



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 50 OF 2017

SILAS MUGENDI KARIUKI.....APPLICANT/APPELANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant in his application dated 29/01/2018 seeks for order for release on bond pending hearing and determination of the appeal.
2. The applicant in his appeal has challenged the judgment of Embu Senior Resident Magistrate delivered on 2/11/2017. He was convicted of the offence of defilement and sentenced to life imprisonment.
3. The grounds supporting the application is that the appeal has overwhelming chances of success. The complainant did not testify this rendering the evidence before the court hearsay. The *voire dire* test was not conducted as required by the law.
4. It is further argued that this court's diary is congested and that the appeal may take a long time to be heard. For that reason the applicant may serve a substantial part of the sentence before his appeal is heard and determined. Finally, that the alibi defence was not considered by the court.
5. The respondent opposed the application on grounds that the conviction was safe for the case was proved to the standards required. The minor was a vulnerable witness being 4 years old and could only testify through her mother. There were other independent witnesses in the case and the court relied on their evidence and rightly convicted the applicant.
6. The respondent further states that this appeal has no chances of success. The alibi defence was an afterthought or it was raised at the close of the case.
7. This appeal was argued by way of submissions. I have perused the said submissions and considered the arguments of the parties in support or in opposition of the application.
8. In an application of this nature, the applicant requires to demonstrate that his appeal has overwhelming chances of success that exists exceptional circumstances.
9. The respondent relied on the case of ***KRISHNAN VS THE PEOPLE*** (no reference) where it was held that the likelihood of delay in determining the appeal is one of those exceptional circumstances.
10. The applicant has this issue of likelihood of delay in determining the appeal is one of those exceptional circumstances. I am aware this is a one judge station and quite busy, however, this court has a special arrangement of determination of criminal appeals which eases the workload and mitigates delay. Such an arrangement is on course in the course of this year and I do not think that delay in hearing this appeal is likely to occur.
11. The applicant has been convicted of a serious offence and sentenced to life imprisonment. He has lost the presumption of innocence provided for by Article 50(2) of the Constitution. Bail pending appeal is different from that of a person whose trial is pending in that different considerations have to be made.
12. It was held in the ***KRISHNAN case (supra)***:-

It is important to bear in mind that in an application for bail pending appeal, the court is dealing with a convict, and such sufficient

reasons must therefore exist before such a convict can be released.

13. The burden of proof is upon the convict to demonstrate that there is an overwhelming probability that the appeal will succeed.
14. The applicant relies on two main grounds in his argument that his appeal has overwhelming chances of success.
15. Firstly, that the complainant did not testify. It is on record that the complainant was a four year old child. The mother testified on her behalf for she was indeed a child of tender years who was not in a position to give evidence. She may not have been possessed of sufficient intelligence and courage to give evidence either in court or in camera.
16. She reported the incident to her mother immediately after. The mother examined her and of course was in a position to testify on what she witnessed and on what the child reported to her. The medical evidence was to corroborate this evidence.
17. Without pre-empting the appeal, I am of the considered opinion that the applicant cannot claim to have been convicted of hearsay evidence.
18. In the case of ***KINYATTI VS REPUBLIC [1884] KLR***, the court dealt with the issues of hearsay evidence. I appreciate the principles of admissibility of hearsay evidence set out therein. However, I find that the case of a vulnerable witness is an exceptional one that must be treated differently with that of a witness possessed of the capacity to give evidence. Since the child was not testifying, no purpose would have been served by conducting a “voire dire” test.
19. On the issue of the alibi which the applicant said was not considered, I have perused the judgment. The magistrate dealt with the defence of the applicant as a whole on the last page of the judgment.
20. In the case of ***CHARLES MUKABI VS REPUBLIC [2016] eKLR*** the court held that the appeal was arguable for the reason that the defence of the applicant was no given due consideration.
21. This case is distinguishable from the one before me in that the magistrate considered the defence as a whole without giving specific reference to the alibi. This situation does not qualify this appeal for having overwhelming chances of success.
22. The applicant relies on the case of ***MUNJIA MICHUBU VS REPUBLIC [2014] eKLR***. The principles on bail pending appeal were explained. It was held that the applicant must demonstrate that his appeal has exceptional or unusual circumstances or that it has overwhelming chances of success.
23. It is my considered opinion that the applicant has failed to demonstrate that his appeal has overwhelming chances of success. He has not shown that any exceptional circumstances exist to justify granting of bail pending appeal in this case.
24. I find no merit in this application and it is hereby dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF MAY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Mate for Respondent

Ms. Mutegi for Andande for Applicant

Applicant present