



**Waithaka v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 5388 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL E001 OF 2023
FN MUCHEMI, J
MAY 16, 2024**

BETWEEN

MARGARET WANGARI WAITHAKA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The application for determination is dated 2nd October 2023 brought under Section 357 of the Criminal Procedure Code and seeks for orders of release on bail pending the hearing and determination of the appeal. In the alternative, the applicant seeks for orders of stay and/or suspension of execution of the sentence in Criminal Case No. MCSO/E008/2022 on similar bond terms given by the trial court.
2. The applicant was charged in Thika CM Criminal (SO) case No. E008 of 2022 with the offence of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same *Act*. The applicant was convicted on the alternative charge and was sentenced to three (3) years imprisonment.
3. Being aggrieved with the judgment of the trial court, the applicant deposes that she filed an appeal against conviction and sentence and that the appeal has very high chances of success. The appellant argues that she was convicted on circumstantial evidence which was not corroborated as the victim alleged that she was licked on her vagina whereas other witnesses especially her mother alleged that the victim's vagina had been penetrated through the use of fingers. Furthermore, the applicant states that there are two conflicting medical reports whereas in one of them, it was reported that the hymen of the victim had been broken as a result of the alleged indecent assault whereas the other one indicated that the hymen was intact on examination.
4. The applicant contends that she was not personally informed of her rights under Section 200 of the *Penal Code* and afforded an opportunity to make a choice thereof and further at the stage of "a case to



answer” she was not informed by the court as to whether she had been placed on her defence on the main count of defilement or on the alternative count of indecent assault.

5. The applicant avers that upon being charged and aligned in court, she moved out of the premises she was living in, which was similar to that of the victim and her parents, and that she then relocated to Thika, a distance of fifteen kilometres away. The applicant further states that during the pendency of the said trial, she has never contacted either the victim or her parents or any other witnesses.
6. The applicant states that she has consistently attended the trial attended court and dutifully abided by the court terms set therein. The applicant further states that she has never been charged with a criminal offence before and has always been a God fearing woman. The applicant is apprehensive that there is a high possibility that a substantial delay may occur pending the hearing and determination of the appeal and since she has been sentenced to serve three years, she is apprehensive that she will have served a substantial part of the sentence to her detriment.
7. The respondent in its Replying Affidavit sworn on 4th January 2024 stated that the intended appeal has no chances of success due to the overwhelming evidence against the appellant. Furthermore, the respondent states that the assertion made by the appellant that she will not abscond if released on bond, even if she is supported by sureties, is not a sufficient ground for releasing a convicted person on bail/ bond pending appeal.
8. The respondent further states that the assertion by the appellant that she will serve a substantial part of her sentence lacks merit since the appeal can be heard and determined within 45 days from the date herein. The respondent avers that they can file their submissions within 14 days from the date of service on the main appeal. In any event, the respondent contends that the applicant has failed to satisfy the extreme high standard for bail/bond pending appeal.

The Applicant’s Submissions

9. The applicant relies on the cases of *Charles Omanga Aluoch vs DPP* (2015) eKLR and *Jiv Raji Shah vs R* (1966) KLR 605 and submits that she has met the threshold requirements for bail pending appeal. The applicant submits that she was found guilty and convicted solely on the evidence of the complainant who was three years old since there was no eye witness to the commission of the offence and neither was there any medical report to corroborate the same as the trial court rightly held that the three medical reports produced by the prosecution were contradicting each other and therefore were inadmissible.
10. The applicant argues that the appeal has high chances of success as the trial court failed to conduct a voire dire examination on the complainant who was three years old, when the matter came up for hearing on 7th September 2022 and 12th September 2022. The applicant further argues that although failure to conduct the voire dire examination on the minor did not per se vitiate the entire prosecution case but such evidence cannot be used to convict her in the absence of corroborating evidence, which evidence was not availed by the trial court.
11. The applicant further submits that the complainant gave contradictory evidence as to what occurred during the incident at the police station and during her evidence in court questioning the truthfulness of the complainant’s testimony. Furthermore, the applicant argues that the prosecution failed to call key prosecution witnesses such one Andrew Maina who was the immediate person who came into contact with PW1 after the alleged acts of defilement were committed, the father of the complainant who the minor told about the incident, the grandmother of the complainant, her auntie and her Sunday school teacher to whom she narrated the said incident the following day.



