



**Osore v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 1760 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E030 OF 2023
SC CHIRCHIR, J
FEBRUARY 22, 2024**

BETWEEN

GRIFFIN OSORE APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. By a Notice of Motion dated June 6, 2023, the appellant herein seeks for bail pending Appeal.
2. The Application is premised on the following grounds:
 - a. Bail pending appeal is discretionary as the Appellant is no longer viewed as being innocent and that it is his right to be released on bail or bond on reasonable conditions pending a charge or trial.
 - b. That there are absolutely no compelling reasons to justify holding the appellant in prison on a judgment that was likely to be dismissed
 - c. That the appeal has a high and overwhelming chance of success on ground of disregard of the medical notes and the credibility of the complainant as a witness.
 - d. The evidence tendered by the prosecution was not well corroborated and is not sufficient to warrant the conviction arrived at by the honourable court.
 - e. The appellant is not a flight risk, he just recently sat for his Kenya Secondary Examinations and has aspirations of joining University.
 - f. There is a possibility of delay in disposal of this appeal as the appellant is already incarcerated and has served 7 months of his sentence.



- g. That the cornerstone of the justice system is that no one will be punished without benefit of the due process.
 - h. That the need for bail is to assure that the accused will appear for trial and not to corrupt the legal process anything more is excessive and punitive.
3. The Application is also supported by an Affidavit sworn by the Applicant in which he argues that it is his constitutional right to be released on bail or bond on reasonable conditions.
 4. He further states that his appeal has a high and overwhelming chance of success on grounds that the trial court disregarded the medical report, the expert witness and that the credibility of the complainant was in question.
 5. He claims that he is not a flight risk and his safety will not be threatened if he is allowed back to the society.

The Respondent's Case.

6. In response the respondent filed the grounds of opposition dated June 20, 2023.
7. The respondent states that the application lacks merit and does not meet the threshold for the orders sought; that the appeal has no chance of success as the evidence tendered by the prosecution was overwhelming, and well corroborated.
8. The respondent further states that due to the nature of the offence that the applicant has been charged with, there is a high likelihood of him absconding and that he has not demonstrated any peculiar and exceptional circumstances to warrant him being granted the orders.

Determination

9. The appellant had been charged with defiling a 15 year old girl, contrary to section 8 (1) as read with section 8 (3) of the *Sexual offences Act*. He faced an alternative charge of committing an indecent Act with the minor contrary to section 11(1) of the *sexual offences Act*.
10. On May 30, 2023, the trial court found him guilty and was sentenced to five (5) years in prison. He was dissatisfied with the judgment and filed this Appeal as well as the present Application, for admission to bail pending Appeal.
11. The only issue before this court is whether the Appellant should be admitted to bond pending Appeal.
12. The right to bail pending Appeal is premised on section 357 (1) of the *Criminal Procedure Code* which states that:

“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.”
13. Under Article 49 of the *Constitution* a person awaiting trial is entitled to bail as a matter of Right. That right can only be taken away where the prosecution demonstrates that there are compelling reasons to deny it. However bail pending Appeal is at the discretion of the court and hence the onus is on the Applicant to convince the court as to why the discretion should be exercised in his favour (Ref: *Charles Owanga Alouch v DPP* [2015] eKLR)



14. In the case of *Chimambhai v Republic* 1971 EA 343, J. Harris made another observation in such an application when he stated:
- “The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....”
15. The principles for granting bond pending an appeal were set out in the case of *Jivraj Shah v Republic* [1986] KLR 605 which laid down the principles as follows;
- “(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.
- (2) 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.
- (3) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”
16. Thus, the Appellant needs to demonstrate that the appeal has overwhelming chances of success and that there are exceptional circumstances warranting his release on bail.
17. The Applicant herein argues that the appeal is likely to succeed on grounds that the trial court disregarded the medical evidence and that of the expert witness and that the credibility of the complainant as a witness was in doubt.
18. He further argues that the trial court’s finding was not backed by medical evidence and that he was also not examined to establish that he was the perpetrator.
19. I have perused the record. The trial court gave tangible reasons as to why it believed the minor witnesses, in finding the accused guilty of the alternative charge of committing an indecent act with a child. In so doing the trial magistrate was complying with provisions of section 19 of the *Oaths and Statutory Declarations Act*.
20. While being careful not to delve into the merits and demerits of the Appeal, am not convinced that the chances of Appeal is overwhelming.
21. The Applicant has not placed before this court evidence of exceptional and unusual circumstances to warrant him bail.
22. The applicant submitted that he was not a flight risk and he has just sat for his KCSE, and that he would not be under any threat if released to the society. However, these two issues have no bearing on whether he is entitled to bail pending Appeal. As was held in the case of in *Dominic Karanja v Republic*



[1986] KLR 612, personal good conduct of an applicant does not constitute an exceptional or unusual circumstance to warrant the grant of bail pending appeal.

23. The Applicant was handed a 5- year sentence. There is no reason as to why this Appeal cannot be disposed of within the next one year, at most. Am not therefore convinced by that the Applicant is likely to serve sentence before the Appeal is disposed of.
24. There is no merit in this Application. The same is hereby dismissed

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF FEBRUARY 2024

S. CHIRCHIR

JUDGE

In the presence of:

Godwin – Court Assistant

Appellant

Ms Osoro for Respondent.

