



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 99 OF 2019

ISAAC MUTIE NTHENGE.....APPELLANT/APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The **Appellant/Applicant** filed this application through Muumbi advocate under Article 159(2) of the constitution Section 356 and 357 of the Criminal Procedure Code seeking an order releasing the Applicant on bond pending appeal.
2. The main ground is that the Applicant having been convicted for an offence of defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offence Act No. 3 of 2006 and sentenced to ten (10) years imprisonment has preferred an appeal.
3. Further that it may take time before the appeal is heard, yet the sentence meted out against him is unlawful. That the Applicant is not a flight risk.
4. The application is supported by the Applicant's affidavit sworn on 17th June, 2019. In it he has expounded on the grounds raised in support of the application. He has deponed that he was a minor at the time of the alleged offence and this was not taken into account at the time of sentencing. To him, the appeal has very high chances of success.
5. He has deponed that he has a fixed abode and if released on bond he will ensure he abides by the conditions given to him. Mr. Muumbi for the Appellant/Applicant filed six (6) authorities in support of his application.
6. The State did not file any response to the application.
7. When the application came for hearing Mrs. Owenga for the State had this to say:

“I have not filed our response to the application due to pressure of work. I wish to state that I am not opposed to the application. I have noted from the proceedings in the lower court that the Applicant had been on bond and complied with the conditions. I believe if released on bond he will comply with the conditions. Otherwise I leave the rest to court”.

8. In response Mr. Muumbi added that the Applicant has met the threshold for grant of the order sought. He submitted that the appeal has high chances of success as they had raised serious issues of law including the age of the Applicant at the time of the alleged offence which was not addressed by the trial court.
9. Section 356 and 357 of the Criminal Procedure code gives this court the mandate to deal with the application before it. It provides: -

Section 356 (1) The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.

Section 356 (2) If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the term of his sentence, unless the High Court or failing that court the subordinate court which convicted and sentenced the person, otherwise orders.

Section 357(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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High court, but a person so refused bail by a subordinate court may appeal against refusal to the High court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not

be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefore, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

10. I do confirm that the Applicant has filed an appeal which is yet to be admitted. The lower court record has been placed before me for perusal. The prosecution presented three (3) witnesses who testified against the Appellant/Applicant. i.e. the complainant (Pw1), the doctor who produced the P3 form (Pw2) and the father to the complainant (Pw3). The Appellant/Applicant gave an unsworn defence and called no witnesses.

11. I have not seen anywhere mention of the Applicant's age, in the proceedings. I however note that the Applicant was 1st arraigned in court on 11th November 2015 and the matter was not determined until 31st May, 2019. He faithfully attended court during the entire period.

12. As I have already mentioned the original file with typed proceedings is already before this court. All that is left is the preparation of the record of appeal and the appeal placed before this court for admission. I therefore do not see any reason for a delayed hearing.

13. Be it as it may the Appellant/Applicant has in his amended appeal raised a number of grounds which he has to prove before this court. I would not wish to discuss them and as the record is before me and I have read through it.

14. The State has not opposed the application nor raised any fears in respect to the Applicant's turning up in court.

15. I therefore allow the application and grant him bond pending appeal on the following conditions.

i. He will be released on a bond of Kshs.300,000/= with a surety in similar sum.

ii. In the alternative he may be released upon payment of a cash bail of Kshs.120,000/=.

iii. Upon approval by the Deputy Registrar the matter will be mentioned on a monthly basis before the Deputy registrar until the appeal is heard.

iv. The Appellant/Applicant must be present during the hearing of the appeal.

DELIVERED, SIGNED & DATED THIS 24TH DAY OF JULY 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE