



REPUBLIC OF KENYA



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**KM v Republic (Criminal Appeal E047 of 2022)
[2023] KEHC 2269 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E047 OF 2022**

**MW MUIGAI, J
MARCH 16, 2023**

BETWEEN

KM APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. A. Nyoike (PM) at the Machakos
Chief Magistrate's Court in Criminal S.O. No. E049 of 2022 delivered on 7/10/2022)*

JUDGMENT

Background

1. The Appellant herein KM was charged with the offence of Defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on diverse dates from August, 2022 to 4th October, 2022 the Appellant/Applicant herein defiled the Minor TNM. aged 11 years.

Trial Court Proceedings

2. The Appellant/Applicant was arraigned in Court on 17/10/2022 for plea and upon the elements of the charges read out to him in a language that he understood as well as the facts of the charge, he pleaded guilty and was convicted on his own plea of guilty.
3. In mitigation, the Appellant/Applicant Prayed the Court for leniency.
4. The Trial Court observed that the Appellant/Applicant did not appear remorseful and that he readily pleaded guilty to the charges despite being informed of the severity of the sentence and proceeded to convict the Appellant/Applicant to life imprisonment.



Memorandum of Appeal:

5. Aggrieved by the conviction and sentence of the Trial Court KM (the Appellant herein) filed his memorandum of appeal dated 19th October, 2022 based on the following grounds:
 1. That the Learned Trial Magistrate erred in law and fact by convicting the appellant without according him a proper opportunity to understand the charges against him.
 2. That the Learned Trial Magistrate erred in law and fact by convicting the appellant upon entering a plea of guilty which was not given voluntarily.
 3. That the Learned Trial Magistrate erred in law and fact by convicting the Appellant without according him the right to a fair hearing when he was convicted on a charge that he did not understand.
 4. That the Learned Trial Magistrate erred in law and fact by convicting the appellant to life imprisonment which sentence was unconstitutional, unlawful and excessive.
 5. That the Learned Trial Magistrate erred in law and fact by failing to consider the appellant's mental state in spite of being made aware of the same through the prosecution and or the police and or which was evident from the appellant's demeanour and actions by way of conduct and speech.
 6. That the Learned Trial Magistrate erred in law and fact by convicting the appellant who at the time of taking the plea was not of sound mind.

Notice of Motion

6. The Appellant/Applicant herein filed his Notice of Motion dated 26th October, 2022 seeking the following orders;
 1. The Appellant/applicant be admitted to bail or bond pending the hearing and determination of the Appeal herein.
 2. That this makes any other appropriate orders/directions as is just and expedient.
7. The application is based on the following grounds:
 1. That the Appellant/Applicant has an underlying mental condition and has been being treated for the same Psychiatric condition for a long time and needs immediate Psychiatric care.
 2. That there are no compelling reasons to warrant the continued incarceration of the Applicant during the pendency of his appeal considering that he has a mental condition.
 3. That the Appellant/Applicant is ready and willing to abide by any conditions that may be imposed by the Court to enable him being admitted to bail or bond pending the hearing and determination of the appeal herein.
8. The application is further supported by the Affidavit sworn by MKN deposing as follows;
 - a. That he is the father of the appellant/applicant herein.
 - b. That the Appellant/Applicant has a constitutional right to be admitted to bail or bond pending the hearing and determination of the appeal.



- c. That Appellant/Applicant lives with them and has been having mental issues for a long time which requires him to be seen by a Psychiatrist at Machakos Level Five Hospital.
- d. That this Court should order for a Psychiatrist/Mental examination of the Appellant so as to ascertain the correctness and authenticity of the contents of this affidavit.
- e. That the family is ready and willing to stand by the Appellant/Applicant in abiding with the conditions of bail/bond that the Court may find fitting for his release on Bail.

Replying Affidavit by the Respondent

9. The Respondent filed their Replying affidavit sworn by Mr. Martin Mwongera on 6th December, 2022 deposed as follows:
 - a. That the state opposes the application for Bond pending Appeal on the ground that the Appellant/Applicant has not demonstrated that his appeal has any chances of success.
 - b. That the solemn assertion by the Appellant/Applicant that he will not abscond if released on bond, even if supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.
 - c. That the assumption that the Appellant/Applicant is mentally challenged, is not supported by any medical documents whatsoever.

Written Submissions

Appellant/Applicant's Submissions dated 3rd December, 2022

10. It is submitted that bail pending appeal has been recognized by numerous case-law and its principles established.
11. Reliance is made in the case of *Chimambhai v Republic* [1971] EA 343, the Court held that;

“The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one-time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.
12. In the instant case it is clear that the Appellant/Applicant did not understand the charge before him and the immensity of the sentence on conviction. The Trial Court observed that the Appellant/Applicant readily admitted to the charge despite being informed of the charge severity. Also it was incumbent upon the prosecution to ascertain the mental state of the Appellant/Applicant before charging him with the said offence which they failed to do.
13. Also see the case of *Samuel Macharia Njagi v Republic* [2013] eKLR where the High Court allowed a similar application by relying on the case of *Arvind Patel v Uganda* S.C. Criminal Appeal No. 1 of 2003 where the Court set out the circumstances under which bail pending appeal could be granted as follows:
 - i. Character of applicant;
 - ii. Whether the applicant is or first offender or not;



- iii. Whether offence with which applicant was convicted involved personal violence;
 - iv. That appeal isn't frivolous and has reasonable possibility of success;
 - v. Possibility of substantial delay in determining the appeal;
 - vi. Whether the applicant complied with bail conditions granted before the applicants conviction during the pendency of the appeal.
14. The said Court also stated that an Applicant did not have to demonstrate all these considerations in order to be granted bail. A combination of two or more of the conditions would be sufficient. Therefore, in the instant case the Applicant has satisfied the criteria set out in the above requirements.

