



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO.10 OF 2020**

**MNM.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from Original Conviction and Sentence in**

**Criminal Case No. 16 of 2020 of the Principal Magistrate's**

**Court at Lamu Law Court - T. A Sitati, PM dated 15<sup>th</sup> July, 2020).**

**Coram: Hon. Justice R. Nyakundi**

**The appellant in person**

**Mwangi for the State**

**JUDGMENT**

This is an appeal by **MNM** hereinafter referred as the appellant who was tried before the lower court for the offence of Incest Contrary to Section 21 of the Sexual Offences Act No. 3, 2006.

The particulars of the charge as framed by the prosecution were that on diverse dates between 15<sup>th</sup> March 2019 and 11<sup>th</sup> July 2020 at Hindi Location Lamu West Sub County within Lamu County being a female person allowed her vagina to be penetrated by **JMN**, a male person who was to her knowledge her uncle.

During the trial, the Appellant pleaded guilty and was sentenced to 10 years' imprisonment. The appellant has now filed the present application dated 29<sup>th</sup> October 2020 in which she seeks to be released on bail pending appeal. The application is based on the grounds that the applicant had preferred an appeal which has overwhelming chances of success, and that if the orders she seeks are not granted, her appeal would be rendered nugatory.

The application is further based on the ground that the admission for hearing and final disposal of the appeal would take a long period, and her fundamental rights ought to be protected. The application is supported by an affidavit sworn on 29<sup>th</sup> October 2020 in which she reiterates the grounds set out in the application.

In her submissions on behalf of the applicant filed on 30<sup>th</sup> November, 2020, Ms. Kai submitted that the application is based on section 357 (1) of the Criminal Procedure Code which gives the High Court inherent power to grant a convicted person bond or cash bail pending hearing or determination of his appeal. She relied on the authorities of **Jivraj Shah vs R (1986) KLR 605** and **Dominic Karanja vs R (1986) KLR 612** on what needs to be established for bail pending appeal to be granted. In my view, this has not been established in this present case. Further, even if she was a student as alleged, that would not fall under exceptional circumstances to be considered in such an application as pointed out in the decision of **Dominic Karanja vs R (1986) KLR 612**.

Having considered both the application and submissions filed on behalf of the Applicant, I am not satisfied that a person who appeals against a sentence imposed following a plea of guilty is entitled, in circumstances such as are before me, to be released on bail pending appeal. In the case of **Cliff Bikeri Mokuia & Another vs Republic Kisii High Court Criminal Appeals Nos 268 and 269 of 2012**, Muriithi J observed as follows:

**“In a decision in the case of, Boke Chacha v. R Kisii HC Criminal Case No. 244 of 2012, I considered the authorities on bail pending appeal and held as follows:-**

**“According to authorities on bail pending appeal, bearing in mind that the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal, the criteria for consideration is:**

**(a) Whether there exists exception or unusual circumstances which justify grant of bail in interests of justice. See Jivraj Shah vs R (1986) KLR 605.**

**b. Such exceptional circumstances exist where the appeal has overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard. See Jivraj Shah supra; Mutua vs R (1988) KLR 497; and Somo vs R (1972) E.A 476.**

**c. The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See Dominic Karanja vs R (1986) KLR 612.**

**d. A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal.**

In view of the foregoing, I am of the opinion that in applications for bail pending appeal, the onus is always on the appellant to demonstrate to the court that there are good reasons why she should not be allowed to continue serving sentence but should be allowed to enjoy his liberty pending the hearing and determination of his or her appeal.

In this case, *Ms. Kai* asserted in her submissions that the appellant’s appeal has high chances of success. But she did support this submission by pointing some concerns in the proceedings of the lower court that would persuade the court to find that there was a substantial point of law to be urged on appeal that would give the appeal high chances of success.

I have on my part perused the proceedings of the trial court. As noted earlier, the appellant was convicted on her own plea of guilty. She was sentenced to ten years’ imprisonment being the minimum sentence prescribed by law.

Though I am alive to the fact that there is an appeal pending which I cannot prejudge, it is important to point out in passing that the sentence imposed on the appellant is the minimum sentence prescribed by the law for the offence of incest.

Taking all relevant factors into account and in order not to prejudice the hearing of the pending appeal, I can only say for now that I am satisfied that the appeal has overwhelming chances of success. The appellant has also demonstrated that there are special or exceptional circumstances exist in her case that would entitle her to the grant of bail pending appeal.

For all the foregoing reasons, I find that the appellant has met the threshold for grant of bail pending appeal. Accordingly, the applicant be and is hereby released on bond of Ksh. 100,000.00 with a surety of identical amount to be approved by the Deputy Registrar of the High Court at Malindi.

That is the order of the court.

**DATED, SIGNED AND DELIVERED AT GARSEN THIS 18<sup>TH</sup> DAY OF MARCH 2021**

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**R. NYAKUNDI**

**JUDGE**