



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 28 OF 2018**

**POLYCAP SIMON MSHORE.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act (herein the Act). He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

When he was arraigned before the Honorable Okuche, S.R.M at Loitoktok on 14.11.17, the appellant was convicted on the principal count of defilement and sentenced to fifteen years' imprisonment. The evidence at the trial comprised of 7 witnesses in support of the case for the prosecution. The learned trial magistrate upon hearing the prosecution and the defence made a finding of guilt and conviction against the appellant. The appellant being dissatisfied by both conviction and sentence lodged an appeal to the high court through a petition appeal dated 12<sup>th</sup> July 2018.

On 19<sup>th</sup> July 2018, the appellant through his advocates NDUNG'U GITHUKA AND COMPANY ADVOCATES subsequently presented a Notice of motion and certificate of urgency dated 19<sup>th</sup> July 2018, seeking that he be release on bail with or without sureties, pending the hearing of his appeal or the execution of his sentence be suspended pending the outcome of the determination of his appeal.

The application is based on the grounds that; the offence the appellant was convicted of and sentenced is bailable; that the appellant has lodged a petition ,appealing against the conviction and sentence of the subordinate court and that he verily believe it has high chances of success; that the appellant is a teacher employed by the Teachers Service Commission and his name will be removed from the register of teachers owing to his conviction and absence from class; that it would occasion great prejudice to the Appellant whereof he succeeds and lose out on his employment in addition to the time he would have been incarcerated ; that the appellant is the sole breadwinner of his family and the incarceration has jeopardized their livelihood; that the prospects of his school going children and his sole proprietorship optician business will have to be closed; and that he is willing to abide by whatever terms this Honorable Court sets and will always attend court whenever required to do so. The application is also supported by an affidavit sworn by the appellant which basically replicates the ground anchoring the motion. Learned counsel for the appellant cited the case of **PKW V Republic 2008 eKLR, Edward Ndegwa Justus V Republic 2010 eKLR** which cases demonstrate essential element that court should take into account in exercising discretion to grant orders on bail pending appeal.

The application for the release of the applicant on bail pending the appeal was opposed by the state in its submissions by Mr. Meroka, the Principal Prosecution Counsel dated 30<sup>th</sup> July 2018. In the submissions, he pointed out that the appellant has not met the minimum threshold of enjoyment of the right as provided for under section 35(7)(1) of the Criminal Procedure Code which provides as follows:

***“After the entering of appeal by a person entitled to appeal, the High Court or the subordinate court which convicted or sentenced that person may be released on bail with or without sureties or if that person is not released on bail shall at his request order the execution of sentence or order appealed against shall be suspended pending the hearing of his appeal.”***

The Counsel for the state reiterated that the grant of bail after conviction is a discretionary right which the burden shifts to the applicant to prove his/her custodial detention is not warranted as there exists high chances of success in an appeal unlike under article 49(1) (h) of the Constitution where the state has a burden of proving compelling reasons.

The Counsel for the state further placed reliance on **Jiuraj Shah V Republic (1986) KLR 605 C.A** which enumerated the foundational pillars for an applicant to anchor his application for bail pending the appeal as follows:

- i. The principal consideration is 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 interest 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 an account of some point of law to be urged and the sentence or substantial point of law to be urged and the sentence or substantial point

It was stated that the above was upheld in the cases ***Somo V Republic (1972) EA 746 and Dominic Karaiya V Republic (1986) KLR 612.***

Counsel also further cited the decision of the ***Supreme Court of Uganda in Arvind Partel V Uganda.*** where the Court added yet another factor to be considered when granting bail pending appeal, which is whether the offence of which the applicant was convicted involved personal violence and a possibility of a substantial delay in the determination of the appeal.

Further, Counsel for the state relied on the decision in ***Krishnan V the People*** in which the Supreme Court of India with respect of the circumstances under which bail pending appeal should be considered.

