



**Oliech v Republic (Criminal Appeal E073 of 2023)
[2024] KEHC 207 (KLR) (Crim) (22 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E073 OF 2023
LN MUTENDE, J
JANUARY 22, 2024**

BETWEEN

GORDON AMOS ONUONG'A OLIECH APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant/appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. Particulars of the offence being that on 29th November, 2021 at [Particulars withheld] area in Njiru Sub-County within Nairobi County, he unlawfully and intentionally caused his penis to penetrate into the vagina of G.M a girl aged 17 years. He was convicted and sentenced to serve 15 years imprisonment.
2. Through an application dated 17th March, 2023, the applicant seeks to be admitted to bail pending determination of the appeal and stay of execution of the sentence. The application is premised on grounds that the appeal filed raises issues of law and fact and it has high chances of success. That the applicant suffers from a chronic ailment that requires constant monitoring, management and treatment.
3. The application is also buttressed by the supporting affidavit filed by the accused counsel. Counsel depones that the applicant was released on bond during trial and the exhibits and surety are yet to be released. That the applicant is not a flight risk and would not interfere with witnesses. That there are no compelling reasons to deny him bail. That the applicant suffers from chronic illness and his health is likely to deteriorate. He is also a family and the breadwinner. Further that he has perused the judgment and exhibits and is certain that the appeal has chances of success.



4. The application was disposed through written submissions. It is submitted by the applicant that: he has filed the record of appeal and is therefore serious in prosecuting his appeal; he did not abscond trial and there is no circumstance to deny him bond; the appeal has merit and high chances of success; the applicant could serve his full sentence term and the time lost if he is released on appeal could not be compensated; and, that he was of good character during trial and this makes his case exceptional. The applicant refers to the case of *Chimambhai v R* (1971) EA 343 and *Simon Mwangi Kirika v Republic* (2006) eKLR; and, also the case of *Dominic Karanja v Republic* (1986) eKLR, where the court stated that the main factor is that the appeal has overwhelming chances of success.
5. It is urged by the respondent that the appellant lost his presumption of innocence and the onus of proof is on the applicant to prove that the court should grant him bond. That there is no evidence of the applicant ailment, the conviction was proper and legal, and, that the applicant has not demonstrated any element of the offence being challenged. That elements of the offence, namely, penetration, age and identification of the perpetrator were proved. Further, that the record of appeal has not been filed.
6. Lastly that the appeal may be expedited and heard on priority basis as the court is currently handling appeals for 2022 and 2023 which calls for dismissal of the application.
7. I have considered rival arguments. The applicant is required to demonstrate that the appeal has chances of success, the sentence or a substantial part of it would be served before the appeal is determined, and, that his case is exceptional.
8. In the case of *Jivraj Shah v Republic* (1986) eKLR at para 11 the Court of Appeal held that:

“...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 granting bail will exist. The decision in *Somo v Republic* [1972] E A 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. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.”
9. In that chronology, it is important that the appellant demonstrates that his grounds of appeal have overwhelming chances of success. (See Daniel Dominic Karanja case).
10. In this case, the applicant has not cited any ground or demonstrated how his appeal would succeed. It was not sufficient to simply depone that counsel has perused the judgment and exhibits and is of the view that the appeal will succeed.
11. The applicant was sentenced on 7th March, 2023 having been arraigned on 8th February, 2022. There is no chance that he would serve his 15-year sentence or a substantial part of it before this appeal can be concluded.
12. The applicant’s ground is that he suffers from chronic ailment, contrary to his said claim, there is no proof of such disease to make his case exceptional. In any event the case of *Daniel Dominic Karanja v Republic* (1986) eKLR settled that there exist medical facilities for prisoners in the country.



13. The Court of Appeal in Dominic Karanja case(*Supra*) also held that a solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.
14. This means that the fact that the applicant / appellant herein was out on bond with a competent surety at trial is not persuasive. Further argument that there are no compelling reasons to deny him bond do not apply to such application since the applicant has already adjudged guilty and is not entitled to bond as a matter of course under Article 49 of *the Constitution*.
15. In *Somo v Republic* (1972) EA 476, the Court of Appeal held that the previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors.
16. The upshot of the above is that the application is not merited, accordingly, it is dismissed.
17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 22ND DAY OF JANUARY, 2024.

L. N. MUTENDE

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JUDGE

In the Presence of:

Mr. Achillah for Appellant/ Applicant

Applicant/ Appellant

Ms Ntabo for ODPP

