



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.E008 OF 2022

REPUBLIC.....APPELLANT

VERSUS

GILBERT NGETICH.....RESPONDENT

R U L I N G

1. The Application coming for consideration in this ruling is the Notice of Motion dated 22/3/2022 seeking the following Orders:-

(i) THAT an order for stay of execution of the Judgment in Kericho Chief magistrate Court CR. No.SO.8 of 2020 be granted pending the hearing and determination of the Petition of Appeal No.8 of 2022.

(ii) THAT an order of stay of the release of the Accused/Respondent from custody be granted pending hearing and determination of the Petition of Appeal No.8 of 2022 and the instant Application.

(iii) Any other orders this Honourable court may deem fit.

2. The Application is supported by the Affidavit of ELVIRA ASEDA of even date in which it's deposed that the Respondent in this case was charged with Defilement Contrary to Section 8 (1) as read with Section 8(4) of the Sexual Offences Act (SOA) No.3 of 2006.

3. It is further deposed that the Respondent changed his plea and pleaded guilty to the charge after five (5) witnesses had testified and he was convicted on his own plea of guilty and placed on probation for a period of 3 years.

4. The prosecution is aggrieved with the sentence and is now seeking for stay of the sentence pending appeal.

5. The prosecution stated in their oral submissions that the sentence meted against the Respondent is illegal since the offence of defilement provides for a jail term.

6. The prosecution is seeking stay of the sentence pending appeal and they are further seeking for orders that the Respondent be remanded in custody pending appeal since he has already been convicted on his own plea of guilty.

7. The Respondent asked the Court to release him on bond since he is a student at Koiywo Technical college and he is about to start undertaking Examinations.

8. I have considered the application dated 22/3/2022 together with the Supporting Affidavit and the brief submissions by both the prosecution and the Respondent.

9. The prosecution relied on the case of AHMAD ABOLFATHI MOHAMMED -vs- SAYEED MANSOUR MOUSAVI [2018] KLR where the Supreme Court was dealing with stay of acquittal pending appeal. The Supreme Court said that filing of an appeal will not entitle the state to a stay of acquittal pending the appeal.

10. The Supreme Court delimited the following as principles for consideration in an Application for stay of acquittal pending appeal:-

(a) The discretion to grant stay of acquittal should be exercised sparingly;

(b) The discretion shall be exercised judiciously and not whimsically;

(c) The accused person has been found not guilty and acquitted, hence there is a presumption of innocence in favour of the accused;

(d) It is in the interest of the public, the state and the court before which the appeal has been filed to preserve the integrity of the appeal;

(e) It is not automatic that upon the state's filing of an appeal stay will be granted. The onus is on the state (Director of Public Prosecution) to lay basis to the satisfaction of the court as to the existence of special circumstances that militates against the release of the acquitted person;

(f) In considering what amounts to special circumstances, the court shall consider the following:- (i) the nature and seriousness of the offence; (ii) Whether the absence or non-attendance of the accused person at hearing of the appeal will render it nugatory; (iii) the probability of accused absconding court if released, is she/he a flight risk

(g) A balance has to be struck between the right to individual liberty of the accused and the interest of the public;

(h) The length of time which is likely to take for the appeal to be heard;

(i) The court shall expedite the hearing and determination of the appeal.

11. Although the Supreme Court was dealing with stay of acquittal pending appeal, I find that the principles are applicable in the current case where the prosecution is seeking stay of the sentence of 3 years' probation pending appeal.

12. I find that the application dated 22/3/2022 is meritorious. The Respondent was convicted on his own plea of guilty and the offence of Defilement is a serious one.

13. The Respondent is not eligible for bond since he has been convicted. The offence of defilement entails violence against a minor and the Respondent is not eligible for bail pending appeal either.

14. I accordingly allow the application dated 22/3/2022 and direct as follows:-

(i) THAT the Respondent be remanded in custody pending appeal.

(ii) THAT the Appellant serves the petition of appeal within 14 days of this date.

(iii) THAT the matter be mentioned on 2/6/2022 to enable preparation of the Record of Appeal in order for the Court to expedite the appeal.

Delivered, dated and signed at Kericho this 25th day of March, 2022.

A. N. ONGERI

JUDGE