12. The applicant submits that she was sentenced to three years imprisonment and in the event the appeal is successful, she will have served a substantial part of the said sentence. The applicant urges the court to balance the competing interests of the applicant absconding and the prospect of the appeal succeeding and find in her favour as she has demonstrated that the appeal has very high chances of success.
13. The applicant further submits that the replying affidavit dated 4th January 2024 by the respondent is fatally defective as it was not taken under oath since it has not been commissioned by a commissioner of oaths. As such, the applicant urges the court to treat the application as unopposed.

The Respondent's Submissions

14. The respondent relies on Section 357(1) of the *Criminal Procedure Code* and the case of *Jivraj Shah vs Republic* [1986] eKLR and submits that the applicant has not met the required threshold for an application for bail pending appeal. Further, the respondent relies on the case of *Somo vs Republic* [1972] EA 476 and submits that the appeal does not have overwhelming chances of success as the evidence shows that the applicant was properly convicted. The respondent further submits that the applicant has failed to demonstrate that she shall serve a substantial part of the sentence if the appeal is likely to succeed.
15. The respondent relies on the case of *R vs Kanji* [1946] 22 KLR and submits that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.
16. Relying on the case of *Chimambhai vs Republic* [1971] EA 343, the respondent contends that currently, the law and practice favour quick dispensation of matters without an unreasonable delay. The respondent argues that the applicant failed to discharge the burden of proof that he is likely to serve a substantial part of the sentence before the appeal is heard which in turn could be successful hence leading to prejudice. The respondent submits that the appeal is ready as the proceedings and the record of appeal are ready and the file can proceed to hearing at any time. As such, the respondent contends that it is unlikely that the applicant will serve a substantial part of her sentence before the appeal is heard and determined.
17. The respondent submits that its replying affidavit dated 4th January 2024 sworn by counsel Cliff Machogu was not commissioned as that was an oversight on their part. Counsel was transferred but he left instructions that the said affidavit be commissioned before being filed. However, the said affidavit was filed before it was commissioned and served upon the applicant's advocates. The respondent argues that the same is a mere technicality which cannot make the prosecution case fatal and in any event they have corrected the anomaly and availed a commissioned affidavit in the court record. The respondent further submits that the applicant has not been prejudiced at all.
18. The applicant filed Further Submissions on 25th March 2024 and submits that it is clear that the replying affidavit by the respondent dated 4th January 2024 was not signed before a commissioner of oaths as the deponent did not appear before a commissioner of oaths on the said date and therefore defies Section 5 of Cap 15 Laws of Kenya. The applicant relies on the cases of *CMC Motor Group Ltd vs Bengeria arap Korir t/a Marben School & Another* [2013] eKLR; *Regina Munyiva Nthenge vs KCB* [2005] eKLR and *K. Too vs K. Edwin Sitieneu* [2018] eKLR and submits that the later commissioned replying affidavit was neither taken before a commissioner of oaths nor on the date it purports to have been taken and therefore the same is equally fatally defective. As such, the applicant urges the court to treat the instant application as unopposed and allow it on its merits.



The Law

Whether the Replying Affidavit Dated 4th March 2024 is Fatally Defective

19. The applicant argues that the replying affidavit dated 4th January 2024 was not signed before a Commissioner for oaths and the deponent did not appear before a commissioner for oaths on 4th March 2024. The respondent in an attempt to explain why the replying affidavit was not sworn by a commissioner for oaths admitted that the deponent of the affidavit was transferred from the station but he left instructions for the affidavit to be commissioned. The respondent argues that it has corrected the error by filing another replying affidavit which has been commissioned by a commissioner for oaths. The respondent contends that it was an error on their part and the same amounts to a technicality which cannot make the prosecution case fatal.

