



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CRIMINAL APPEAL NO. E035 OF 2021**

**CHARLES RATEMO MATUMO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The appellant herein, **Charles Ratemo Matumo**, was charged before the Mavoko Chief Magistrate's Court in Sexual Offence Case No. 13 of 2016 and convicted of the offence defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* on 25<sup>th</sup> May, 2021.

2. Aggrieved by the said decision he has lodged this appeal. Pending the hearing and determination of the appeal, he seeks that he be admitted to bail. According to him, his appeal has chances of success on the grounds that there was no sufficient evidence to warrant his conviction and that his sentence was excessive and illegal.

3. He deposed that he was initially admitted to bail and that he never jumped the same and is willing to abide by the bond terms that may be imposed by this court.

4. According to the applicant, he is a Kenyan citizen with family resident in Kenya hence there are no chances of him absconding. He undertook to attend the court whenever required to do so without fail.

5. The application was opposed by the Respondent based on the following grounds of opposition:

- 1) That the instant application does not meet the threshold for the grant of the orders sought.**
- 2) That bail pending appeal is discretionary and the applicant's innocence was compromised upon conviction.**
- 3) That the applicant has not demonstrated any peculiar or exceptional circumstances to warrant grant of the orders sought.**
- 4) That the intended appeal has no overwhelming chances of success as the prosecution proved their case beyond reasonable doubt at the trial.**
- 5) That there is no probability of the sentence met on the applicant being served before the appeal is heard.**
- 6) That grant of bail pending appeal under section 357(1) is discretionary and not absolute.**
- 7) That due to the long sentence that the applicant is facing, his chances of absconding are high.**

6. On 22<sup>nd</sup> June, 2021, this court directed that the application be prosecuted by way of written submissions.

7. According to the Applicant, this Court has the discretion to grant bail pending the hearing of the appeal. Citing Sections 357(1) of the

**Criminal Procedure Code** and the cases of **Chimambhai vs Republic (No 2) {1971} E.A.343**, and **Arvind Patel -vs- Uganda S.C Cr. Appeal No. 1 of 2003**, it was submitted that the Applicant is enjoined to establish unusual exceptional circumstances as to why, instead of being in prison serving his sentence he should be out pending the hearing and determination of his appeal. Your Lordship, the applicant contends that he has a good appeal with high chances of success because no DNA Samples were collected from the appellant for comparison with the samples found on the respondent.

8. In this case it was submitted that the findings of the lower court that missing hymen in a minor is prove of penetration does not hold water. This submission was based on the decision of **Maraga and Rawal, JJA**, (as they then were), in **P. K.W VS Republic [2012] eKLR** and it was submitted that the Appellant's humble submission that he has been convicted erroneously. It was submitted that there is anticipated delay in the hearing of the appeal since the proceedings are yet to be typed and the record of appeal is yet to be compiled and owing to the good character of the appellant as the 1<sup>st</sup> offender, the court should exercise its discretion and grant him bail pending the hearing and the determination of the appeal. It was contended that the Appellant has abided by bond terms in the lower court and will similarly abide by the terms as may be set by this court and the sentence as meted to the appellant is harsh and unreasonable.

9. On behalf of the Respondent, it was submitted that the instant application is brought on the wrong provisions of the law. The chamber summons is brought under section 123 (3), 126 and 135 of the **Criminal Procedure Code**.

**123. (1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:**

**(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.**

**126. When a person may be required by a court or officer to execute a bond, with or without sureties, the court or officer may, except in the case of a bond for good behaviour, require him to deposit a sum of money to such amount as the court or officer may fix, or to deposit property, in lieu of executing a bond.**

**135. (1) Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.**

10. Looking closely on the above cited provisions of law, it was submitted that it is clear that they deal with the right to bail after plea has been taken and joinder of counts in a charge. According to the Respondent, the correct provision in law for bail pending appeal is provided under section 357 of the **Criminal Procedure Code**.

