



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 41 OF 2016**

**KAVOO KIMONYI.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From the original conviction and sentence of Resident Magistrate Gilbert Shikwe at Kithimani, Criminal Case No. 33 of 2014).***

**RULING**

1. The accused person **KAVOO KIMONYI** was charged with the offence of Defilement contrary to Section 8(1)(3) of the Sexual Offences Act No.3 of 2006.The particulars of the offence are that:

**“On 19<sup>th</sup> October,2014 and 23<sup>rd</sup> October,2014 in Masinga Sub-County within Machakos County the accused person intentionally caused his penis to penetrate the vagina of W.N a child of 14 years.”**

The appellant also faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006.The particulars of the offence are that:

**“On 19<sup>th</sup> October,2014 and 23<sup>rd</sup> October,2014 in Masinga Sub-County within Machakos County intentionally touched the vagina of W.N a child aged 14 years with his penis.”**

2. The accused was found guilty, convicted and sentenced to serve twenty (20) years imprisonment through a judgment delivered on 21<sup>st</sup> June 2016 by the Resident Magistrate Hon Gilbert Shikwe at Kithimani.

3. By a **Notice of Motion** dated 28<sup>th</sup> June of 2016 the accused person now seeks to be released on bail or bond pending the hearing of his appeal on such reasonable terms as the court may determine. The application has been brought under **Section 356(1)** of the Criminal Procedure Code.

4. The application is premised on five grounds on the face of the Motion which are that:

*(i) The Applicant was on 21<sup>st</sup> June 2016 convicted and sentenced to twenty (20) years in prison by the Kithimani Resident Magistrate’s Court in Criminal Case No. 33 of 2014.*

*(ii) The applicant has moved expeditiously and lodged an appeal against the said conviction and sentence.*

*(iii) The appeal might take some time for hearing and determination.*

*(iv) It is only fair and just that the Appellant/Applicant be granted bail and/ stay of execution pending the hearing and disposal of the appeal.*

*(v) The appeal has high chances of success.*

5. The Application is further grounded on a supporting affidavit dated 29<sup>th</sup> June, 2016 sworn by KAVOO KIMONYI, the accused. He went on to depone that having been charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No 3 of 2006 he was convicted and sentenced for twenty years imprisonment. Further he stated that he preferred an appeal against the judgment and order.

6. He stated that he was well aware that owing to the many cases this Honourable court has, his appeal might take a bit longer before it is

heard and determined. He also stated that throughout his trial by the Lower Court he was out on bond and there is no single day he absconded bond. He also stated that he was a frail senior citizen and his health does not accord him the opportunity to jump bail.

7. That he urged the court to stay the execution of the sentence of the lower court and grant him bond/bail pending hearing and determination of his appeal, which has great chances of success. He attached a draft copy of the Petition of appeal marked "KK-1"

### **Respondent's Replying Affidavit**

8. The Respondent in opposing the application filed a replying affidavit sworn on 13<sup>th</sup> November, 2017 He went on to state that the applicant had not demonstrated that his appeal has any chance of success since that was an assertion that can only be proved upon full hearing of the appeal.

9. Further the respondent stated that the applicant had not demonstrated that there were any exceptional circumstances that would warrant the court to exercise its discretion in his favour.

10. The application was canvassed by way of written submissions by both parties.

### **Submissions by the Appellant**

11. The appellant in his submissions relied on **Section 357 (1)** of the Criminal Procedure Code which provides for admission to bail or suspension of sentence pending appeal provides 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."***

12. Placing reliance on the judicial authorities he cited the case of **Dennis Yobesh Ombogo & another –Vs- Republic (2014) eKLR where Justice Sitati held that:**

***"this court was 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."***

He outlined the principles and guidelines upon which bail pending appeal is anchored as outlined in **Jivraj Shah vs. Republic (1986) KLR 605** which are:-

***(i) 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.***

***(ii) 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.***

***(iii) 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.***

13. He went on to state that in the Ombogo case(supra) Justice Sitati had cited the Court of Appeal case of **Ademba -vs.- Republic (1983) KLR 442** where the Court of Appeal inter alia held that:-

***a. Bail pending appeal may only be granted if there are exceptional or unusual circumstances.***

***b. The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties in view of the unlikelihood of success in this appeal, the application could not succeed.***

14. On whether the applicant's appeal has overwhelming chances of success the applicant submitted that the trial magistrate had found that the testimony of the complainant differed with the statement recorded in police station and that the mother (PW 3) and aunt (PW 5) to the complainant were not truthful and that ought to have tilted the scales in favour of the appellant.

