



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 45 OF 2018

MERCY CHEMUTAI KOSGEY.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

[1] Before the Court for Ruling is the Notice of Motion dated **10 August 2018**. It was filed herein by the Appellant/Applicant, **Mercy Chemutai Kosgey**, pursuant to **Section 356** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** for orders that the Applicant be released on bail pending appeal. The application was premised on the grounds that:

- [a] The appeal has overwhelming chances of success as the Charge of prostitution was not established;
- [b] The Applicant is unwell;
- [c] There is danger of the Applicant serving a greater part of her sentence before the appeal is heard and determined;
- [d] The Applicant is a single parent with three young children who depend on her for their basic needs; and
- [e] It is fair and just that the Applicant be admitted to bail pending the hearing of her appeal.

[2] The application was supported by the Applicant's affidavit, sworn on the **10 August 2018** as well as her Supplementary Affidavit filed on **18 December 2018**. She averred therein that she is the Appellant in this matter; and that her appeal has overwhelming chances of success for the reason that the offence of prostitution, with which she was charged before the lower court, was not proved. She further averred that she is a single parent of three young children aged between 4 and 12 years; and that they are now in the custody of her aged parents, one of whom (her mother) is epileptic. She annexed to the Supplementary Affidavit copies of her children's Certificates of Birth to back up her assertions. She also averred that she is unwell and produced medical documents as annexures to the Supplementary Affidavit in proof thereof. She therefore prayed that she be released on bond pending the hearing and determination of her appeal.

[3] In support of the application, **Mr. Momanyi**, Learned Counsel for the Applicant reiterated the averments set out in the two Supporting Affidavits and reiterated their contention that the appeal has overwhelming chances of success; and that there is a danger of her serving a substantial portion of her sentence before the appeal is heard. He further submitted that the Applicant is a single parent of three; and that she is neither a flight risk nor a *persona non grata*. Counsel submitted that, given her circumstances, including her medical condition, it would be in the interest of justice that she be admitted to bail pending appeal.

[4] **Ms. Mumu**, Learned Counsel for the State opposed the application contending, with regard to the Charge before the lower court, that it was sufficient that the Applicant caused the minor to remain in a building for purposes of sexual abuse; which fact was proved before the lower court. Counsel further posited that the issue of the Applicant's health is one that can be managed at the Prison; and that the fact of her being a single parent and bread-winner is not an exceptional circumstance. She accordingly prayed for the dismissal of the application.

[5] I have given due consideration to the application in the light of the lower court proceedings and the Grounds of Appeal filed herein. The record shows that Applicant was charged with the offence of Child Prostitution contrary to **Section 15(a)** of the **Sexual Offences Act, No. 3 of 2006**. The allegation against her was that on **4 March 2015** at [Particulars withheld] Village within Elgeyo Marakwet County, she knowingly permitted DCK, a girl aged 17 years to remain in premises belonging to one Kipyator for the purpose of being sexually abused. The Learned Trial Magistrate heard the evidence and the Applicant's defence and was of the conclusion that she was guilty of the offence. She was accordingly convicted as charged and sentenced to 10 years' imprisonment. That is the decision from which this appeal has been filed.

[6] There is no gainsaying that the Applicant, as an appellant is entitled to bail pending appeal, for **Section 357(1)** of the **Criminal Procedure Code** recognizes 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.”

[7] However, having been convicted, the Applicant must meet a set criteria to be admitted to bail pending the hearing and determination of her appeal. These conditions are now well settled. For instance, in **Jivraj Shah versus Republic [1986] KLR 605** the principles for grant of bail pending appeal were explained thus:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interests of justice to grant bail. 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.”

[8] Likewise, in **Dominic Karanja v. Republic [1986] KLR 612** the Court of Appeal held thus:

“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.

[9] Looking at the Grounds of Appeal in the light of the evidence adduced before the lower court, while I would say the appeal is arguable, it cannot be said to have overwhelming chances of success; and as noted herein above, issues about the effect of the Applicant's imprisonment on her children are not exceptional or unusual factors. In any event, the remarks of the Learned Trial Magistrate before passing his sentence was that although a single mother, the Applicant had no parental responsibility as her children were being taken care of by others even before her imprisonment. And, as pointed out by **Ms. Mumu**, her medical condition can be attended to and managed at the prison.

[10] In the result, I am not satisfied that a good case has been made out for the release of the Applicant on bail pending appeal. I would, in the circumstances, dismiss her application date **10 August 2018**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF FEBRUARY, 2019

OLGA SEWE

JUDGE