



REPUBLIC OF KENYA



**KENYA LAW**  
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**Moreka v Republic (Criminal Appeal E029 of 2023)  
[2024] KEHC 898 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 898 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KILGORIS  
CRIMINAL APPEAL E029 OF 2023  
F GIKONYO, J  
FEBRUARY 6, 2024**

**BETWEEN**

**SAMWEL ONDUSO MOREKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for bail pending appeal from the Ruling, Judgement, and sentencing of Hon. Moranga (SPM) in Kilgoris SPM SO No. 62 of 2020 on 124th October 2022)*

**RULING**

**Bail pending appeal**

1. In the Chamber Summons application dated 09.11.2023, the applicant has applied for bail pending appeal.
2. The appellant/applicant maintains his innocence. He prays to be accorded his right to bail pending a review of the trial court's records and proceedings. The appellant/applicant relied on *JOO vs Republic* [2015] eKLR., Article 49 and 51(1) of the *Constitution*.
3. The appellant/applicant averred that he was admitted to bail in the lower court. He attended court throughout the proceedings without fail and as such he is not a flight risk. He attended court without fail from early October 2020 to the last day of judgment on 24.10.2023.
4. The appellant/applicant averred that it will not serve justice if the appellant serves a large chunk and/ or even a part of the sentence but finally gets acquitted by review of the proceedings and the record of the trial court by this court.
5. The appellant/applicant was convicted on 24.10.2023 for the offence of defilement of a minor contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.



6. The appellant/applicant averred that he is a father whose family entirely relies on him for their upkeep and his incarceration may render his family destitute.
7. The probation report was duly filed. The trial court then sentenced the appellant to a custodial sentence of 15 years. The appellant/applicant urged this court to consider the probation and after-care service report prepared in respect of the accused person, the appellant's village elders, and Martin Onyango as compelling circumstances to consider granting the appellant/applicant bail pending appeal.
8. The respondent opposed the application for bail pending appeal. The respondent filed a replying affidavit sworn by Emmanuel Ger Okeyo on 23. 11.2023. The respondent averred that the application in its entirety raises no compelling reason to grant the appellant/applicant bond pending appeal. The respondent contends that the appellant/applicant having been tried and convicted of the offence of defilement by a court of competent jurisdiction such a conviction erodes the appellant/applicant's right to presumption of innocence including the right to bail. Further, obedience to bond terms is not a compelling ground for release on bail pending appeal.
9. The respondent argued that the appellant/applicant may not serve a substantial part of the sentence given the current judiciary principle on quick disposal of cases.
10. The respondent averred that the appeal does not raise any particular legal issue with a high probability of success.
11. The respondent averred that the averment by the appellant/applicant is a father whose family entirely relied on is not backed by evidence.
12. In a rejoinder the appellant/applicant filed a supplementary affidavit sworn by his advocate Edward Aboki Begi on 04.12.2023. The appellant/applicant averred that he filed his petition of appeal on 10.11.2023 which on the face of it contains 10 grounds of appeal that raise pertinent legal issues hence making the appeal arguable.
13. It was averred that the appellant/applicant has equally applied and paid for certified copies of proceedings and judgment from the lower court and the same have not been supplied hence a reasonable belief that the same may take time before being supplied for purposes of preparing a record of appeal for directions and hearing by this court.
14. It was averred that the appellant has two students in form 3 who solely support their educational needs as he is a single parent since his wife ran away leaving the appellant with the children as can be seen from the probation officer's presentencing report on the personal history of the appellant/applicant.
15. It was averred that the appellant/applicant has suffered ill health at the prisons and has twice been taken to hospital for treatment with the latest visit to the hospital being on 04.12.2023. He urged this court to admit him to bail pending appeal.
16. The appellant/applicant filed a further affidavit which has elaborated on the averments in the supplementary affidavit and the supporting affidavit. The arguments raised in the further affidavit are matters for consideration in the appeal.
17. Mr. Ondimu orally submitted that the application raises pertinent issues which the court should consider. He argued that there is a need to interrogate the legality of the sentence. He stated that the prosecution has no objection to the application.



## Directions of the Court

18. The appellant/applicant to file written submissions. The appellant/applicant has not filed.

## Analysis and Determination

### Issue

19. Upon consideration of the application and submissions made as well as the replying affidavit, the supplementary affidavit, and further affidavit filed hereto, is the applicant entitled to release on bail pending appeal?

