



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 207 OF 2019**

**EDWIN SITIENEI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant (**EDWIN SITIENEI**) was convicted in **KAPSABET PMCC No. 3495 of 2016**, on a charge of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act- the victim being a 12 year old girl named **SJ\* [1]** He was sentenced to serve 20 years imprisonment, and has appealed against the conviction as well as the sentence. He has also filed an application dated 08/01/2020, where he prays to be granted bail pending hearing and determination of the appeal.

2. The application is premised on grounds that the appeal has overwhelming chances of success. Further, that the appellant is a man of good character, and was declared by the prosecution as a first offender, who during the trial in the lower court, had been out on bond and never failed to attend court. He laments that he stands to suffer irreparable loss and prejudice, as his appeal will be rendered nugatory if the prayer is not granted.

3. In his supporting affidavit, he deposes that the appeal is likely to succeed because the minor's evidence was uncorroborated, and he was arrested 4 days after the incident. That in any event, the minor was beaten by her mother, forcing her to implicate him, and the judgment had no factual basis, disregarding certain pertinent facts like blood likely to be as a result of the minor being on her menses

4. To further demonstrate the likelihood of his appeal succeeding, he points out that the court unfairly disallowed his wife to testify as his witness, and dismissed his alibi defence, thus shifting the burden of proof on him

5. In arguing the application, the appellant's counsel, **Mr. Magut**, submits that the applicant has an acute allergy to cold and dust which affects his eyes, and is likely to worsen with his confinement

6. In opposing the application, **Miss Okok** on behalf of the DPP submits that the appeal does not stand any chances of success, as the prosecution properly discharged the burden of proof.

7. As regards his health concerns, it is pointed out that the applicant can access treatment at the prison, and if his health needs are not met there, then he can be referred to **MOI TEACHING AND REFERRAL HOSPITAL (MTRH)** for escalated attention

8. **Miss Okok** contend that, just because the applicant did not jump bail during the trial, is not a guarantee that he will attend court for hearing and determination of the appeal as:

a) The offence he has been convicted for, is a serious one

b) The weight of the already pronounced sentence is so severe that it predisposes him to abscond

9. Section 357 (1) of the Criminal Procedure Code provides that:

**357. Admission to bail or suspension of sentence pending appeal**

**(1) 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:**

10. The principles governing grant of bail pending appeal were set out in the case of **JIVRAJ SHAH versus REPUBLIC [1986] KLR 605** as:

- a) The existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is just to grant bail
- b) If it appears prima facie that the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued
- c) The sentence or a substantial part of it will have been served by the time the appeal is heard

11. **Are there any exceptional or unusual circumstances?** The applicant claims to suffer certain health conditions, yet he has not availed any medical record to support that assertion. Secondly, it has not been demonstrated that the health facility at the prison, or at **MTRH**, are such as not to be able to avail the medical attention which the applicant requires.

12. **Circumstances indicating the appeal is likely to succeed?** The issues raised on the appeal are issues of fact, and not a weighty legal question that would prima facie suggest an overwhelming chance of success

13. **Substantial part of the sentence likely to be served?** The applicant was sentenced to 20 years on 10/12/2019 – he has not served even an eighth of the sentence. In any event, I am aware that appeals are being quickly admitted and dates are available in July 2020, so the issue of the appeal being rendered nugatory does not hold.

14. **Good conduct before conviction?** The case of **DOMINIC KARANJA VS REPUBLIC 1998 KLR 616** observed that the previous good conduct of an applicant, and the hardships, if any, that his family may be facing are not exceptional or unusual. That ill health per se would not constitute an exceptional circumstance where there exist medical facilities for prisoners. 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.

The mere fact that the appellant did not breach the bail terms at the trial court, is not enough to warrant admission to bail pending appeal. Indeed, Article 49 of the Constitution of Kenya cannot be used as a blanket provision for all matters relating to bail. Precisely because it relates to the rights of a person facing a criminal charge, and awaiting trial, and who is presumed to be innocent, unlike a case where the applicant is already convicted.

Consequently, I find that no reasons have been set out here to merit granting bail pending hearing and determination of appeal, and the application is thus dismissed.

**E-Delivered and dated this 22<sup>nd</sup> day of MAY 2020 at Eldoret**

**H.A. OMONDI**

**JUDGE**

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[1] Initial used to protect the minor's identity and privacy