



**Kirigia v Republic (Criminal Appeal E047 of 2023)  
[2023] KEHC 18898 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18898 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E047 OF 2023  
EM MURIITHI, J  
JUNE 15, 2023**

**BETWEEN**

**GEORGE MURIMI KIRIGIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Appellant was convicted of the offence of Attempted Defilement contrary to section 9(1) and (2) of the Sexual Offences Act No. 3 of 2006 and was sentenced to ten (10) years imprisonment on 15/3/2023.
2. He has filed a notice of motion under certificate of urgency dated 29/3/2023 in this court seeking that, “2) The Honorable court be pleased to extend the bond terms imposed by the trial court on the Appellant/Applicant pending the hearing and determination of the appeal or in the alternative. 3) This Honorable Court be pleased to grant reasonable bail/bond terms pending the hearing and determination of the appeal.”
3. He contends that his appeal has high chances of success as there was no probative value on the evidence which the trial court relied upon to convict him. He is apprehensive that the appeal will be rendered nugatory should bail/bond be denied as he will have served the sentence or a substantial part of it before the appeal is heard and determined. He is a family man with 2 children and the sole breadwinner. He was granted a bond of Ksh. 200,000 in the trial court and he attended court without fail whenever he was required to do so. He is ready and willing to comply with reasonable bail/bond terms to be imposed by this court, and he is not a fright risk. He is a person of good reputation and good standing in the society with a fixed abode, and no prejudice will be occasioned to the Respondent if the application is allowed.



4. On 27/4/2023, the Respondent filed grounds of opposition that, “The Appellant was properly convicted and sentenced before the trial magistrate and as such he is serving a lawful sentence; Pursuant to article 49 (1) (h) of *the Constitution*, 2010 an accused person who is facing a criminal charge has a right to bond because he is presumed to be innocent till proven guilty unlike in this case where the Appellant has already been convicted before a competent court; The Appellant’s appeal will be rendered nugatory, neither will he be prejudiced if bail pending appeal is not granted since this court has powers to quash the conviction in the unlikely event that they overturn the decision to convict him. Additionally, the Appellant was convicted on 15<sup>th</sup> March, 2023. There is no possibility that the Appellant would have served a substantial portion of his sentence of 10 years before the appeal is heard and determined; The grant of bail pending appeal is at the court’s discretion which must be exercised judiciously. Tied to this, bail pending appeal is not a constitutional right as there is a presumption that the Appellant was lawfully convicted unless the contrary is proved; The Appellant has not demonstrated that he has an arguable appeal with high chances of success; In this matter, only the judgment of the trial court was availed to the Respondent but the proceedings were not. As a consequence, this court does not have the benefit of perusing the said record to determine whether the grounds of appeal disclose an arguable appeal with high chances of success; Be as it may, from the proceedings the Appellant appeal does not have a high chance of success based on the following reasons:-

- i. PW1 testified that it was the Appellant who attempted to defile her by pulling off and tearing her pants.
- ii. This was corroborated by PW2 and a report was made immediately at Igoji Police Station.
- iii. PW3 upon examining PW1 found her pants has been torn.
- iv. Appellant alleged that he was at PW1 home the previous night.
- v. The Appellant was properly convicted by the trial court pursuant to Section 184 of the Criminal Procedure Code.

The Appellant has not demonstrated any unusual or exceptional circumstances for the grant of bail pending appeal. The fact the Appellant did not breach the bail conditions before the trial court is not an exceptional circumstance which can warrant a decision to admit the Applicant to bail pending appeal as was held in the case of *Peter Hinga Ngotho v Republic* (2015) eKLR; Although the Appellant did not abscond during the trial, there is a high incentive to abscond now that he is convicted.”

5. The application was urged orally and counsel for the Appellant cited *David Waweru Mugure v Republic* (2019) eKLR, *Charles Owanga Aluoch v Director of Public Prosecutions* (2015) eKLR, *Daniel Dominic Karanja v Republic* (1986) eKLR, *Hisham Shally v Republic* (2022) eKLR and *John Muturia v Republic* (2021) eKLR.

#### Determination

6. The principles to be considered in an application for bail pending appeal pursuant to the provisions of section 356 and 357 of the *Criminal Procedure Code* were set out in *Jivraj Shah v R.* (1986) KLR



605 which considered earlier decisions of the Court and expounded on the factor of overwhelming chances of success and held as follows: -

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court 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 some substantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in *Somo v Republic* (1972) EA 476 which was referred to by this court with approval in Criminal Application 5 No. NAI 14 of 1986, *Daniel Dominic Karanja v Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self defeating to attempt to define phrases or to establish formulae.”

7. The Appellant contends that his appeal has overwhelming chances of success, because the trial court relied on evidence which had no probative value to convict him coupled with the fact that he never jumped bail during trial, to warrant his denial of bail pending appeal.
8. It is true that the proceedings of the trial court have not been availed to enable the court gauge the probability of the Appellant’s appeal succeeding. It is further true that the Appellant was sentenced to 10 years imprisonment the other day on 15/3/2023, and it is highly unlikely that he will have served a substantial portion of the sentence before the appeal is heard and determined.
9. The court finds that the Appellant has not shown any exceptional circumstances to warrant his release on bail pending appeal.

#### **Orders**

10. Accordingly, for the reasons set out above, the Court finds that the appellant’s application dated 29/3/2023 has no merit and it is declined.
11. However, the Appellant’s appeal will be heard on priority basis, in line with the holding in [\*Thambura Leonard Mucui v Republic\*](#) (2021) eKLR.
12. Order accordingly.

**DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF JUNE, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

#### **APPEARANCES:**

Mr. Karatu for Applicant

Mr. Masila for DPP.