Respondent's Submissions

15. On behalf of the Respondent it is submitted that section 357 (1) of the [Criminal Procedure Code](#) provides admission to bail pending appeal, it states 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.”

16. The principles for granting bond pending an appeal were reiterated in the case of [Jivraj Shah v Republic](#) [1986] KLR 605.
17. The assertion that the Applicant's appeal has high chances of success can only be proved at and upon the full hearing of the Appeal herein. Consequently, the prayer for bail pending appeal on grounds that his appeal has high chances of success is misconceived, unmerited and premature and therefore it should be dismissed.

Determination

The Court has considered the Application, for bail pending appeal, the court record and the submissions by the parties herein through respective Counsel.

The provision of law that applies to bond/bail pending appeal is section 357 of the [Criminal Procedure Code](#) which provides as follows:

“(1) 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”

The principles for granting bond pending appeal are well set out in the case of [Jivraj Shah v Republic](#) [1986] eKLR which include;

“(1) 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.

- (2) If it appears prima face 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.
- (3) 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.”

18. *Peter Hinga Ngatbo v Republic* [2015] eKLR, *Rebeca Nabutola v Republic* [2012] eKLR and *Dominic Karanja v Republic* (*supra*) the Court of Appeal set out guiding principles for grant of bail pending appeal as;

- i. The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances,
- ii. The previous good character of the applicant,
- iii. Solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.

19. Nairobi High Court Misc Crim Appli 469 of 2006 *Stephen Nduva Mwanzwii v Republic* 2006 eKLR; where the grounds of granting bail pending appeal were; that the Applicant was not given an opportunity to be represented by counsel despite having one on record, that the Applicant did not understand the language of the court, that the Complainant’s evidence, who was minor was not corroborated and that the charge was not proved. The Court found none of these grounds were substantiated.

20. *Wickliffe Omondi Madindou v Republic* Misc Crim Appli 468 of 2006 Nairobi High Court [2006] eKLR It was submitted that the conviction of rape was upon evidence of the prosecution, PW2 the Doctor did not in his evidence link the Applicant with the offence and that it was fatal to the prosecution case. That the evidence of the Complainant was not corroborated and the court did not warn itself before convicting on that evidence. Counsel also submitted that the Applicant’s defense was not considered. Counsel submitted that the Applicant was a TB patient who needed constant medical care and that he stood to loose his job if bail was not granted. The Court did not find that there are overwhelming chances that the appeal will succeed to justify a finding that there are no grounds to deprive the Applicant of his liberty at this stage.

21. *Omari Kamadula Juma v Republic* [2006] eKLR where the Applicant argued he had an appeal with overwhelming chances of success and was suffering from ulcers that required treatment.

The court perused the Memorandum of Appeal and without preempting the hearing and determination of the appeal found the conviction and sentence were not safe.

22. From the instant case-law on grounds and proof of such grounds to warrant the grant of bail/bond pending appeal, that the appeal has overwhelming chance of success based on the 3 broad issues raised



namely, the plea-taking process is alleged was not in line with the law, the appellant was not granted a fair trial and that the Appellant lacked the requisite mental capacity during plea-taking.

23. The Appellant was convicted on his own plea of guilty and section 348 of the CPC comes into play. It states:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

A cursory perusal of the Trial Court record the following is borne out as follows; On 17/10/2022 the substance of the charge was read to the Accused person in Kiswahili and he responded; ‘It is true’ The prosecution read out the facts that constituted the commission of the offence, the child /victim was aged 11years as per clinical card produced as Exhibit 4. The offence of defilement was occasioned by the Appellant who visited the victim’s home regularly while her father and siblings were away and her mother worked away from home. The appellant defiled the victim various times between August 2022-4/10/2022.

The Class teacher noticed the victim’s gait and difficulty in walking properly and after friendly talk the victim divulged the circumstances of defilement by the Appellant and others. The report elicited investigations by Police and the medical examination disclosed the victim’s broken hymen, swellings and vaginal discharge.

24. The Appellant admitted the facts.
25. The Trial Court informed the appellant that he was of the age of majority and the offence attracts life sentence.

The Appellant maintained the plea of guilty

Without preempting the exercise of right of appeal by the Appellant, I find no legal basis for granting bond/bail pending appeal at this stage.

The appellant’s written submissions disclose the allegation of mental instability and the fact that the appellant has/had been attending Machakos Level 5 hospital for mental checkup and hence did not take/make an informed plea.

26. This Court finds that the grounds for granting bail/bond not borne out by evidence on record; especially where the appeal is against both conviction and sentence where the Appellant pleaded guilty on his own plea of guilt. Without preempting the appeal, whether the Appellant enjoyed proper mental health has been brought into question/focus, which this Court finds not substantiated by any medical and/or documentary evidence at the time of trial and during proceedings for bail bond application pending appeal.
27. The Court hereby orders that the bail/bond application is denied. The appeal is admitted and fast tracked to be heard. The mental examination of the Appellant by Psychiatrist at Machakos Level 5 Hospital and the comprehensive medical report shall be availed to court through DR MHC during hearing and determination of the appeal.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 16TH MARCH 2023
(PHYSICAL/VIRTUAL CONFERENCE)**

M.W.MUIGAI

JUDGE



In the presence of:

Mr. J Mwangela - for the appellant

Mr. Martin Mwangera - for the respondent

Geoffre/patrick - Court Assistant (s)