15. Further the testimony of all the prosecution witnesses was not credible and therefore such was unreliable and the trial magistrate ought to have disregarded the same. On the other hand the trial magistrate had failed to consider the defence by the appellant that there was a long standing land dispute where members of the appellant's family were assaulted by the complainant's relatives.

16. Based on the foregoing the appellant prayed to court to allow the bail application in consideration of his frail health and the fact that he is likely to have served a considerable amount of his sentence before the appeal is heard and determined.

### **Respondent's Submissions.**

17. The respondent filed their submissions on 20<sup>th</sup> December 2017. He went on to submit that it was worth appreciating the fact that the appellant was now a convict having stood trial in a competent court and he therefore no longer enjoyed the right to bail enshrined under **Article 49(1)(h)** of the Constitution of Kenya.

18. He further indicated that the threshold for an application and/ or grant of bail pending appeal is much higher than that of an accused person and therefore there ought to be sufficient grounds advanced for the same and therefore at that stage the presumption of innocence no longer applies.

19. He relied on the case of **Jeremiah Mwangi Ngatia- Vs-Republic, Criminal Appeal No 110 of 2011** where the court in considering whether or not to grant bail pending appeal, ought to bear in mind that it involves the proposition that a person who has been found guilty and convicted by a court of competent jurisdiction and whose sentence of imprisonment has not been set aside, must nevertheless be let loose on the community instead of staying in prison to serve sentence which is prima facie deserved.

20. He went on to indicate that the appellant having been convicted, his constitutional freedoms and rights were significantly circumscribed by his conviction. They relied on **Somo –Vs-Republic (Supra)** and therefore an appeal with great chances of success must be demonstrated before bail pending appeal can be granted.

21. While relying on the conditions of bail pending appeal as set out in the case of **Dominic Sibi Peter -Vs- Republic (2014) eKLR** which quoted with approval the case of **Dominic Karanja- Vs- Republic (1986) KLR 162** they submitted that the applicant had not advanced any ground to satisfy the Honourable court that justice will be endangered if he is not granted bail pending appeal. Hence the appellant had not demonstrated that his appeal has overwhelming chances of success.

22. The Respondent further submitted that the Appellant who was charged with the offence of defilement where prosecution was to prove the age of the victim, there was penetration and that the penetration was caused by the appellant, the same had all been proved by the evidence tendered by PW-3, PW- 4 and PW-1 respectively.

23. In conclusion the Respondent urged this court to find that the application lacks any exceptional circumstance to warrant the grant of bail pending appeal and thus should be dismissed in its entirety.

### **Determination**

24. I have perused the petition of appeal and also the proceedings and judgment in this case. I do not agree with the applicant that his appeal has overwhelming chance of success as the same is yet to be heard. In order not to pre-empt the appeal I will just mention that it may not lead to an outright discharge.

25. When considering an application for bail pending appeal the court has discretion in the matter. However, that discretion must be exercised judiciously. The Applicant in this case was convicted of defilement. He was sentenced by the RM Court at Kithimani on 21<sup>st</sup> June 2016. I can state that the Appeal may be arguable but I do not see it having an overwhelming likelihood of success.

26. Having considered the application I decline to grant the Applicant bail pending his appeal simply because there are no exceptional reasons for me to grant bail. The applicant states that he is frail and he thinks that he might have served a substantial period of the sentence before the appeal is determined. These are not exceptional as the Prisons have health Practitioners who ensure that convicts are treated whenever they fall sick and secondly the assumption that the appeal might take long before being determined is not true. Since the same can be speedily suffice to add that most appeals are canvassed by way of written submissions and this appeal is no exception.

27. As a result I do direct that the appellant stays in custody until his appeal is heard and determined. The Applicants application is hereby dismissed. Parties are hereby directed to set down the Appeal for hearing on priority basis.

Orders accordingly.

**Signed, Dated and Delivered at Machakos this 8<sup>th</sup> day of March, 2018.**

**D.K. KEMEI**

**JUDGE**

**In the presence of:**

Kaluu - for the Applicant/Appellant

Machogu - for the Respondent.

Kituva - Court Assistant