



**JMM v Republic (Criminal Appeal E008 of 2024)
[2024] KEHC 5140 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E008 OF 2024**

RK LIMO, J

MAY 16, 2024

BETWEEN

JMM APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Joseph Mutiwa Musyoka, the applicant herein was charged and convicted of the offence of incest contrary to Section 20(1) of the Sexual Offence Act No 3 of 2006 in Kitui CM’s court S.O Case No E104 of 2023 Particulars are that on diverse dates between the year 2022 and 29th November 2023 at unknown time at Kitui he unlawfully committed an act that caused penetration to A.N.M a child aged 12 years who to his knowledge was his daughter by inserting his genital organ namely penis to her genital organ namely vagina.
2. The applicant/appellant denied the offence but after trial he was convicted and sentenced to serve 25 years in prison.
3. He has now moved this court vide a Notice of Motion dated 15th March 2021 brought under Section 356(1) and 357(1) of the Criminal Procedure Code asking for bond/bail pending appeal herein.
4. The grounds raised in the application are that the applicant might serve substantive part of his sentence by the time the appeal herein is heard and determined. He also contends that he is a man of good character as exemplified by the fact that he was out on bond during trial.
5. He also cites that unless he is out on bond, his chance to communicate with the advocate handling his appeal will be limited and deprive him a right to fair hearing.
6. He further contends that the appeal filed raises substantial legal issues which he believes gives him high chances of success in the appeal.



7. He says he is ready and willing to abide by terms that maybe informed and contends that his right under Article 49(1) (h) of the Constitution should be protected.
8. The respondent has opposed this application through a replying affidavit sworn on 7th May 2024 by Pauline Karimi Mwaniki from the ODPP.
9. Counsel submits that a bond pending appeal is like a privilege and not a right under Article 49(h) of the Constitution because the applicant no longer enjoys the presumption of innocence because he is now a convict.
10. The respondent contends that the appeal filed is weak and has no chance of success.
11. She avers that the appellant has not demonstrated any plausible or exceptional circumstances to warrant bond pending appeal.
12. This court has considered this application and the grounds raised. I have also considered the opposition made by the State for the respondent.
13. Bond pending appeal are only given under very special circumstances because as correctly part by the respondent, presumption of innocence under Article 50 of Constitution ends upon conviction. The right to bail under Article 49 of Constitution only applies to arrested person or person charged but not a person who have been tried and convicted. A convicted person can be granted bail/bond but must give compelling reasons or circumstances besides demonstrating that his appeal stands high chances of success.

This court finds that the applicant has not demonstrated a special circumstance or circumstances in his trial or conviction that shows that he deserves bond pending appeal. He has not stated that any of his constitutional right was infringed at the trial.

I have called for lower court file and upon perusal I have not seen anything irregular in the proceedings at the trial. The proceedings have not yet been typed but the handwriting of Hon. Ogutu is excellent and as good as typed proceedings.

The applicant was sentenced to serve 25 years and this appeal won't take more than a year to be concluded barring anything unusual happening. He therefore cannot claim that he will have served a substantial period of his sentence by the time his appeal is heard and determined.

In the premises, this court finds that application dated 15th March 2024 lacks in merit and is disallowed. The applicant should speed up his appeal by filing the Record of Appeal promptly and placing the file before this court for direction on the appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF MAY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

