



REPUBLIC OF KENYA



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**Chepkechoi v Republic (Criminal Appeal E060 of 2024)
[2025] KEHC 5061 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL APPEAL E060 OF 2024
JRA WANANDA, J
APRIL 28, 2025**

BETWEEN

WILSON KIPTOO CHEPKECHOI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Pending before Court is the Appellants' Notice of Motion dated 15/11/2024 filed through Messrs Rioba Omboto & Co Advocates. It seeks orders as follows:
 - a. [.....] spent
 - b. That the Appellant be admitted/released on bond terms pending the hearing of the main appeal.
 - c. That on granting bond the Appellant be released on terms and conditions that the Court may determine or deem fit.
2. The brief background to the Application is that the Appellant was charged with the offence of defilement under Section 8(1) and 8(3) of the *Sexual Offences Act* in Iten Criminal Case (SO) E014 of 2023 and by the Judgment delivered on 12/11/2024 by Hon. V. Karanja - PM, he was convicted and sentenced to serve 20 years imprisonment. Dissatisfied with the decision, the Appellant filed this Appeal. It is against this backdrop that the Appellant has filed this Application the subject hereof.
3. In his Supporting Affidavit, the Appellant deponed that he has an arguable Appeal and he then described the matters which, according to him, constitute such arguable Appeal. He further deponed that he is a senior citizen aged over 75 years old and that he will not jump bail.
4. The Application is opposed by the Respondent by way of the Grounds of Opposition dated 28/01/2025. The Grounds listed are that the Application is an abuse of the process as the Appellant



was properly convicted after the case against him was proved beyond reasonable doubt, there are no unusual or exceptional circumstances that the Appellant has shown to warrant the granting of bond pending Appeal, the offence that the Appellant was convicted of is a serious one with a legally severe sentence already pronounced and therefore, the Appellant is likely to abscond should bail pending appeal be granted, and that the merit of the Appeal is mainly based on points of fact and not points of law and is therefore not guaranteed to succeed.

5. The Application was canvassed by way of written Submissions. The Appellant filed his Submissions on 29/01/2025 while the State, through Prosecution Counsel Racheal Mwangi, filed its Submissions on 26/02/2025.

Appellants' Submissions

6. Mr. Omboto submitted that the Appeal has high and overwhelming chances of success on the grounds that the trial Court disregarded the medical reports especially P3 forms, and that the credibility of the complainant and Prosecution witnesses was in question. He submitted further that one of the ingredients of the offence of defilement being penetration, the trial Magistrate erred in failing to consider that the victim's testimony corroborated with the medical evidence of the two medical officers as the complainant had given birth to two children. He urged further that the testimony of the clinical officer PW4 was that the complainant presented a mild abdominal pelvis 5 days after delivery of the child, and that clinical officer PW6 recommended DNA to prove paternity", and not penetration. He submitted further that the prosecution brought the charges after a period of 3 years, whereas the medical reports (P3 Form) were prepared 3 years later by which time the complainant had given birth to the 2 children hence the medical examination that came after 3 years was of no value. He cited the case of JK VS Republic (2018) eKLR. He also urged that the trial Magistrate erred in relying on a DNA test conducted on 5/04/2023 whereas the alleged defilement was committed on unknown dates to wit; diverse dates between May 2020 and February 2012, that it is trite law that a case of rape or defilement is not proved by DNA test but by way of evidence and/or essential ingredients (penetration and impregnation). He also cited the case of AML vs Republic (2012) eKLR, the case of Evans Wanjala Wanyonyi vs Republic (2019) eKLR, and the case of Williamson South vs Republic (2016) eKLR. Counsel then cited Section 57(1) of the *Criminal Procedure Code* and urged that the Appellant is not a flight risk, he was granted bond at the subordinate Court and abided by the terms given, and his age (75 years) renders him unlikely to abscond.

Respondent's Submissions

7. Ms. Mwangi, on her part, cited Section 357 of the *Criminal Procedure Code* and submitted that the Section does not automatically grant a right to bond pending appeal which means that the Appellant must show substantial grounds why he should be released while the appeal is pending. She cited the case of Jivraj Shah v Republic (1986) KLR 605 and also urged that the Application does not demonstrate any exceptional and unusual circumstances that would warrant this Court to grant bond pending appeal. She also cited the case of Ademba v Republic (1983) eKLR.
8. Counsel also submitted that Section 57(1) of the *Criminal Procedure Code* is irrelevant in this case as it addresses bond/bail in the subordinate Court and deals with approval or declining of sureties. She urged further that bond pending appeal is not a constitutional right but a discretion of the Court which may grant the same after considering the circumstances of each. She cited the case of Charles Owanga Oluoch v The DPP [2015] eKLR and submitted that the Appellant has no right to bond pending appeal, but that the same is at the discretion of the Court. Counsel submitted further that the Appellant's averment that he is not a flight risk, that he was granted bond at the subordinate Court and that he is 75 years old and therefore cannot fail to attend Court does not hold water, that he has already



been convicted and sentenced to 20 years imprisonment after being found guilty of defilement which is enough reason for the Appellant to abscond Court since the success of his appeal is not guaranteed. She also cited the case of Dominic Karanja v Republic (1986) eKLR. According to Counsel, the Appellant has not demonstrated that his appeal has an overwhelming chance of success, the Application does not raise any substantial or weighty matters of law but only matters based on facts and findings of the lower Court therefore the appeal is bound to fail. She cited the case of Mburu v Republic (Criminal Appeal E039 of 2023 [2024] 1 KEHC 2757 KLR (14 March 2024).

