



REPUBLIC OF KENYA



**Mwaniki v Republic (Criminal Appeal 12 of 2023)  
[2023] KEHC 20830 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20830 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL 12 OF 2023  
RM MWONGO, J  
JULY 25, 2023**

**BETWEEN**

**DANIEL KARIUKI MWANIKI ALIAS SAMUEL WAWERU  
MWANIKI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was charged and convicted with the defilement of a minor aged sixteen years old. He was sentenced to ten years (10)years' imprisonment on 24<sup>th</sup> February, 2023.
2. Dissatisfied with the judgment, the applicant filed an appeal on 9<sup>th</sup> March 2023. On 15<sup>th</sup> March, 2023 the applicant also filed this notice of motion seeking the following orders:
  - i. Spent.
  - ii. That the Honourable Court be pleased to admit the Applicant appellant Daniel Kariuki Mwaniki Alias Samuel Waweru Mwaniki to bail pending the hearing and determination of the instant Appeal.
  - iii. That the Honourable Court be pleased to order stay and /or suspension of execution of sentence in Sexual Offence Case No.007 of 2021 pending the hearing and determination of the instant appeal.
  - iv. That the bond terms be similar to the bond ordered at the trial Court.
3. This application is based upon the following grounds:



- i. The Applicant has been tried convicted and sentenced to a total of 10- years in prison by the Hon. Wanjiru M.N SRM sitting at the Principal Magistrate’s court at Gichugu in sexual Offence Case No.007 of 2021.
  - ii. The applicant being dissatisfied with the judgement and sentence has lodged an appeal vide HC Criminal Appeal No. 12 of 2023.
  - iii. That the Applicant during trial fulfilled and complied with all conditions of bail without fail placed by the Court which was a cash bail of Kshs.300, 000.
  - iv. That the appellant has good grounds to appeal with extremely high chances of success.
  - v. The applicant has a young family and is the sole bread winner.
4. The applicant filed a Supporting Affidavit and made the following major averments:
- i. That I am an Advocate of the High Court of Kenya practising in the firm of Kiguru Kahigah & Co. Advocates who have the conduct of the appeal on behalf of the Appellant/Applicant.
  - ii. That he was charged with the offence of Defilement of a Child Contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No.3 of 2006.
  - iii. That he was convicted and was sentenced to imprisonment for 10 years.
  - iv. That the appellant is dissatisfied with the conviction and sentence and has lodged an appeal in this honourable court as appears in the petition of appeal.
  - v. That the appeal herein has a high probability of success.
  - vi. That the appellant is apprehensive that if not granted bail his appeal may be rendered nugatory should he succeed given that he may have served most of his sentence by the term the appeal is heard and determined.
  - vii. That it is to my personal knowledge that the appellant is the sole bread winner of his young family.
  - viii. That it is to my personal knowledge that Applicant during trial fulfilled and complied with all conditions of bail without fail placed by the Court which was a cash bail of Kshs.300,000.
5. The respondent filed a Replying Affidavit dated 21<sup>st</sup> March, 2023 and reiterated the facts in the application.
6. The parties were directed to file written submissions to dispose of the application.

### **Applicant’s Submissions**

7. The right of the Applicant to be admitted to bail at this stage is provided for in Section 357(1) of the *Criminal Procedure Code* Cap 75 Laws of Kenya. The Appeal herein has overwhelming chances of success, a close look at the Petition of Appeal dated 8.3.2023, the nine (9) grounds raises fundamental issues that the trial court failed to consider. These fundamental issues are arguable in appeal.
8. In *Dominic Karanja v Republic* (1986) KLR 612 the Court of Appeal highlighted the most important issue in such an application as overwhelming chances of success.
9. The principles guiding the consideration of bail pending appeal were set out in *Jivraji Shah v Republic* [1986] KLR 605



10. The Supreme Court of Uganda in *Arvind Patel v Uganda* S.C Cr. Appeal No.1 of 2003 expounded the circumstances which bail pending appeal could be granted, and went further to state 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.
11. The Applicant herein has a young family and infact is a father to a nine-month-old baby. He is the breadwinner and the continuous detention of the applicant will harden the life of the minor and in particular during these hard economic times.
12. The Applicant, during trial was admitted to a bail/bond of Kshs. 300,000 and following the principal's as highlighted by the Supreme Court of Uganda, the Applicant is a candidate of the prayers sought.
13. The appellant is likely to serve his sentence or a substantial part thereof and as such if he is subsequently acquitted of the charge or appeal, he will have suffered irreparable loss.

