



**Mumachi v Republic (Criminal Appeal E034 of 2024)
[2024] KEHC 17052 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 17052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E034 OF 2024
WM MUSYOKA, J
MAY 23, 2024**

BETWEEN

JAVAN AYOTI MUMACHI APPELLANT

AND

REPUBLIC RESPONDENT

*(ppeal from conviction and sentence by Hon. EA Nyaloti, Chief
Magistrate, CM, in Busia CMCSOC No. 15 of 2020, of 28th August 2024)*

RULING

1. The appellant was convicted, on 28th August 2024, after a full trial, of the offence of defilement of a minor of fifteen years, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. He was sentenced to serve twenty years in jail. The appellant then lodged an appeal herein, on 15th October 2024, by way of a petition of appeal, dated 14th October 2024.
2. I am invited to consider an application, dated 16th January 2025, for orders that the appellant be admitted to bail/bond pending appeal. The application is founded on grounds, principally, that the appellant was a sole breadwinner for his family of four; he had been on bond, during trial, and never absconded; he undertakes to abide by such bond terms as may be imposed by the appellate court; and the offence, in respect of which he was convicted, is bailable.
3. No document was filed by the respondent, in opposition or response to the application.
4. The application was placed before me, on 27th March 2025, for hearing, but it was put off to 1st April 2025, as Mr. Onanda, for the respondent, was yet to have access to it.
5. It was argued orally, before me, on 1st April 2025.



6. Mr. Ashioya, for the appellant, submitted that the appellant had been on bond during trial, and he attended court religiously up to the date he was convicted, and, therefore, he was not a flight risk. It was further submitted that all the witnesses had testified, and the issue of interference with them did not arise. It was argued that given that murder suspects are admitted to bond, the case of the appellant was not exceptional.
7. Mr. Onanda, for the respondent, submitted that the appellant was a convict, and that his conviction was safe and sound. On the analogy, of murders suspects being admitted to bond/bail, it was submitted that their case was different, as the suspects would not be convicts, but accused persons, who would be entitled to constitutional rights as the trial process would not have commenced, unlike this case, where a trial has been conducted and concluded. It was submitted that the appellant had not sought to establish that the appeal stood any chance of success.
8. In rejoinder, Mr. Ashioya submitted that the conviction of the appellant by the trial court did not take away his constitutional right relating to admission to bond. It was argued that the fact of conviction should be one of the factors to be considered, when assessing bond terms.
9. 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.
10. The factors taken into account, for grant of bail pending appeal, were discussed in *Arvind Patel v Uganda* [2003] UGSC 25 (Oder, JSC) and *Samuel Macharia Njagi v 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 v Uganda* [2003] UGSC 25 (Oder, JSC).
11. Taking these 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 brought out, a pre-sentence report was called for, and the appellant did not have a previous criminal record. 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.
12. 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 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 element 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 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.



13. 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 twenty 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 fifteen years. Section 8(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, under which the appellant was charged, prescribes a minimum sentence of twenty years imprisonment, upon conviction for defilement of a child between twelve and fifteen years.
14. 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. 600,000.00, with 1 surety of like amount, or, alternatively, to post cash bail of Kshs. 250,000.00.
15. 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 and served within fourteen days. The appeal shall be canvassed by way of written submissions. Let the parties file and exchange written submissions, within thirty days. The matter shall be mentioned on 23rd June 2025, to receive written submissions, and to allocate a date for judgement. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 23RD DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Oye Ashioya, instructed by Ashioya & Company, Advocates for the appellant.

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