Determination

9. The issue that arises for determination herein is “whether the Appellant should be released from prison, on bond and/or bail pending the hearing and determination of his Appeal”.

10. I begin by quoting Article 49(1)(h) of *the Constitution* which provides as follows:

“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.

11. On its part, Section 357(1) of the *Criminal Procedure Code* provides as follows:

“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.”

12. The Court of Appeal, in the case of JivRaji Shah vs. R [1986] KLR 605, guided that:

“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 v 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. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7-86.

13. The Court of Appeal, also, in the case of Dominic Karanja v Republic (1986) KLR 612 held as follows:

“(a) The most important issue was that if the Appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his



liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;

- (b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;
- (c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending Appeal;
- (d)

14. I also cite the case of *Masrani v R* [1060] EA 321, where it was held that:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

15. Further, in the case of *Charles Owanga Aluoch v Director of Public Prosecutions* [2015] eKLR, Hon. Lady Justice J. Mulwa J, held as follows:

“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.

16. From the above guidelines, it is clear that a different test from that applied in bail pending trial is applied when dealing with Applications for bail pending Appeal. When considering the latter, the Court has discretion which, needless to state, must be exercised judicially, taking into consideration the relevant factors set out in the above authorities. The Court must also appreciate that the accused has by then become a convicted person, and more caution has to therefore be exercised before deciding whether or not to grant him/her bail.

17. What constitutes “exceptional circumstances” were dealt with in the case of *R vs. Kanji* [1946] 22 KLR, where De Lestang, Ag. J (as he then was) held as follows:

“The appellant’s Appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an Appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the Appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his Appeal has been admitted to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail.”



18. The rationale for considering the chances of success of the Appeal were set out in *Somo v R* [1972] EA 480 in which the Court observed as follows:

“There is little if any point in granting the application if the Appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the Appeal court.

I have used the word "overwhelming" deliberately for what I believe to be a good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his Appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his Appeal will prove successful, he must show that there is an overwhelming probability that it will succeed."

19. In the present case, the Appellant has alleged that the Appeal has "overwhelming chances of success". I have considered the grounds of Appeal and, although, at this point, I would not wish to veer too deeply into commenting on the merits or demerits of the Appeal, I am satisfied that the Appellant has raised arguable grounds.
20. As regards "exceptional circumstances", the Appellant has cited his advanced age alleged to be of 75 years. I note however that in a P3 Form exhibited by the Appellant himself and dated 27/12/2022, his age, as at that date, is indicated as 67 years. Nonetheless, since the Respondent did not challenge the alleged age of 75 years, I will go by it.
21. There are various cases in which the Courts have granted bail pending Appeal to Appellants on the ground of their advanced age as one of the considerations. I may for instance, mention the case of *Stephen Ngui Kyalo Versus Republic* [2019] eKLR in which Ong'udi J considered the Applicant's age of 70 years as an "exceptional circumstance". Similarly, Muchemi J, in the case of *Kigoro Machoro Versus Republic* [2019] eKLR made a similar finding in respect to the Applicant's age of 80 years. There is also the decision of Onyiego J in the case of *John Koyi Waluke & another v Republic* [2020] eKLR.
22. I also consider the probable relatively lengthy period of time that it may take for this Appeal to be ready for hearing, leave alone being ready for "admission", as I am aware of the backlog in the Courts in the typing of proceedings caused by the perennial problem of insufficient number of staff.
23. Considering the above factors, I find that the Appellant has basically met the threshold for grant of bail pending Appeal and the interest of justice also tilts in his favour. Accordingly, I will allow Application but on stringent conditions.
24. In reaching my above decision, I confirm that I have taken into consideration the fact that the Appellant has already been convicted and is therefore serving a lawful sentence. The offence of defilement for which he is in jail is also a serious one and I am aware that releasing him on bail pending Appeal may as well send out a wrong signal that this Court condones such offences. Far from it, since each case is to be resolved on the basis of its own facts, in this case, I have placed weight on the fact that the Appellant is a senior citizen approaching his eighties and that it may also some considerable time before this Appeal is ready for hearing. Of course, this decision should not be wrongly construed to mean that in all Applications for bail pending Appeal, the Appellant should automatically be granted bail if he is of an advanced age. Not at all. My decision herein is entirely based on the unique facts of this case.



Final Orders

25. In the premises, I allow the Appellant's Notice of Motion dated 15/11/2024 in the following terms:
- i. The Appellant is hereby admitted to bail pending Appeal and he shall be released on a bond of Kshs 400,000/- with one surety of a similar sum pending the hearing and determination of the Appeal herein.
 - ii. Once released, the Appellant shall be appearing for Mentions on a monthly basis before the Deputy Registrar of this Court until the hearing and determination of the Appeal, and shall, at all times, also attend Court whenever the Appeal is heard or mentioned for any other reason.
 - iii. Unless in the case of a medical emergency, the Appellant shall not leave the territorial or geographical jurisdiction of this Court without informing it in advance
 - iv. The Deputy Registrar of this Court is directed to take steps to cause typing of the proceedings of the subordinate Court to be fast-tracked to facilitate the preparation of the Record of Appeal and subsequent admission of the Appeal for hearing and determination.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2025

.....

WANANDA J. R. ANURO

JUDGE

