

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL 53 OF 2019

MOSES KIMATHIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being An Appeal Against The Conviction And Sentence In The Judgment Of Hon. E.w. Ndegwa In Githongo Rm Sexual Offence Case No. 15 Of 2018 Republic V Moses Kimathi Delivered On 5th March 2019)

RULING

1. The Appellant has by an application dated 19th March, 2019 sought to be released on bail/bond pending the hearing and determination of his appeal against the above decision.
2. Counsel for the appellant submitted that the appellant is a student who had just concluded form Four hence is in his formative age. He relied on the case of **Gerald Macharia Githuka v Republic [2015] eKLR** and urged that applicant be granted bail. He also submitted that the appeal has high chances of success.
3. The prosecution opposed the application and submitted that the right to bond is for those who have not gone through trial. That Article 49 does not apply to bond at this stage. That bond or bail pending appeal is in the discretion of the court.
4. It was submitted for the respondent that bail or bond pending appeal can only be granted if it is demonstrated that; by the time the appeal is heard the appellant would have already served a substantial term, the existence of special circumstances that warrant consideration. Finally, that the appeal has overwhelming chances of success. Counsel for the respondent submitted that none of the foregoing was demonstrated.
5. I have considered the entire record and the submissions of Counsel. I agree with the respondent's Counsel that bail or bond pending appeal is in the discretion of the court. The court must be satisfied that there are exceptional circumstances. In the present case, no such circumstances were established. There was no proof that the appellant was proceeding to or had been admitted to any College and that that warranted him to be considered for release.
6. An applicant for bail pending appeal must also demonstrate that the hearing of the appeal will delay whereby the applicant would have served a substantial portion of the sentence. In the present case, the proceedings of the lower court are ready and the original record has been received from the trial court. The appeal can be heard and determined in less than two months.
7. Further to the foregoing, since in an application for bail pending appeal the court is dealing with a person who has undergone due process and duly convicted, there is no more presumption of innocence. In this regard, the applicant must show that his appeal has overwhelming chances of succeeding. **See Jivraj Shah v. Republic [1986] KLR 605.**
8. In the present case, I have perused the draft petition of appeal. Without delving as to the merits of the appeal which is the realm of the court that will try the appeal, I am unable to say if the applicant's appeal has any overwhelming chances of success.
9. In the circumstances, I find that the application has no merit and I dismiss the same. I will however, give directions that it be prosecuted and concluded within 60 days.

DATED and **DELIVERED** at Meru this 30th day of May, 2019.

A. MABEYA

JUDGE