



REPUBLIC OF KENYA



**Taabu v Republic (Criminal Appeal E023 of 2023)
[2024] KEHC 2820 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E023 OF 2023
WM MUSYOKA, J
MARCH 15, 2024**

BETWEEN

KENNEDY ABANGI TAABU APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from conviction and sentence by Hon. EA Nyaloti, Chief Magistrate,
CM, in Busia CMCSO No. E046 of 2022, delivered on 9th October 2023)*

RULING

1. Judgment was delivered at the trial court on 9th October 2023. The appellant then lodged an appeal herein, on 15th January 2024. The appellant was convicted of defilement of a girl aged 5 years, and was sentenced to serve 55 years in prison.
2. What I am invited to consider is an application, dated 11th December 2023, for orders that the appellant be admitted to bond/bail pending appeal, and the same be similar to those imposed by the trial court. The application is founded on grounds, principally that the appellant has an appeal with good grounds, and that the application has been brought without unreasonable delay.
3. I have seen a replying affidavit by the respondent, sworn by Shirley Chepkonga, Principal Prosecution Counsel. It is averred that bail/bond pending appeal is not a constitutional right, for the appellant is a convict, and the presumption of innocence is not available to him. It is further averred that grant of bond/bail pending appeal could only be at the discretion of the court.
4. Directions were taken on 18th January 2024, for canvassing of the application, by way of written submissions. Both sides have complied.
5. The appellant cites *Andrew Kisigei Choge v Republic* [2022] eKLR (J. Kamau, J), to argue that sexual offences are unusual and exceptional, as the option of a fine is not available, which could prejudice an



- appellant should the appeal be successful. *Chimambhai v Republic* [1971] EA 343 (Harris, J), [Jivraj Shah v Republic](#) [1986] eKLR (Nyarangi, Gachuhi & Apaloo, JJA), [Arvind Patel v Uganda](#) [2003] UGSC 25 (Oder, JSC) and [Mkirani v Republic](#) [2021] KEHC 300 (KLR)(Mativo, J) are cited, for the submission that grant of bail/bond is discretionary, and to point out the factors that a court would normally take into account.
6. The respondent cites *Chimambhai v Republic* [1971] EA 343 (Harris, J) and [Francis Kamote Mutua v Republic](#) [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA), to argue that the appellant is a convict, serving punishment, and bond/bail pending appeal is, therefore, not available, on account of lack of the presumption of innocence. It is submitted that grant of bail/bond pending appeal is discretionary, and discretion is to be exercised judicially. I am invited to consider the factors enumerated in [Arvind Patel v Uganda](#) [2003] UGSC 25 (Oder, JSC) and [Samuel Macharia Njagi v Republic](#) [2013] eKLR (Abuodha, J) in evaluating whether to admit the appellant to bond pending appeal or not.
 7. The appeal herein arises from a conviction and sentence from 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 fairly 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, should be excluded from the computation of the term of his sentence.
 8. I consider the principles enumerated in [Arvind Patel v Uganda](#) [2003] UGSC 25 (Oder, JSC) and [Samuel Macharia Njagi v Republic](#) [2013] eKLR (Abuodha, J), around the factors of 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 has a reasonable chance of success, and whether the appellant had been on bond at trial and complied with the bond terms there, among others. It was pointed out, in [Arvind Patel v Uganda](#) [2003] UGSC 25 (Oder, JSC), that all these factors need not be present in every case.
 9. Taking those factors into account, I have made note of the following. Firstly, the appeal herein is yet to be admitted. Secondly, I note that the appellant had been denied bond at the trial. Thirdly, the appellant made a statement in mitigation, pleading for leniency. There was no indication as to whether he had a previous criminal record. Fourthly, the offence, for which the appellant was convicted, involved sexual violence, on a minor of 5 years, a stepdaughter of the appellant. Fifthly, that once appeals are admitted here at Busia High Court, they tend to be disposed of fairly quickly.
 10. The discretion given to the High Court, and the magistrate's court, in sections 356 and 357 of the [Criminal Procedure Code](#), is fairly broad. Of course, the caution sounded in *Chimambhai v 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 v Republic](#) [1988] eKLR (Platt, Apaloo JJA & Masime, Ag JA), that an appellant seeking bail pending appeal is actually a convicted person, serving sentence for his crime. It would appear that it would be open to the court to grant bail/bond, or suspend the sentence, pending appeal, subject to such terms or conditions as the court may deem reasonable, subject to the above cautions.
 11. In exercise of that broad discretion, I find myself unable to admit the appellant to bond/bail pending appeal. Firstly, the sentence imposed, of 55 years, cannot be served out before the appeal herein is heard and determined. Secondly, the victim was a 5-year-old stepdaughter of the appellant. Thirdly, bond



was denied at trial. I shall accordingly deny the appellant bond/bail pending appeal, and dismiss the application herein.

12. To move the matter forward, I do hereby admit the appeal herein, as a record of appeal has been filed, and the original trial court records have been availed. I direct that the appeal be canvassed by way of written submissions, to be filed and exchanged within 21 days. The matter shall be mentioned on 11th April 2024, for compliance, and allocation of a date for judgement. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 15TH DAY OF MARCH 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the appellant.

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

