



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KISUMU

#### CRIMINAL APPEAL NO. 61 OF 2019

BETWEEN

**ERICK OMONDI AKENDU.....APPELLANT/APPLICANT**

AND

**REPUBLIC.....RESPONDENT**

#### RULING

1. On 24<sup>th</sup> October, 2019; the Applicant/Appellant was convicted for the offence of defilement of a girl contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 in **Maseno S.O NO. 79 OF 2018** and was sentenced to serve 20 years' imprisonment.

2. By a Notice of Motion dated 04<sup>th</sup> November, 2019 brought under Article 50 (f) and (q) of the Constitution and Section 357 of the Criminal Procedure Code the Applicant/Appellant has moved the court praying for orders that:

**This Honourable Court be pleased to suspend the sentence and or admit the Applicant/Appellant to bail pending the hearing and determination of the appeal with or without sureties**

3. The application is based on the grounds **THAT**:

**a. The Applicant was on bail during the trial**

**b. The Applicant has filed an appeal**

**c. The applicant is not a flight risk**

**d. Application is ready, able and willing to provide security to ensure he appears in court**

4. The application is supported by an affidavit sworn on 4<sup>th</sup> April, 2019 by Washington Athung'a, advocate for the Appellant/Applicant in which he reiterates the grounds on the face of the application.

5. Ms. Gathu, learned counsel for the state opposed the application on the grounds that Applicant/Appellant had not established exceptional circumstance for bond pending appeal.

6. I have carefully considered the application. Section 357 of the Criminal Procedure Code provides: -

**(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**

7. This court is thus clothed with the power to grant bail/bond with or without sureties, or to suspend execution of any sentence imposed by the subordinate court pending the hearing of the appeal. In granting bail pending appeal, the court is obliged to consider the circumstances of each case so that the discretion is exercised judiciously and not capriciously.

8. In the case of **Jivraj Shah -vs- Republic [1980] KLR 605**, the Court of Appeal set out the parameters to be considered by an appellate court in applications for bail pending appeal as follows: -

a. 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

b. 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 urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

c. 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 Mutua v R, [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 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. In view of the foregoing, the onus is always on the Appellant to demonstrate to the court that there are good reasons why he/she should not be allowed to continue serving sentence but should be allowed to enjoy his/her liberty pending the hearing and determination of his or her appeal.

11. The Applicant/Appellant herein has not demonstrated to the court, through affidavit that there exist a set of circumstances which disclose substantial merit in the appeal. The contention that Applicant/Appellant was on bond during the trial on its own does not entitle the Applicant/Appellant to bond pending appeal.

12. Regarding compelling reasons provided for under the provisions of Article 49(1) (h) of the Constitution, I am in agreement with the state that the Applicant/Appellant herein cannot benefit from the said right which guarantees **an accused the right to be released on bond or bail, on reasonable conditions, pending a charge and trial, unless there are compelling reasons not to be released**, since he is not an accused but a convict. (*Emphasis mine*)

#### **Disposition**

13. For all the foregoing reasons, I have come to the conclusion that the Applicant/Appellant has not passed the test for grant of bond pending appeal. The Notice of Motion dated 04<sup>th</sup> November, 2019 is not merited and it is accordingly dismissed.

**SIGNED AND DELIVERED IN KISUMU THIS 21<sup>st</sup> DAY OF November, 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Amondi/Okodoi

Appellant - Present

For the Appellant - Mr. Maua hb for Mr. Athunga

Counsel for the State - Ms. Gathu