REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 1 OF 2019

EZEKIEL KIMWANGI NJAGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Mwingi Senior Resident Magistrate's Court Criminal Case No. 596 of 2015** by **Hon. W. G. Kirugumi (SRM)** on **28/12/18)***

R U L I N G

1. **Ezekiel Kimwangi Njagi,** the Applicant was convicted of the offence of **Rape** and sentenced to **ten (10) years imprisonment.** He filed a Memorandum of Appeal and approached this Court by way of Notice of Motion seeking bail pending Appeal.

2. The Application is premised on grounds that the Appeal contains serious points and raises arguable grounds and has overwhelming chances of succeeding; that the Applicant has a medical condition and his continued incarceration may jeopardize his health; he is a nurse at **Waita Health Centre** and is likely to lose his employment, he was on bond of **Kshs. 200,000/=** but did not abscond and that he is a sole breadwinner of his family that consists of a wife and three children.

3. The Application is supported by an affidavit deponed by **Okello H. O. Advocate** who reiterated what is stipulated on the body of the Application and added that the Applicant is of poor health, requires constant medical attention with special diet and that his health condition is likely to deteriorate while in custody serving sentence and that the Respondent does not stand to suffer prejudice if the Application is allowed.

4. In response the Respondent through learned State Counsel **Mr. Mamba** swore an affidavit where he deposed that the affidavit sworn and the annextures thereto do not prove the existence of exceptional circumstances to warrant the Court to grant bail pending Appeal. He dismissed treatment notes issued bearing a stamp impression of **Mwingi Sub-County Hospital** as being outdated therefore having not disclosed any reason to warrant granting of bail. He called upon the Court to uphold the rule of law and find that the presumption of innocence did not apply as the Applicant was already convicted.

5. In his oral submission Counsel for the Applicant **Mr. Okello** urged that the charge was defective for failure to include the words "unlawful" in the particulars of the offence. In this regard he relied on the case of **Daniel Nyareru Achoki vs. Republic (2000) eKLR** where the Court held that:

> ***"The particulars of the offence of attempted rape upon which the appellant was convicted did not state that the attempted carnal knowledge was unlawful and was without the consent of CKK (PW1). That the charge did not disclose an offence known to the law and the appellant was wrongly convicted on it."***

6. This, in his opinion satisfied the requirement that the Appeal had a high chance of succeeding.

7. In response, the learned State Counsel, **Mr. Mamba** urged that there were no exceptional circumstances that required the Appellant being released on bail. That bail at this stage is not automatic and that the Appellant faced an alternative Count that bears the word "unlawful" and that an error of omission is curable.

8. I have duly considered rival submissions of both Counsels. In the case of **Dominic Karanja vs. Republic (1986) KLR 612** the Court of Appeal stated thus:

> ***"a. The… appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances. (Emphasis added)***

b. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

c. 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.

d. Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful."

9. In the case of **Mutua vs. Republic (1988) KLR 497** the Court of Appeal stated thus:

"It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so."

10. Reasons given by the Applicant herein as necessitating his release on bail as stated in the cited authorities are not exceptional circumstances that would call for his release at this point in time as he is not presumed to be innocent having been convicted by a properly constituted Court.

11. Regarding the success of the Appeal the only issue pointed out is an alleged omission in the particulars of the offence. Such an omission may be curable; and as correctly pointed out there exists an alternative count. In the circumstances I find no reason to invoke the discretion bestowed upon me by statute. Consequently, the Application fails and is dismissed.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 25th day of April, 2019.

L. N. MUTENDE

JUDGE