



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.201 OF 2017**

**(Appeal Originating from Nyahururu CM's Court Cr.No.931 of 2015 by: Hon. J. Wanjala – C..M.)**

**JOHN MUGO GATHONI.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**John Maina Gathoni**, the applicant, was on 31/10/2017 convicted for the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act and sentenced to 20 years imprisonment. He is aggrieved by the said conviction and sentence and filed Cr. Appeal No.201/2017 together with the Chamber Summons dated 26/3/2018 seeking to be released on bail pending the hearing of the appeal. The application is based on grounds found on the face of the application and an affidavit sworn by the applicant on the 26/3/2018. Through his counsel, Mr. Waichungo, the applicant argued that he had been on bond in the Lower Court and attended court faithfully for 2 years and will do likewise if released; that he has a young family which depends on him; that he has filed an appeal which has high chances of success and lastly that the appeal is likely to take long before it is heard and the applicant may serve a substantial part of the sentence.

Ms. Rugut, counsel for the State opposed the application contending that the appeal has no chances of success; that the applicant having been sentenced to 20 years imprisonment, is unlikely to serve most of the sentence before the appeal is heard. Counsel also argued that bond is a Constitutional right before conviction but at this stage, it can only be granted in exceptional circumstances.

The principle considerations in the grant of bail pending appeal were considered in the case of *Jivraj Shah v Republic (1986) KLR 605* which laid the principles inter alia;

- 1. The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.**
- 2. If it appears prima face 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.**
- 3. 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.”**

Other considerations are whether the applicant is likely to serve a substantial part of the sentence before the appeal is heard and determined. In *Dominic Karanja v Republic (1986) KLR 612*. The Court of Appeal laid down the following principles as pre conditions for grant of bail pending appeal:

- a. The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;**
- b. The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;**
- c. A 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;**

d. ....

Unlike an application for bond pending trial under Article 49 of the Constitution, the applicant has already been found guilty and does not have the benefit of the presumption of innocence provided under the above Article. See *Chimambhai v Republic 1971 EA 343* where J. Harris observed “*The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases.....*”

The grant of an order of bail pending appeal is an exercise of the court’s discretion which has to be exercised judiciously, taking into account the principles espoused in the cases considered above.

The applicant was sentenced to 20 years imprisonment on 31/10/2017. It is unlikely that the applicant will serve a substantial part of the sentence before the appeal is heard.

The court has had a cursory look at the Lower Court record and without going into the merits, the applicant has not attempted to demonstrate that the appeal will automatically succeed.

As regards the applicant’s contention that he attended the Lower Court faithfully while on bond, a conviction now hangs on his neck and the prospects of absconding cannot be wished away.

As regards the applicant’s young family, that is not a ground for grant of bail because nearly all convicts would raise the same reason for release on bond and there would be nobody serving sentence because of family commitments.

For the above reasons, I find no merit in the application. It is hereby dismissed.

**Dated, Signed and Delivered** at NYAHURURU this 18<sup>th</sup> day of May, 2018.

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Ms. Kirui - Prosecution Counsel

Ms. Wanjiru holding brief for Mr. Waichungo for applicant

Soi - Court Assistant

Appellant – present