



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO 208 OF 2019**

**JULIUS KIPSANG ..... APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **JULIUS KIPSANG (the APPLICANT)** was convicted on a charge of attempted defilement contrary to section 9 of the **Sexual Offences Act**. He was sentenced to serve 30 years imprisonment. Being aggrieved with the decision, he has filed an appeal against both sentence and conviction, and in the meantime prays to be released on bail pending hearing of the appeal.

2. **Mr Sagasi** who appears for the applicant has submitted that the appeal stands high chances of success as the trial court shifted the burden of proof onto the applicant. Further, that the evidence was of a single witness whose credibility is questionable as she was economical with information about her general moral conduct. Counsel also pointed out that the sentence was manifestly excessive, thus predisposing the appeal to succeed.

3. **Mr Onkoba** on behalf of the DPP had no serious objection to the application, not so much on account of the likelihood of the appeal's success, but on account of the extraordinary circumstances prevailing due to the global pandemic of the **COVID 19 virus**.

4. Once a trial court has made a determination and found an accused guilty of the offence, he is no longer considered innocent for his guilt has already been established. In this regard, if such a convict dissatisfied with the outcome, his recourse is to appeal against the decision. With respect to bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an "overwhelming probability" that his or her appeal will succeed.

5. Needless to say the conditions applicable for bail pending trial and bail pending appeal are not the same. After trial and conviction, an accused can no longer be presumed as innocent and bail is no longer an automatic right. Such an applicant must demonstrate that his appeal has overwhelming chances of success to be entitled to bail pending appeal.

6. The Court of Appeal in the case of **Jivraj Shah -vs- Republic [1986] KLR 605**, held as follows: -

***"... If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged, and the sentence or substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist."***

7. Also in **Dominic Karanja v. Republic [1986] KLR 612** the it was held: -

***"The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo v. Republic [1972] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal."***

8. The applicant's counsel has pointed out to the issue regarding shifting the burden of proof, as well as the harsh nature of the sentence. Under section 9 of the Sexual Offences Act:

9. (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

I think the applicant has an arguable appeal with good chances of success and I find no reason to deny him being released on bail pending appeal. Consequently, he shall be released on bond of Kshs, 200,000 plus one surety of a like amount who shall be examined by the Deputy Registrar

**E-Delivered and dated this 27th day of April 2020 at Eldoret**

**H. A. Omondi**

**Judge**