It was the State Counsel's submission that with due regard to the guidance given in the Court decisions cited above on what to consider in granting bail pending appeal, none of which parameters has been met by the applicant herein. Counsel further reminded the court that the matter in case is in relation to a person properly serving a sentence by a subordinate court which has not been overturned. Reliance was further placed on the Court of Appeal decision in ***Mutua Vs. Republic (1998) KLR 497*** on the proposition that the applicant was convicted by a properly constituted court and undergoing punishment because in the conviction which stands until it is set aside for appeal. The gist of that proposition is that it would not be wise to set the applicant at liberty either from the point of view of his welfare or on the state unless there is a real reason why the court should do so.

Counsel for State in their submission further stated that the practice procedure rules by the Judiciary over this matter, the Bail and Bond Policy Guidelines at page 27 which provide that the applicant must demonstrate that there is an "overwhelming probability of his appeal succeeding."

It was the Counsel for the state's submission that the applicant is serving a fifteen (15) year sentence, and the intended appeal before this Court will be canvassed sooner thus there is no likelihood that he would have served substantial part of the sentence before the appeal is heard and determined. Therefore, the Counsel urged the court to dismiss the application for Lack of Merit.

#### **Determination**

I have considered the application, the applicant, the grounds for appeal, the submission by the counsel for the State as well as the record of the lower court.

Under section 357 of the Criminal Procedure Code, the court is clothed with wide discretion in deciding whether or not to admit an applicant on bond pending appeal.

Generally, bail is a channel that is used to secure one's freedom pending appeal, some facts must be considered. It is important in that regard to look at the strength of the evidence on record.

In an application for bond pending appeal, the onus is always on the appellant to demonstrate to the court that there are good reasons why he should not be allowed to continue serving sentence but should be allowed to enjoy his liberty pending the hearing and determination of his or her appeal.

There were certain reasons that were developed by the courts in order to justify admission of an appellant to bail pending determination of appeal. In that respect, the appellant must establish that his appeal has high or overwhelming chances of success. Once that is proved, the court would have no excuse of denying the appellant his freedom. (***See Somo v Republic (1972)EA 476 and Dominic Karanja v Republic (1986 KLR 612).*** He may also establish existence of exceptional or unusual circumstances that would convince the court to exercise its discretion in his favor. As regards to the question of what constitutes exceptional or unusual circumstances, the courts have not given a legal definition.

However, from the common practice in relation to the previous court decisions, unusual and/or exceptional circumstances include where the appellant suffers from a serious medical condition which requires medical attention that cannot be provided for while he is in prison, where the appellant is a person of old age, where the appellant and the complainant have since reconciled and compensation paid or where the appellant is a student attending school or college. It is instructive to note that the list given an example herein is not exhaustive since it is trite that each application is considered in accordance with its facts and circumstances therein.

In this case, it is abundantly clear that the Appellant did not convince this court, beyond reasonable doubt, that he has an appeal with overwhelming chance of success. Without deferring much into the merits of the appeal to be heard and considered, the prosecution during the trial court proceeding was found to have proved the ingredients of the offence of defilement in terms of section 8 (1)(4) of the Sexual Offenses Act.

In the same, the appellant has not produced a compelling evidence or argument to support his assertion that would show or prove existence of an error in the proceedings of the lower court that would persuade the court to find that there was a substantial point of law to be urged on appeal, that would give the appeal high chances of success.

I also find that the applicant has not demonstrated that there are unusual or unexpected circumstances upon which this court may conclude that it would be in the interest of the justice to grant him bail pending appeal. He did not for example produce evidence to substantiate and

claim that would fall under the category of exceptional and unusual circumstances as explained in this case earlier on.

I have also considered the fact that the appellant was sentenced to fifteen years imprisonment and in my view, granting bail pending appeal is not tenable as there exist a high risk that the accused may abscond. Further, by the time the appeal is concluded, the applicant will not have served a substantial part of the sentence imposed.

In view of all the foregoing reasons, I find that the appellant has failed to meet the threshold for grant of bail pending appeal. The application lacks merit and is hereby dismissed. It is so ordered.

**Dated, Delivered and signed in open court at Kajiado on this 24<sup>th</sup> day of September 2018.**

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**R. NYAKUNDI**

**JUDGE**

**Representation**

Mr. Githuka for the appellant – Present

Mr. Meroka for the State - Present