



REPUBLIC OF KENYA



**Odero v Republic (Criminal Appeal E312 of 2023)
[2024] KEHC 5073 (KLR) (Crim) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E312 OF 2023**

LN MUTENDE, J

MAY 8, 2024

BETWEEN

JOHN OWOUR ODERO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. John Owour Odero, the applicant was arraigned, tried and subsequently convicted for Rape contrary to 3 (1) (a),(b)(3) of the *Sexual Offences Act*. The applicant was stated to have intentionally and unlawfully caused his penis to penetrate the vagina of PAO without her consent.
2. Consequently, he was sentenced to serve ten (10) years imprisonment. Aggrieved by the decision of the court delivered on 2/11/2023 in Makadara Sexual Offences Case No. xxx of 2018, the applicant proffered an appeal and also seeks to be released on bail pending the appeal. The applicant also prays for stay of the sentence imposed by the trial court.
3. The application is supported by the affidavit deposed by Irumba Ismael Counsel seized of the matter.
4. The application is premised on grounds that: the offence the applicant was convicted of is bailable; that during the trial the applicant was out on bail and he dutifully attended court. That he is a Kenyan citizen and religious leader with high moral standing; he is a prophet at [Particulars Withheld] Church Nairobi, a church that is now facing a tremendous challenge following his incarceration and is in dire need of his leadership and financial support.
5. That his brother, part of the church leadership, Peter Otieno Odera , the Bishop, died after the appellants conviction and this affects the running of the church.



6. Lastly that his parents are above 70 years and his children are still young and school going who depend on him. In support of the quest to be released, [Particulars Withheld] Church attached a letter, requesting the court to allow their pastor resume duty and save the church situation as the appeal has merit.
7. The application is opposed by the respondent who contend that the applicant has not proved any unusual circumstances to be considered to grant the bail and also that the sentence he is serving is lawful.
8. That the conviction is proper and will not be overturned. The applicant is a young and energetic person and the matter may be heard on priority basis.
9. In a rejoinder the applicant reiterates that the exceptional circumstance in his case is that he has young children who have relocated to upcountry after he was incarcerated.
10. The provisions of Section 357(1) of the *Criminal Procedure Code* provide 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."
11. The right to bail pending appeal is not automatic at the appellate stage but discretionary. The applicant must prove that his appeal is exceptional making it justified to grant him bail, that his appeal has chances of success and that he is likely to serve the sentence before the appeal is heard and determined.
12. In the case of *Jivraj Shah v Republic* [1986] KLR 605 Court of Appeal it was stated:

“The principal consideration in an application for bail pending appeal is the existence of unusual circumstances upon which the court of Appeal 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 substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard conditions for granting bail will exist.”
13. The burden of proof is on the applicant who continues to serve a lawful sentence after he has been legally convicted.
14. The issues for determination are therefore whether the appeal has chances of success, whether the appellant has proved that his case is exceptional and whether his likely to serve his sentence before the appeal is heard and determined.
15. The applicant’s grounds of appeal must raise a triable issue for consideration at the main hearing. The issue must be persuasive with a likelihood to affect the conviction or sentence.
16. The applicant was convicted following reasons given by the trial court. The applicant has not urged and demonstrated how his appeal has merit therefore this court will not delve into the merits of the case.
17. The applicant is stated to be a minister of the gospel and serves in the top clergy, he is also the proprietor of the church and holds a vital position in the church. It has been explained through affidavit evidence and the attached letter that the church operations have been affected after he was incarcerated, that the



- Bishop of the church also passed on worsening the situation of the church. Further, the flock has been wooed away on ground that the pastor has been convicted for rape.
18. However, the applicant’s social standing, being a person of high moral standing and by him holding an essential position in the clergy does not make his case exceptional. The applicant’s liberty has been limited following his conviction by a court of law.
 19. In the case of *Mutua v Republic* [1988] KLR 497, the Court of Appeal stated:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.”
 20. It is expected that during the period of incarceration his freedom of movement and daily business operation will not only be affected but this may also extend to others closely associated with and /or person he engages with in the course of his duty .There is nothing peculiar in the effect of the conviction on church , further , there is no evidence that the interests of this small group in the church set up supersede interests of the public and criminal justice system .
 21. Moreover, the letters on the church being strained was written on 8/11/2023. It cannot be assumed that the church has stopped its operation for the 5 months the applicant has been behind bars. The death of his brother and Bishop of the church is not exceptional. A transitional management team of the church should be able to deal with this.
 22. The applicant personal circumstances are also an important consideration for granting bail, however, at the appellate stage this ground is not persuasive. In addition, his obedience to bail terms and assertion that he will not abscond is also nor persuasive,
 23. In the case of *Dominic Karanja v Republic* (1986) KLR 612, the Court of Appeal held that:

“ (b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;

(c) 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;”
 24. The applicant was sentenced to serve 10 years imprisonment. The lower court record having been availed it is a matter of admitting the appeal and it proceeds to hearing. There will be no delay in determining the matter.
 25. For reasons given, the application lacks merit, accordingly, it is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 8TH DAY OF MAY, 2024.

L. N. MUTENDE

JUDGE

