



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 90 OF 2015**

**NAHASHON KIPKEMEI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The appellant was charged with the offence of defilement contrary to *Section 8 (1)* as read with *Section 8 (4)* of the *Sexual Offences Act*. It is alleged that on 27<sup>th</sup> June 2015 at in Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of *P.J (Name withheld)* a child aged 17 years.

2. In the alternative, the appellant is charged with the offence of committing an indecent act with a child contrary to *Section 11(1)* of the *Sexual Offences Act* in that on the same date and place, he unlawfully and intentionally caused his penis to get into contact with the vagina of *P.J* a child aged 17 years.

3. When he was arraigned before the principal magistrate's court at Kapsabet, the appellant was convicted of the principal count of defilement on his own plea of guilty. He was sentenced to fifteen years imprisonment.

4. Being dissatisfied with his conviction and sentence, the appellant lodged an appeal to the High Court through a petition of appeal dated 15<sup>th</sup> July, 2015.

On 18<sup>th</sup> June 2016, the appellant through his advocates *Ms Komen Kipchirchir & Company Advocates* presented a Notice of Motion seeking that he be released on bail or bond pending the hearing and determination of his appeal.

5. The application is based on grounds that the offence with which he was convicted is bailable and that he has a constitutional right to be released on bond pending appeal; that there are no compelling reasons to warrant refusal of bond pending appeal and that once granted bond, he will abide by the terms and conditions the court may deem fit to impose. The application is also supported by an affidavit sworn by the appellant which basically replicates the grounds anchoring the motion.

6. At the hearing of the application, learned counsel *Mr. Awi* appeared for the appellant while learned prosecuting counsel *Ms. Mokuu* represented the state.

In his submissions, *Mr. Awi* re-iterated the grounds stated on the face of the motion and relied on the depositions in the supporting affidavit. He in addition contended that the application ought to be allowed as in his view, the appeal has high chances of success.

7. The application is contested by the state. *Ms Moku* in her submissions urged the court to find that the appellant does not have a constitutional right to be released on bond; that the appeal has no chances of success as the appellant was properly convicted on his own plea of guilty; that at the appellate stage, it is not for the state to prove existence of compelling reasons to justify denial of bail but it is the duty of the appellant to demonstrate why he deserves to be released on bail pending appeal.

8. I have considered the application, the rival submissions by counsel for both parties, the record of the lower court and the grounds of appeal.

I wish to start by stating at the outset that under *Section 357* of the *Criminal Procedure Code*, this court is clothed with wide discretion in

deciding whether or not to admit an appellant on bond pending appeal. But it is important to state that this discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.

9. That said, I wish to deal with the appellant's submission that the application should be allowed as he has a constitutional right to bail pending appeal and that no compelling reasons have been given by the state to justify the denial of bail or bond pending appeal.

10. In my view, the appellant appears to have confused the law relating to the grant of bond pending trial with the law pertaining to the grant of bond pending appeal. I say so because the grounds premising the motion and the submissions made in support thereof relate to the grant of bond pending trial and not bond pending appeal. The legal parameters for the grant of bail pending trial are completely different from those that guide the court in the admission of an appellant to bond pending the hearing of an appeal.

For the former, all accused persons are presumed to be innocent unless they plead or are proved guilty and that is why they enjoy a constitutional right to bond pending trial subject to the existence of compelling reasons.

11. The constitutional right to bond is safeguarded under Article *49(1)(h)* of the Constitution. The relevant provisions of this Article states as follows:-

***“An arrested person has the right;***

***(a) .....***

***(b) .....***

***(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. A reading of the above Article shows clearly that the constitution only protects the right to bail of arrested persons who are either waiting to be charged with a criminal offence or those that have already been charged and are awaiting trial. It does not apply to persons who have already been convicted of a criminal offence. The provision therefore guarantees only the right to bond or bail pending trial if the state does not offer compelling reasons to justify denial of bond. It does not give appellants the right to bond pending appeal.

13. The reason for the lack of any constitutional protection of the right to bond pending appeal is clear and simple. It is because once an accused person is convicted of a criminal offence, he or she immediately loses the presumption of innocence and is deemed to have been properly convicted unless and until the conviction is set aside on appeal. That is why different considerations apply when considering applications for bond pending trial and bond pending appeal.

14. As was stated by the Court of Appeal in *Mutua V Republic 1988 KLR 497.*

***“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. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so”.***

15. In view of the foregoing, I agree with Ms Mokuu that in applications for bond pending appeal, the onus is always on the appellant to demonstrate to the court that there are good reasons why he should not be allowed to continue serving sentence but should be allowed to enjoy his liberty pending the hearing and determination of his or her appeal.

16. The courts have developed over time through case law the reasons that would justify admission of an appellant to bond pending appeal. The appellant must demonstrate that his appeal has high or overwhelming chances of success or that special or exceptional circumstances exist in his case that would entitle him or her to bond pending appeal – See **Somo V Republic (1972) EA 476 Dominic Karanja V Republic (1986) KLR 612.**

17. In this case, Mr. Awi asserted in his submissions that the appellant’s appeal has high chances of success. But he did not support this submission by pointing to any error in the proceedings of the lower court that would persuade the court to find that there was a substantial point of law to be urged on appeal that would give the appeal high chances of success.

18. I have on my part perused the proceedings of the trial court. As noted earlier, the appellant was convicted on his own plea of guilty. He was sentenced to fifteen years imprisonment.

Though I am alive to the fact that there is an appeal pending which I cannot prejudge, it is important to point out in passing that the sentence imposed on the appellant is the minimum sentence prescribed by the law for the offence of defilement where the victim is between the age of sixteen and eighteen years. The complainant in this case is said to have been 17 years old at the time the offence was committed.

19. Taking all relevant factors into account and in order not to prejudice the hearing of the pending appeal, I can only say for now that I am not satisfied that the appeal has overwhelming chances of success. The appellant has also not demonstrated that any special or exceptional circumstances exist in his case that would entitle him to the grant of bond pending appeal.

20. For all the foregoing reasons, I find that the appellant has failed to meet the threshold for grant of bail pending appeal. The Notice of Motion

dated 8<sup>th</sup> June, 2016 is thus not merited and is accordingly dismissed.

It is so ordered.

**C. W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 6<sup>th</sup> day of July 2016**

In the presence of:

The appellant

Ms Mwaniki for the State

Ms Naomi Chonde Court Clerk

No appearance by Mr. Awi for the appellant