### Nature of Bail Pending Appeal

20. The appellant is a convicted person. This tincture the presumption of innocence. However, such person who has entered an appeal, may be released on bail or seek suspension of execution of the sentence pending the hearing of his appeal.

21. See section 357(1) of the *Criminal Procedure Code* which provides that:

After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.

### The test

22. Judicial decisions show that, in determining whether or not to grant bail pending appeal, the court should consider: -

- i. Whether the appeal has overwhelming chances of success. Matters touching on legality of the sentence and charge which are readily discernible from the record, would constitute 'overwhelming chances of success' of the appeal. See *Ademba vs. Republic* [1983] KLR 442, *Somo vs. R* [1972] EA 476, *Mutua vs. R* [1988] KLR 497;
- ii. Whether there are exceptional or unusual circumstances to warrant the exercise of the court's discretion in releasing the appellant on bail. For instance, illness that the prison establishment cannot treat. See *Raghhbir Singh Lamba vs. R* [1958] EA 37; *Jivraj Shah vs. R* [1986] eKLR; *Somo vs. R (supra)*; *Mutua vs. R (supra)*;
- iii. Whether there is a high probability of the sentence or substantial part of it being served before the appeal is heard. See *Chimabhai vs. R* [1971] EA 343.

23. The applicant for bail pending appeal should establish one or more of the above matters. See *Raghhbir Singh Lamba v R* [1958] 1 EA 337 (High Court of Tanganyika) Spry Ag J at page 338.

### Chance of Success of Appeal

24. Parties herein have argued that the appeal has an overwhelming chance of success. In the further affidavit the appellant/applicant contends that there was no medical collaboration to the offence of defilement. And, that the medical report may not support the offence of defilement. These are matters heavily laden of evidentiary evaluation and fit for interrogation in the appeal rather than in an



application for bail pending appeal. It is not even a matter that could be considered as an exceptional circumstance.

25. The court noted that the Prosecution Counsel appeared to doubt the legality of sentence. But the learned prosecution counsel did not clothe the submission with any or an iota of substance. Notably also, the DPP merely stated that they are not opposed to the application without giving any plausible reasons.

### **Possibility of Serving a Substantial Part of the Sentence**

26. The appellant/ applicant was sentenced to 15 years imprisonment in Kilgoris SPM SO No. 62 of 2020 for the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#). The proceedings have been typed and the original trial court's record has been forwarded to this court. What remains is preparation of the record of appeal- something that should be done within shortest time possible. Therefore, it would be untenable at this stage to argue that the applicant will have served the sentence, or substantial part thereof before the appeal is heard and determined.

### **Exceptional Circumstances**

27. Exceptional circumstances which may prompt the court to release the applicant/appellant on bail pending appeal depend on the circumstances of the case.
28. The appellant/applicant argued that he is a father and sole breadwinner. Whereas the value of the presence and role of a father who is also the sole bread winner in a family, cannot be diminished, however, much more is needed for the ground to qualify as 'exceptional circumstance' for purposes of bail pending appeal.
29. It was also averred that the appellant/applicant has suffered ill health at the prisons and has twice been taken to hospital for treatment with the latest visit to the hospital being on 04.12.2023.
30. There was no evidence that the illness he is suffering from is of such nature that cannot be handled by the prison health establishment or protocols.
31. Before closing, the court should state, that; the fact that the appellant/applicant had been released on bond during trial and did not abscond or faithfully attended court is not sufficient ground to release a person on bail pending appeal. See [Dominic Karanja v Republic](#) (1986) KLR 612, that: -

" ... A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal"

### **Conclusions and Orders**

32. The applicant has not established any ground for release on bail pending appeal. His application therefore fails and is dismissed.
33. Nevertheless, the appeal should be fast-tracked to avoid any delay. Accordingly, upon perusal of the record, the appeal is admitted to hearing. The appellant shall file and serve the record of appeal within 14 days. A date for directions to be given by the court on the basis of priority.
34. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2024**



**HON. F. GIKONYO M.**

**JUDGE**

In the presence of:

C/A – Mr. Leken

Appellant – Mr. Begi - Present

Respondent – Present

