



**Gathu v Republic (Criminal Appeal E075 of 2024)
[2025] KEHC 11453 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 11453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E075 OF 2024
DO CHEPKWONY, J
FEBRUARY 27, 2025**

BETWEEN

BERNARD WAICIGO GATHU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. What is before this Court for determination is the Notice of Motion application dated 20th December, 2024 in which the Applicant seeks the following orders:
 - a. Spent.
 - b. This Honourable Court be pleased to admit the Appellant to bail pending the hearing and determination of this instant appeal.
 - c. The costs be provided for.
2. The Application is based on the grounds as set out on its face of it and the supporting affidavit of the Applicant sworn on the instant date. The Applicant has stated that he was charged with four counts of Defilement contrary to Section 8 (1) and (2) of the *Sexual Offences Act* and an alternative charge of committing an indecent act with children contrary to Section 11 (1) of the *Sexual Offences Act* where he was convicted and sentenced to serve thirty-five (35) years imprisonment. Being aggrieved with the Judgment of the trial court in Kikuyu CM SO No. E016 of 2019, the Applicant/Appellant lodged the present appeal which he claims is meritorious.
3. The Applicant is now seeking bail pending appeal as the ground that he is a person of advanced age of 66 years, with permanent residence within the jurisdiction of the court. He also states that he is the sole bread winner of his family and it would therefore be in the interest of justice that he be granted release on bail pending appeal.



4. When the matter came to court on 27th February, 2025, the Applicant's Counsel, Dr Khaminwa, urged the court to allow the application on the basis that the Applicant is over 60 years old. Counsel relied on the provisions of Article 57(c) and (d) of the Constitution alongside books and Articles on the conditions the Kenya Persons, advanced age and good character as mitigating factors on sentencing. He submitted that the Applicant is a school teacher who retired in 2018. He further holds that Kenyan prisons are very crowded hence detrimental for an elderly person. It is Counsel's argument that since the Applicant is over sixty (60) years old being sentenced to thirty-five (35) years amounts to being imprisoned to a life sentence or death as it is unlikely that he will come out of there alive. He has therefore urged the court to grant the Applicant release on bail pending appeal as he has an arguable case on appeal.
5. Further, the Applicant's Counsel has relied on the case of Republic –vs- Lenchura[2012]eKLR and stated that the accused in the matter had been found guilty of the charge of manslaughter and was sentenced to serve five (5) years which was suspended and was also ordered to pay one (1) female camel to the deceased's family and report to the chief owing to the accused's advanced age.
6. In response, the Prosecution's Counsel, Ms Ndeda, indicated that they were not opposed to the Applicant being granted bail pending appeal owing to his advanced age. In rejoinder, the Applicant's counsel urged the court to grant a free bond and he will be availed in court by his family as and whenever he will be required.
7. The court has read the Notice of Motion application and the supporting Affidavit and has considered the oral arguments made by the Applicant's Counsel as well as the Prosecution Counsel. The main issue for consideration is whether this court should grant the Applicant bail pending appeal.

Analysis and Determination

8. The Law on bail pending appeals is enshrined under Section 357 of the Criminal Procedure Code which states that: -

[357]. Admission to bail or suspension of sentence pending appeal

- “(1) 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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.”

9. It is trite that Article 49(1)(h) of the Constitution gives an accused person right to bail or bond. It 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.
10. Although the accused person has a right to bail and bond, upon conviction this right is absolute as the court has to consider the circumstances of the case and exercise its discretion. This court agrees with the position in the case of 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...
11. In summary, the court has discretion to grant bail pending appeal based on the circumstances of the case. In this case the main ground the Applicant is relying on is his age which is over sixty (60) years old and urges the court to grant the same. The court has read through the case of Lenchura cited by the Applicant and while it considers the age of the accused person therein being over sixty (60) years it cannot however grant a free bond owing to the nature and seriousness of the offence that the Applicant was charged with. In the circumstances the court shall exercise its discretion and grant the Applicant cash bail of Kshs. 100,000/= or in the alternative bond of Kshs. 500,000/= with one surety of similar amount.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF FEBRUARY 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

Dr. Khaminwa counsel for the Convict

M/S Ndeda counsel for the Respondent

Court Assistant - Martin

