



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njue v Republic (Criminal Appeal (Application) E042 of 2022)  
[2024] KECA 1625 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1625 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL (APPLICATION) E042 OF 2022  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
NOVEMBER 8, 2024**

**BETWEEN**

**BRIAN MUTWIRI NJUE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Conviction and sentence in judgment of the High Court at Embu (L. Njuguna, J.) dated 28th April 2022 in HCRA No. E050 of 2022)*

**RULING**

1. The appellant/applicant, Brian Mutwiri Njue was convicted of the offence of defilement contrary to section 8(1) of the *Sexual Offences Act* and sentenced to serve seven (7) years imprisonment before the Chief Magistrate's Court sitting at Embu. His appeal against both conviction and sentence before the High Court was dismissed, hence the appeal now pending before this Court.
2. Pending the hearing and determination of the appeal, the appellant moved this Court vide a Notice of Motion dated 5<sup>th</sup> April 2023 seeking to be released on bail pending appeal. For the benefit of counsel who filed the application, we find it necessary to point out that none of the provisions he has predicated his application on are applicable for an application for bail pending appeal before this Court. We reiterate that Articles 47, 48, 49(1)(b) of *the Constitution* which are often times cited by counsel in support of applications for bail pending appeal before this Court apply to accused persons awaiting trial and not persons who have been properly convicted and are serving lawful sentences imposed by the trial court, and where applicable, upheld by the first appellate court.
3. That said, we shall proceed to consider the application before us on merit.
4. The appellant seeks an order that he be released on reasonable bond/cash bail terms pending the hearing and determination of his appeal. The application is premised on grounds that the appellant was on free bond when attending trial before the trial court and he never absconded; and that he is a



young man (said to be 20 years old) as at the time he was convicted; that he is of good behavior even in prison and he will comply with any conditions set by the Court.

5. The application is supported by an affidavit sworn by his counsel Mr. Simon Ndege, who repeats the grounds on the face of the application and has annexed several documents to the affidavit. Among his important depositions is that the appeal has merit and overwhelming chances of success. Counsel has also attached documents showing that the appellant was in Form 3 when the incident took place and that he would like to go back to school and complete his studies. Counsel goes on to state that the applicant lives with his parents and is not a flight risk.
6. We have considered the application along with the submissions filed by learned counsel for the applicant in support of the application. When the matter came up for plenary hearing, Ms. Nandwa, learned counsel for the DPP informed the Court that they were not opposing the application. She stated that after going through the evidence both at the trial court and the High Court, she was persuaded that the appeal has high chances of success.
7. Ordinarily, the Court is quite stringent when considering an application for bail pending appeal before this Court, particularly when such an appeal is a second appeal. The Court has over time set out principles to guide it when considering such an application. Among the things to be demonstrated is presence or existence of compelling or unusual circumstances which would persuade the Court to grant bail pending appeal. See this Court's decision in *Jivraj Shah -vs- Republic* [1986]eKLR, where the Court expressed itself 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 vs- 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. It is almost self defeating to attempt to define phrases or to establish formulae.” ( Emphasis ours)

8. One of the reasons proffered is that the appellant is a young man who should be given an opportunity to complete his studies. This, in our view, may not be compelling reason as we are aware that opportunities to complete his studies and sit for his exams are available in prison. In any event, having stayed out of school for the last three years, it is unlikely that he would be back to continue with his studies.
9. There is a deposition by his counsel that the appellant is ailing.  
There was no medical evidence availed to this Court in that regard.
10. We have nonetheless read the judgments of the two courts below.

Like the DPP, we are persuaded that the appeal has merit and has high chances of success, for reasons that we do not need to delve into at this stage. The concession by the State, though not binding to this Court, is indeed based on serious deficiencies on important points of law, that is apparent on the face of the two judgments. We also note that the appellant was sentenced to 7 years' imprisonment



and there is likelihood that he could serve a substantial part of the sentence before the appeal is heard and determined.

11. For the foregoing reasons, we find that the appellant should be accorded an opportunity to pursue his appeal while on bond.
12. Accordingly, we find the application with merit. We allow it and order that the appellant be released on his own bond of Kshs.50,000.00 plus one surety in like amount, or a cash bail of Ksh.20,000 to appear for the hearing of his appeal as will be directed by the Deputy Registrar of the Court.

Orders accordingly.

**DATED AND DELIVERED AT NYERI THIS 8<sup>TH</sup> DAY OF NOVEMBER 2024.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