11. It was submitted that the applicant's appeal does not have any overwhelming chances of success as alleged. According to the Respondent, the prosecution tendered a water tight case and prove their case beyond any reasonable doubt. It was its view that the prosecution established the key ingredients of defilement, namely; the age of the complainant, penetration and that the applicant is the one who caused the penetration. In this regard reliance was placed on the case of **Jivraj shah vs. Republic (1986) KLR 605** and **Paul Kanai & another V Republic (2017) eKLR** and it was submitted that there are no exceptional circumstances brought forward by the applicants to warrant bond pending appeal. Looking at the grounds of appeal, it was submitted that they are the usual grounds of appeal. In the Respondent's view, the applicant is flight risk and there is a likelihood for him to abscond as he is serving many years in prison. The Respondent cited the case of **Dominic Karanja vs. Republic (1986) KLR 612** in support of its submissions.

12. It was contended that since the applicant was sent to so many years in jail by the trial court, there is no probability of the applicant serving his sentence before his appeal is heard and determined. The Respondent also relied on the case of **Chimabhai v/s R (1971) EA 343** and submitted that the courts conviction and sentence to the applicant was proper and very lenient in view of the offence committed by the applicant since the court took into consideration the circumstances which the offence was committed and noted that the offence was aggravated. The applicant has been confirmed to be dangerous to the society and the court should not take chances by releasing him on bond.

13. In light to the foregoing, it was submitted that the applicant has not raised sufficient grounds to warrant bail pending the intended appeal and the Court was urged to dismiss the application.

#### **Determination**

14. I have considered the application and the affidavit in support thereof, the grounds of opposition thereto and the submissions filed.

15. Article 49(1)(h) of the Constitution 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.***

16. However, a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the **Criminal Procedure Code** provides as follows:

***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.*

17. It was therefore held in Masrani vs. R [1060] EA 321 that:

**“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”**

18. I therefore agree with the position in Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR where 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 vs. R [1966] KLR 605*, the principle considerations for granting bail pending appeal were stated as follows:**

**(1) Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.**

**(2) It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.**

**Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.”**

19. This position was restated in Mutua vs. R [1988] KLR 497, in which the Court of Appeal stated:

**“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.”**

20. In Jivraj Shah vs. Republic [1986] KLR 605; [1986] eKLR, the Court of Appeal held that:

**“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] E A 476* which was referred to by this court with approval in Criminal Application 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.”**

21. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the Court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

a) Whether the appeal has overwhelming chances of success. See Ademba vs. Republic [1983] KLR 442, Somo vs. R [1972] EA 476, Mutua vs. R [1988] KLR 497;

b) There are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion. See Raghubir Singh Lamba vs. R [1958] EA 37; Jivraj Shah vs. R [1986] eKLR; Somo vs. R (supra); Mutua vs. R (supra);

c) There is a high probability of the sentence being served before the appeal is heard. See Chimabhai vs. R [1971] EA 343.

22. What constitute exceptional circumstances were dealt with in R vs. Kanji [1946] 22 KLR, where De Lestang, Ag.J (as he then was) held that:

**“The appellant’s appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admit to hearing showing thereby that it is**

not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail.”

23. According to Trevelyan, J in Somo vs. R [1972] EA 476:

“...the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance.”

24. Good character alone, however, it was held in the same case:

“can never be enough. There is nothing exceptional or unusual in having such a character.”

25. The rationale for considering the chances of success of the appeal was given in Somo vs. R (supra) at page 480 as follows:

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed.”

26. In this case, I have considered the grounds of appeal and I am not satisfied that the said grounds disclose the existence of an appeal has overwhelming chances of success. Whereas the appellant may well succeed in urging the said grounds at the hearing of the appeal, I am not satisfied that the chances of the appeal succeeding can be said to be overwhelming. The grounds are the usual grounds and there is no ground that stands out as one that is very likely to succeed even before the same is argued based on the state of the record, which record has not even been placed before me.

27. As regards the exceptional circumstances, I cannot see any. The mere fact that the applicant believes that his appeal has chances of success does not necessarily amount to exceptional circumstances since appellants are only expected to lodge appeal where they believed that their appeals have chances of success. It requires more than such belief to satisfy the court that there are exceptional circumstances.

28. In light of the foregoing I find no merit in this application. Let the appellant expedite the process of the hearing of his appeal.

29. It is so ordered.

**Ruling read, signed and delivered in open court at Machakos this 14<sup>th</sup> day of July, 2021.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Mokaya for the Applicant**

**Mr Mwakio for Mr Ngetich for the Respondent**

**CA Geoffrey**