



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL APPEAL NO. 79 OF 2017**

**SIMON NGUI IRUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[An application for bail pending appeal from the decision of M. Wachira,***

***Chief Magistrate, in S.O. No. 30 of 2015 at Murang'a dated 1<sup>st</sup> November 2017]***

**RULING**

1. The appellant was adjudged guilty of *defilement* contrary to section 8 (1) as read with section 8 (2) of the ***Sexual Offences Act***. He was sentenced to *life imprisonment*.
2. The particulars were that on 31<sup>st</sup> August 2016 at *[particulars withheld]* village within Murang'a County, he intentionally caused his penis to penetrate the anus of M.N.R *[particulars withheld]* a child aged *ten years*.
3. The appellant lodged a *petition of appeal* on 2<sup>nd</sup> November 2017.
4. Pending the hearing and determination of the appeal, the appellant has presented a *notice of motion* dated 14<sup>th</sup> November 2017 pleading for bail. It is supported by a deposition of his counsel.
5. The appellant contends that the appeal has overwhelming chances of success. The appellant's learned counsel submitted that the mandatory provisions of section 200 of the ***Criminal Procedure Code*** were not complied with. Counsel contended that the *election* whether or not to recall any witness belonged *exclusively* to the *accused*. In this case it was his *counsel* who elected to proceed from where the matter had reached.
6. It was also submitted that there were material *contradictions* between the evidence of the complainant and PW4. While the complainant said he was defiled inside a church, PW4 said the offence was committed in a nearby bush. It was also submitted that the doctor (PW3) did *not* find any injuries on the anus of the complainant.
7. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail.
8. The application is *not* contested by the Republic. Learned prosecution counsel intimated that she will *concede* the main appeal.
9. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj Shah v Republic* [1986] KLR 605-

*“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 is *Somo v Republic* [1972] EA 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.”*

7. I resist the temptation to comment about the merits of the appeal. It will be the duty of the first appellate court to *re-evaluate* the evidence; and, determine whether it was *reliable*. The court will also consider whether there was an *infraction* of section 200 of the ***Criminal***

**Procedure Code.**

8. Regarding the latter point, I note that the convicting magistrate took over the proceedings from R. A. Oganyo, Chief Magistrate. Counsel for the accused told the succeeding magistrate-

*“We can proceed from where we reached. We don’t intend to recall any witness”*

9. I am not persuaded that a *substantial point of law* has been urged on that aspect to sway the court to grant bail pending appeal.

10. But I find there are some *material discrepancies* in the evidence which are conceded by the Republic. As I pointed out, learned prosecution counsel intimated that she will *concede* the main appeal.

11. It is true that the appellant was sentenced to *life imprisonment*. But from what I have stated, the appeal is *arguable*; and there are *exceptional* circumstances which warrant grant of bail pending appeal. *Somo v Republic* [1972] EA 476, *Jivraj Shah v Republic* [1986] KLR 605.

12. The appellant *may* be released upon executing a cognizance in the sum of Kshs 500,000 together with *one* surety of a similar sum. The appellant *must* appear at the mention or hearing of the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED** at MURANG’A this 16<sup>th</sup> day of January 2019.

**KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of-**

Appellant (absent).

No appearance by counsel for the appellant.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.