REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 173 OF 2018.

HARRISON MUTISYA MBALUKA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING

1. By a Notice of Motion 11th October, 2018, the Applicant majorly prays to be admitted to bail/bond pending the hearing and determination of the instant appeal.

2. He was charged at Makadara Chief Magistrate's Court in Cr. Case No. 5512 of 2012 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences No. 3 of 2006. It was alleged that on 2nd April, 2012 at Mukuru Kaiyaba Slums in Industrial Area Nairobi committed an act which caused penetration with his penis into the vagina of SH a child aged four (4) years. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was found guilty of the main charge and sentenced to serve life imprisonment.

3. He preferred the instant appeal against both the conviction and sentence. In the meantime, he filed the present application. The main grounds upon which the application is premised are, *inter alia*, that his appeal has high chances of success and that he is willing to abide by any terms the court may deem just and reasonable to grant. The supporting affidavit to the application is sworn by Chadianya K. Matotse, advocate on record for the Applicant, on 11th October, 2018. The affidavit expounds on the grounds set out in the application. Basically, that the learned trial magistrate did not properly evaluate the evidence on record before reaching a decision to convict the Applicant. He cited the lack of identification of the Appellant as the culprit because the same was pegged on the testimony of a single witness. He also alludes to the fact that the Applicant is not a flight risk because whilst undergoing the trial, he remained within the court jurisdiction and did not abscond the trial. He would therefore abide by any terms the court deems best and just for his release.

4. Annexed to the affidavit is a Pre-Sentence Probation Officer's Report recommending that the Applicant is a person of good conduct and his antecedents would not render him a flight risk. He also relies on rulings namely; **Job Kenyanya Musoni V Republic (2012) eKLR** and **Susan Mbinya Musyoka V Inspector General of Police and another [2016]eKLR** which are persuasive to this court in support of the application.

5. The application was canvassed before me on 4th March, 2019 with Mr. Chindianya representing the Applicant and Ms/ Nyauncho for the Respondent. It suffices to state that the Respondent opposes the application citing that the appeal has no chances of success and that there did not exist any unusual or exceptional circumstances to warrant the grant of bail to the Applicant. I have considered the respective rival submissions and I take the following view of the application.

6. Bail pending appeal, unlike bail pending trial, is not a constitutional right. This is in view of the fact that the Appellant is now a convict who has already been found guilty of the offence he was charged with before the trial court. He does not therefore have the benefit of presumption of innocence which is normally available to an accused person who is yet to face trial. In **Samuel Macharia Njagi –vs- Republic [2013] eKLR,** Abuodha, J rendered himself as follows:

> ***"The Appellant/Applicant is prima facie a convict and his constitutional freedoms and rights are thus significantly circumscribed by his conviction. He no longer enjoys the absolute presumption of innocence available to a person facing trial at the first instance. In admitting such a person to bail the court ought to, in addition to the principles governing admission to bail pending appeal, bear in mind the possible dilemma of resending such a person to prison in event that his/her appeal fails."***

7. It is however a statutory discretion to grant bail pending appeal under **Section 357 (1)** of the **Criminal Procedure Code** which provides thus:

"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."

8. The grant of bail pending appeal is a matter of the court's discretion which must be exercised judiciously. The main principle that must be taken into account in so doing is whether the appeal has overwhelming chances of success. The court will also consider whether there are exceptional circumstances that will justify the grant of bail pending the hearing and determination of the Appellant's appeal. The court in the case of **Jivraj Shah vs Republic** [**1986] KLR 605** laid down the principles as follows:-

(i). The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.

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

(iii). The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.

9. In the instant application, learned counsel for the Applicant merely made a statement that the application had high chances of success, reasons wherefore bond should be granted. On the part of the Respondent, M/s Nyauncho argued that all the three elements constituting the offence of defilement namely; proof of the age of the minor, proof of penetration and proof of identification of the perpetrator were sufficiently established. As regards to the age, she submitted that a birth certificate was adduced in court establishing that the minor was four years old as at the time of the offence. As regards penetration, she submitted that in addition to the evidence of the minor, PW2 who was a Clinical Officer confirmed positively by indicating that the minor had a vaginal tear. With respect of the identification of the A appellant, she submitted that the same was by recognition as the complainant knew him prior to the incident.

10. On the part of this court, I have scrolled through the evidence adduced in court. A total of five prosecution witnesses testified. Without pre-emptying the result of the intended appeal, my view is that although the Appellant may have an arguable appeal, the same may not necessarily succeed. The witnesses were able to demonstrate that he was culpable. At this point, it is best that the court that will hear the appeal adequately re-evaluates the evidence and comes up with an independent decision. For purposes of this application, I leave it at the point that the appeal may most unlikely succeed.

11. As regards to whether their exists any exceptional or unusually circumstances to warrant the grant of bail, the Applicant's counsel argues that the Applicant was of good conduct, a fact that was attested by the Pre-sentence Probation Officer's Report. It was also argued that he did not abscond throughout the trial and so he was not a flight risk. The court was persuaded to rule in his favour based on the cited case law.

12. My view is that the application on this ground would succeed if, *prima facie*, the appeal itself has high chances of success either on conviction or sentence. As regards the conviction, I have already delivered myself of on the same. As pertains to the sentence, the Applicant was sentenced to life imprisonment which sentence has no time limit as it is dictated by the life of the convicted person. Therefore, it cannot be argued that he will have served a substantial part of the sentence by the time the appeal is heard and determined as was held in the case of **Jivraj Shah V Republic** (Supra). Further, as the Court of Appeal held in the case of **Dominic Karanja v Republic (1986)eKLR** held that:

"b) 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; c) 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..",

the mere fact that the Applicant was of good conduct and did not abscond the trial does not constitute good grounds for the grant of bail pending appeal. Of course the rationale to this proposition is that the Applicant is deemed to have been convicted by a competent court and is deemed guilty until and unless the conviction or sentence is upset by a court of a higher jurisdiction. That position obtains in the instant case.

13. In the circumstances, I find this application unmeritorious and I dismiss it with no orders of costs.

DATED and DELIVERED this 26th day of MARCH, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *M/S Ambani h/b for Mr. Chidianyi for the Appellant/ Applicant.*

2. *M/s Sigei for the Respondent.*