



**Pkemoi v Republic (Criminal Application 178 of 2020)
[2023] KECA 201 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 201 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPLICATION 178 OF 2020
HM OKWENGU, M NGUGI & F TUIYOT, JJA
FEBRUARY 17, 2023**

BETWEEN

EDWIN PKEMOI APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for bail pending the hearing and determination of an appeal from the judgment of the High Court of Kenya at Kapenguria (S. M. Githinji, J) delivered on 3rd November, 2016 in H.C. CRIM CASE NO. 7 OF 2016)

RULING

1. Edwin Pkemoi, the applicant, is serving a life imprisonment having been convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. He has preferred an appeal against the conviction and sentence and is now before us on a notice of motion dated October 26, 2020 for bail pending appeal.
2. Curiously, and unexplained, the applicant chose to support the application through an affidavit sworn by his counsel Emmanuel Koskei. In it, counsel avers that his client's appeal has overwhelming chances of success and that the offence he faces is bailable.
3. The application is opposed. Mr Okang'o, Senior Principal Prosecution Counsel, contends that it is without merit, and we agree.
4. The law on bail pending appeal is set out in the decision of this Court in *Jivraj Shab -Vs- Republic [1986] KLR 005* as follows:

"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'.

5. The plea by the applicant that he be granted the relief rests on two grounds: that his appeal has overwhelming chances of success and; that the offence for which he was convicted and punished is bailable. The applicant, however, does not tell us why his appeal would have good prospects of success and even if had, that alone would not entitle him to bail pending appeal. The principal consideration in an application of this nature is the existence of exceptional or unusual circumstances. An example of an exceptional circumstance is the likelihood of an applicant serving a substantial part of his/her prison term before his/her appeal is heard and determined. The applicant here is serving a sentence of life imprisonment and the applicant does not even dare suggest that he would have served a substantial part of that sentence before his appeal is heard.
6. His further contention that the offence for which he was convicted is bailable certainly accords with the constitutional edict under Article 49 (1) (h) that, save for compelling reasons, an accused person has a right to bail but is an argument that will be available in support of an application for bail pending a charge or trial. Here, this is already a conviction by a competent court of law and it falls on the applicant to show that exceptional or unusual circumstances exist for him to deserve the suspension of the jail sentence as he processes his appeal. Having failed to do so, then the application lacks merit.
7. The notice of motion dated October 26, 2020 is accordingly hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

