



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 65 OF 2019**

**ROBERT KIMUTAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. One of the prayers in the Notice of Motion dated **25 March 2019** is that, pending the hearing and determination of this appeal, the Court be pleased to order that the Appellant be released on bail or bond on such conditions as the Court may deem reasonable. The application was premised on the ground that the appeal is an arguable appeal, with high chances of success; and that the Appellant was given bond in the lower court, though he was unable to avail a surety to post bail for him. The application is supported by the Appellant's affidavit, sworn on **25 March 2019** and was argued by **Mr. Kipkorir** on behalf of the Appellant. He submitted that the Appellant is not a flight risk; and that he is ready to abide by any conditions that may be imposed by the Court.

2. **Ms. Mumu**, Learned Counsel for the Respondent, opposed the application, contending that the Appellant had neither demonstrated that the appeal has high chances of success, nor shown any other justifiable cause to warrant his release on bond. She accordingly urged for the dismissal of the application.

3. **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.”**

4. Nevertheless, having been convicted, it is a requirement of the law that the Applicant must meet certain conditions to be admitted to bail pending the hearing and determination of his appeal. These conditions are now well settled. For instance, in **Jivraj Shah vs. Republic [1986] KLR 605** the principles for grant of bail pending appeal were explained thus:

**“...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.”**

5. A similar position was taken by the Court of Appeal in **Dominic Karanja v. Republic [1986] KLR 612** 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.**

6. The Appellant was charged with attempted rape contrary to **Section 4 of the Sexual Offences Act No. 3 of 2006**. The Prosecution called four witnesses before the lower court; and, in addition to the Complainant, there was an eye witness who responded to the Complainant’s distress call and found the Appellant lying on top of the Complainant. Hence, while I would say the appeal is arguable, I am far from satisfied that it has overwhelming chances of success. In the same vein, there was no demonstration of any exceptional circumstances to warrant the admission of the Appellant to bail. It is to no avail that the Appellant was given the opportunity to be released on bond by the lower court; and as has been observed herein above, the fact that he is married with two children is not an unusual or exceptional factor.

7. In the result, I am not satisfied that a good case has been made out for the release of the Appellant on bail pending appeal. I would, in the circumstances, dismiss Prayer 4 of his application dated **25 March 2019** and accordingly finally dispose of that application.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 9<sup>TH</sup> DAY OF AUGUST 2019.**

**OLGA SEWE**

**JUDGE**