20. The law on commissioning of affidavits is provided in Section 5 of the [Oaths and Statutory Declarations Act](#) which states:-

Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

21. The court addressed itself to the compliance of Section 5 of the [Oaths and Statutory Declarations Act](#) in the case of [Mary Gathoni & Another vs Frida Ariri Otolu & Another](#) [2020] eKLR where the court cited with approval the case of [Regina Munyiwa Ndunge vs Kenya Commercial Bank Limited](#) (2005) eKLR as follows:-

The second issue raised by the applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the [Oaths and Statutory Declarations Act](#) provides that:- Every Commissioner for Oaths before whom any oath or affidavit is taken or made....shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia, Commissioner for Oaths, on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is therefore fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed.

22. Similarly in [CMC Motors Group Limited vs Bengeria arap Korir t/a Marben School & Another](#) (2013) eKLR the court stated:-

The merit as I find it in respect of Waudo's affidavit is that the affidavit does not seem to have been sworn before a Commissioner for Oaths. For avoidance of doubt the Black's Law Dictionary defines an oath as follows- 'oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one's statement is true or that one will be bound to a promise... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.' Bearing that definition the question that needs to be



answered is whether Waudu took an oath before a Commissioner for Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner for Oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of section 5 of Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.

23. In the instant case, the replying affidavit dated 4th January 2024 was sworn on the same date by Cliff Machogu, a prosecution counsel. The said counsel was transferred and the respondent filed the said affidavit without it been commissioned. The respondent then annexed to their submissions a replying affidavit dated 4th January 2024 deposed by the same counsel but commissioned before a Commissioner for Oaths. Therefore it is evident that the deponent of the affidavit did not appear before the said commissioner for oaths to swear the affidavit. Thus it follows that the said replying affidavit fails to conform to the requirements of Section 5 of Cap 15. Accordingly it is my view that the same is truck out.
24. Even though the application remains unopposed, it does not mean that the same can be allowed on that basis alone and the court needs interrogate the merits of the application and to examine whether the applicant has met the requirements for the orders of bail pending appeal.

Whether the Applicant Has Met the Threshold for Granting Bail Pending Appeal.

25. Section 357(1) of the *Criminal Procedure Code* provides for the granting of bail pending appeal, it states that:-

After 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.

26. The principles for granting bond pending appeal were reiterated in the case of *Jivraj Shah vs Republic* [1986] KLR 605 which laid down the principles as follows:-
 - a. The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.
 - b. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.
 - c. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.
27. It is trite law that in considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration the following factors.



Does the Appeal Have Overwhelming Chances of Success?

28. The applicant argues that the appeal has a high probability of success as she was convicted on circumstantial evidence which was not corroborated by any evidence.
29. I have carefully perused the record of appeal, particularly the grounds of the appeal, the proceedings of the trial court and the judgment and without pre-empting the appeal, the appeal falls short of raising any substantial or weighty points of law. It is essentially founded on facts and the findings of the trial court which will be addressed substantially during hearing of the appeal. This is not to say that the appeal is not arguable. The appellant will still have his day in court to argue her appeal and the respondent will have his submissions considered..

Is There a Possibility of Delay in Hearing and Determining the Appeal?

30. The applicant was sentenced on 25/9/2023 to serve three (3) years imprisonment. Thus it is highly unlikely that she shall have served a substantial part of the sentence before the appeal is heard. The court diary is accommodative of appeals whereas hearing dates are available. Furthermore, the Record of Appeal has already been prepared and therefore the appeal is almost ready for hearing. As such, it is my considered view that this is an appeal that will be heard and determined in the shortest time possible. Accordingly, I am of the view that the appeal is not likely to delay.

Demonstration of Exceptional or Unusual Circumstances

31. In *Dominic Karanja vs Republic* [1986] KLR 612 the Court of Appeal held:-
 - a. The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;
 - 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 exceptional circumstances 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;
32. Similarly in *Peter Hinga Ngotho vs Republic* [2015] eKLR it was held that the fact that the applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal.
33. In the instant case, the applicant argued that she did not breach the bail terms given in the trial court and dutifully attended court. Relying on the above cited cases, it is my considered view that the applicant has not demonstrated any unusual or exceptional circumstances to warrant the grant of bond pending appeal.
34. I therefore find that the application dated 2nd October 2023 lacks merit and it is hereby dismissed.
35. It is hereby so ordered.

RULING DELIVERED AT THIKA, DATED AND SIGNED THIS 16TH DAY OF MAY 2024.

F. MUCHEMI

JUDGE

