



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL NO. 89 OF 2017

NDAMBUKI MUTIE.....1ST APPLICANT

MOSES MUTIE NDAMBUKI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application herein is by the 1st Applicant, who was charged with the offence of defilement contrary to section 8(1) and(3) of the Sexual Offences Act, at the Machakos Chief Magistrate's Court Criminal Case No.743 of 2013. He pleaded not guilty, was tried and convicted, and sentenced to serve fifteen (15) years imprisonment. Being aggrieved, he filed an appeal against the judgment of the trial Court by way of a Petition of Appeal dated 17th July 2017. The Applicant also subsequently filed an application by way of a Notice of Motion dated 28th August 2017 seeking orders that he be granted bail pending the outcome of his appeal.

The main grounds of the application are set out in an affidavit sworn on 20th February 2017 by his Advocate, Leonard Nzioka Ngolya, which are that the 1st Applicant's appeal has a high chance of success, in that he has set forth substantial points of law, the most important being that the trial magistrate noted the existence of gaps in the prosecution's evidence, and required the Applicants to fill these gaps thereby shifting the burden of proof to the 1st Applicant. Further, that the 1st Applicant is a civil servant and if he is not released bail pending hearing of the appeal, he will lose his job and his appeal will be rendered nugatory as he serves the whole or substantial part of the sentence. Lastly, that the 1st Applicant is ready and willing to abide by any conditions this Court may impose on his bond.

The 1st Applicant's learned counsel also filed a further affidavit he swore dated 9th November 2017, wherein the above arguments were reiterated, and he further stated that the trial Court omitted to make reference to Defence exhibits that exonerated the 1st Applicant. The counsel submitted that a ruling be given on the basis of the application and the affidavits he filed.

The learned Prosecution Counsel, Ms. Rita Rono, opposed the application in a replying affidavit she swore on 24th October 2017, wherein she deponed that the Applicant has not demonstrated that his appeal has high chances of success, and Article 49 of the Constitution no longer applies to the 1st Applicant since he was tried and convicted by a court of competent jurisdiction. Further, that the 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.

According to the prosecution counsel, the sentence of 15 years imprisonment is lenient, and she put the 1st Applicant on notice that the state shall at the hearing of the appeal seek enhancement of the sentence. The learned Prosecution counsel wholly relied on her replying affidavit and did not file written submissions.

I have considered the pleadings by the 1st Applicant and Prosecution. I note that unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proved guilty, an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In **Mutua vs 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 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.”

A different test from that applied in bail pending trial is therefore applied in bail pending appeal. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

- a. Whether the appeal has overwhelming chances of success. See **Ademba vs Republic (1983) KLR 442**, **Somo vs R [1972] E.A 476**, **Mutua vs R [1988] KLR 497** in this regard;
- b. There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. In this regard see **Ragbir Singh Lamba vs R [1958] E.A 337**; **Somo vs R (supra.)**; **Mutua vs R (supra.)**
- c. There is a high probability of the sentence being served before the appeal is heard as held in **Chimabhai vs R, [1971] E.A 343**.

In the instant application, the argument by the Applicant that his appeal has a high change of success must be subjected to examination *vis-a-vis* the evidence produced in the trial Court and applicable legal principles. Therefore, it cannot be established at this stage. However, this notwithstanding, I have perused the record of the trial Court proceedings, and indeed note certain gaps in the evidence as concerns the 1st Applicant's commission of the offence he was convicted of.

Given this circumstance, I am satisfied that this is a proper case in which to exercise this court's discretion in favour of the 1st Applicant. I accordingly grant the prayer for bail pending appeal in the Applicant's Notice of Motion dated 28th August 2017 on the following terms:-

1. That pending the hearing and determination of the appeal herein, the 1st Applicant be released on his own bond of Kshs.500,000/= (Kenya Shillings Five Hundred Thousand) with one (1) surety of a like amount;
2. The surety shall be approved by the Deputy Registrar of the Machakos High Court;
3. The 1st Applicant will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until his appeal is heard and determined.
4. The 1st Applicant shall be required to attend court for the hearing of the appeal without fail.
5. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and sureties called to account.
6. There shall be no order as to costs.

It is so ordered.

DATED AT MACHAKOS THIS 21ST DAY OF MARCH 2018.

P. NYAMWEYA

JUDGE