



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ibrahim v Republic (Criminal Appeal E047 of 2022)  
[2023] KEHC 17769 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17769 (KLR)

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

**JN ONYIEGO, J  
MAY 19, 2023**

**BETWEEN**

**ADAN ALI IBRAHIM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The notice of motion application dated December 15, 2022 was brought pursuant to section 357 of the [Criminal Procedure Code](#) and all other enabling provisions of the law. The application seeks orders that the honourable court be pleased to admit the applicant to bail pending hearing and determination of the instant appeal against his conviction and sentence in the Principal Magistrates Court Mandera, Sexual Offences Case No E011 of 2021.
2. Briefly, the applicant was charged with the offence of defilement contrary to section 8 (2) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that on the March 16, 2021 at around 1300 hours in Mandera Central Sub-County within Mandera County, intentionally caused his penis to penetrate the vagina of NAA a child aged 11 years.
3. He was further charged with an alternative charge of indecent act with a girl contrary to section 11 (1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that on the March 16, 2021 at around 1300 hours in Mandera Central Sub-County within Mandera County, intentionally caused his penis to touch the vagina of NAA a child aged 11 years. Having returned a plea of not guilty, the matter proceeded to full trial. Upon conclusion, he was convicted of the main count and subsequently sentenced to 30 years' imprisonment on July 28, 2022.
4. Aggrieved by the said conviction and sentence, he filed the instant appeal citing 12 grounds of appeal. Subsequently, the applicant filed the instant application urging the court to grant him bail pending appeal. He basically relied on the averments contained in the affidavit in support sworn on December



- 15, 2022 in which he deposed that he has got good grounds of appeal with overwhelming chances of success.
5. The applicant stated that; there were no documents produced to support the charge as the doctor who was stood down was never recalled by the prosecution; the case was closed before either the doctor or investigating officer were called; the doctor did not produce any findings as to whether the hymen was intact or not and therefore, penetration was not proved; the age of the minor was never proved by the prosecution; there was no birth certificate or age assessment reports produced and; the issue of age was never determined.
  6. The applicant went further to state that the probability of success of his appeal was high owing to the speculative inconsistencies and glaring gaps in the prosecution's case which was purely premised on suspicion and lacked material corroboration hence not proven beyond reasonable doubt.
  7. During the hearing, the applicant adopted submissions filed on March 28, 2023 by Kakai Mugalo advocates thus reiterating the content of the averments contained in the affidavit in support of the application.
  8. The republic represented by Mr Kihara Principal State Counsel filed grounds of opposition on January 31, 2023 thus stating that the appeal has no overwhelming chances of success. In submission, Mr Kihara adopted the content contained in his submissions filed on March 22, 2023 does submitting that the application lacked merit as it had not disclosed any ground to warrant the orders being sought hence should be dismissed.
  9. The learned counsel contended that the appeal has no overwhelming chances of success as the evidence adduced by the prosecution against the accused was cogent, consistent, reliable and admissible to support the charge of defilement. Counsel opined that the court has not been sufficiently moved to warrant exercise of its judicial powers to award the orders being sought hence the application should be dismissed.
  10. I have considered the application herein, the affidavit in support and submissions by both parties. The only issue for determination is whether the applicant has met the threshold for grant of bail pending appeal. It is trite that bail pending trial or appeal is geared towards guaranteeing or securing human liberty which is a constitutional right. However, this right is not absolute as it is subject to certain well laid down conditions. Whereas bail pending trial is pegged on a party's innocence until proved guilty, bail pending appeal is to a larger degree dependant on whether the appeal has high chances of success and not innocence. However, there are factors to be taken into consideration which are far and large similar to those considered in bail pending trial under article 49(1)(h) of the [Constitution](#) and section 123A of the [Criminal Procedure Code](#).
  11. Article 49(1)(h) of the [Constitution](#) of Kenya, 2010 provides that;  
An accused person has the right.  
(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.
  12. In the case of [Charles Owanga Aluoch v Director of Public Prosecutions](#) [2015] eKLR, it was held that: -  
“The right to bail is provided under article 49(1) of the [Constitution](#) but is at the discretion of the court and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines



upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah v R* [1966] KLR 605, the principal considerations for granting bail pending appeal were stated as follows:

“(1) The principle 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.”

13. Also, in the case of *Dominic Karanja v Republic* (1986) KLR 612 the court stated that: -

“(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 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”

14. The applicant submitted that; he has complied with sec 357 (1) of the *Criminal Procedure Code* by filing an appeal and therefore rightly seeking the court’s judicious exercise of the discretion to admit him to bail pending the hearing of the appeal; the appeal has overwhelming chances of success and, that he had fully complied with the bail terms and conditions as was granted by the trial court until his conviction.

15. The respondent in their grounds of opposition stated that the intended appeal has no chances of success; that with the conviction and sentence of 30 years’ imprisonment, the appellant’s chances of absconding are extremely high; the applicant’s innocence was compromised upon conviction, and that the applicant has not demonstrated any peculiar or exceptional circumstances. Save for the ground that the appeal has overwhelming chances of success, there are no special or exceptional circumstances to warrant release on bail.

16. The applicant has vehemently challenged the conviction citing various grounds. At this stage, I will not in detail endeavour to determine this matter on merit as it will jeopardise the outcome of the appeal. I will simply state that from the evidence tendered before the trial court, one cannot simply dismiss the conviction on the face value. Considering the seriousness of the offence vis avis the evidence on record and the severity of the sentence attached to the offence, the applicant herein could be a flight risk. He



is not innocent anymore. To that extent, I do not find merit in the application hence dismiss the same. Accordingly, the applicant shall remain in custody pending hearing and determination of his appeal which should be expedited.

**Dated, signed and delivered virtually at Garissa this 19<sup>th</sup> day of MAY, 2023**

**J. N. ONYIEGO**

**JUDGE**

