to *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR)(Koome, CJ, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ), where it was held that the sentences, prescribed under the Sexual Offenders Act, are legal and constitutional.
13. One would be tempted to be cautious about admitting the appellant to bond in the circumstances of what I have discussed in the foregoing paragraph. However, I am not persuaded that any serious objections have been raised, for me to reject the application, to admit the appellant to bond/bail pending appeal. The appellant was on bond during trial, and did not abscond. In exercise of the broad discretion, given in the provisions that I have discussed above, I do hereby admit the appellant to bail herein pending appeal, or suspend execution of the sentence herein, subject to the appellant executing a bond of Kshs. 900,000.00, with 1 surety of like amount, or, alternatively, to post cash bail of Kshs. 450,000.00.
14. To fast-track the matter, I hereby admit the appeal, seeing that proceedings of the trial court have been typed, and the original trial court records have been availed. I direct that the record of appeal be filed within 14 days. The appeal shall be canvassed by way of written submissions. As the respondent has already filed its written submissions, let the appellant file and serve his, within 21 days. The matter shall be mentioned on 3<sup>rd</sup> April 2025, to receive written submissions, and to allocate a date for judgement. It is so ordered.

**RULING IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 14<sup>TH</sup> DAY OF MARCH 2025.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Wycliffe Okutta, instructed by Ouma-Okutta & Associates, Advocates for the appellant.

Mr. Antony Onanda, instructed by the Director of Public Prosecutions, for the respondent.