### **Respondent Submissions**

14. The respondent submits that the Applicant was taken through a full trial, was found guilty and sentenced to serve ten years' imprisonment for the Offence of Defilement Contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offence Act* No 3 of 2006. The Prosecution was able to prove all elements of defilement.
15. The respondent also submits that the Appellant/Applicant was granted a fair hearing during trial stage as required by Article 50 of *the Constitution* of Kenya, 2010, and was convicted and sentenced on the strength of the prosecution evidence as such his appeal has no overwhelming chances of success.
16. Further, the respondent submits that the general principles which guide the Court in granting and/or denying bail or bond were the right of presumption of innocence until proved guilty, rights of liberty of the applicant versus the rights of the victims.
17. The Applicant/Appellant has not demonstrated that exceptional or unusual circumstance exists to grant bail pending appeal.
18. The Appellant/ Applicant was convicted two Months ago thus the sentence started running on the 24<sup>th</sup> February 2023.
19. The trial Court was wholly persuaded by the age of the minor, the sentence the offence carries and the offender perpetrator who stole the minor's innocence at a tender age.

### **Issues for Determination**

20. The issue for determination is whether the applicant should be granted bail/bond pending hearing and determination of the appeal herein.

### **Analysis and Determination**

21. The Applicant was tried convicted and sentenced on 24<sup>th</sup> February, 2023 to a total of 10 years imprisonment by the learned Principal Magistrate's Court at Gichugu in Sexual Offence Case No.007 of 2021. He filed an appeal vide HC Criminal Appeal No. 12 of 2023.
22. The underpinning law regarding bail pending appeal is that if an applicant can show that there exist exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail; or that it appears on a prima facie basis that from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law and that the



- appellant may spend the substantial part of his sentence by the time the appeal is heard (See *Jivraj Shah* case (*supra*) *Dominic Karanja Case (supra)*, *Somo v R*[1972]EA476).
23. The Applicant during trial fulfilled and complied with all conditions of bail without fail placed by the Court which was a cash bail of Kshs.300, 000. he further states that he has a young family and is a father to a nine months old baby. He is the breadwinner and the continuous detention of the applicant will harden the life of the minor and in particular during these hard economic times.
24. 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:
25. In the *Dominic Karanja* case the Court of Appeal highlighted the most important issue in such an application as overwhelming chances of success that there is no justification for depriving the applicant of his liberty.
26. The respondent submits that the Applicant/Applicant has not demonstrated that exceptional or unusual circumstance exists to grant bail pending appeal.
27. 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 principle considerations for granting bail pending appeal were stated as follows:
- “(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.”
28. The applicant deposed in his Supporting Affidavit that the appeal is likely to be successful on account that the Honourable Magistrate failed to consider vital issues and facts during the trial before convicting him.



29. Additionally, the applicant is likely to serve a substantial part of the sentence before the appeal is heard. He was sentenced to 10 years' imprisonment on 24<sup>th</sup> February, 2023 and has already served four months of his sentence.
30. The respondent submitted that the appeal can be fast-tracked to prevent the applicant serving a substantial part of the sentence before the appeal is heard and determined. Further, the respondent filed a Replying Affidavit dated 21<sup>st</sup> March, 2023 and did not expressly oppose the application's applicant for bail/bond pending appeal.
31. Without getting into the substance of the appeal, nothing has been pointed out or stands out on a prima facie basis to demonstrate that the appeal has overwhelming chances of success.
32. Considering all the representations made before me, and the law on the issue, I am unable to see any demonstration of any special or unusual circumstances that have been presented by the applicant to enable me to exercise my discretion in his favour.
33. Accordingly, the application fails and is dismissed. However, the applicant's appeal may be fast tracked for hearing within the next 120 days from the date hereof.
34. Orders accordingly.

**DATED AT KERUGOYA THIS 25<sup>TH</sup> DAY OF JULY 2023**

.....

**RICHARD MWONGO**

**JUDGE**

**Delivered in the presence of:**

1. Kahiga for Applicant/Appellant
2. Mamba for DPP
3. Murage Court Assistant

