



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPEAL NO. 46 OF 2017**

**ABUYEKA ENANE LINDOLINE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The appellant, ABUYEKIA ENANE LINDOLINE, has by way of Notice of Motion application dated 13<sup>th</sup> March, 2017 moved this court under Article 49, 50, and 159 of the constitution of Kenya, 2010 and section 357 (1) of the Criminal Procedure Code applied to be admitted to bail or bond pending the hearing and determination of the appeal filed herein.

The application is premised on the grounds on the face of the application and supporting affidavit of the said appellant stating that;

- (a) he was charged with the offence of defilement and indecent act with a child vide Mombasa Chief Magistrate's Criminal case No 2062 of 2014 on 10.11.2014;
- (b) the matter proceeded to full hearing and in a judgment delivered on 28.2.2017, the appellant was convicted for the offence of indecent act with a child and sentenced to serve ten(10) years imprisonment
- (c) during the pendency of the said criminal case, the appellant who had been released on a bond of Ksh 300,000/= with one surety of a similar amount, fully cooperated with the court and never failed to attend court whenever he was required to do so.
- (d) The appellant is a well behaved person with no previous criminal record;
- (e) the appeal herein raises exceptional strong grounds and has an overwhelming chance of success as demonstrated by the grounds of appeal cited.
- (f) the appellant is a student at the [particulars withheld] where he joined in 2016 and risks losing his degree course if the application is not allowed;
- (g) the appellant is quite young and entitled to a chance to complete his education.

The Respondent has not filed any replying affidavit.

In arguing the application during the hearing, Mr Gikandi, counsel for the appellant, reiterated the said

grounds cited in support of the application and emphasized on the ground that the appeal has an overwhelming chance of success. He took the court through the evidence that was adduced before the trial court and the judgment that was delivered by the said court, pointing out the anomalies, inconsistencies and missing links that were not canvassed by the trial magistrate in reaching her decision to convict and sentence the appellant.

He also submitted that while the trial magistrate convicted the appellant on the evidence of a single witness as per the provision of section 124 of the Evidence Act, which allows for conviction in the absence of corroboration in the case of a sexual offence, she did not expressly state why she arrived at such finding.

He cited the authority of PETER HINGA NGATHU VRS REPUBLIC, HIGH COURT OF KENYA AT NYERI, and CRIMINAL APPEAL NO. 2 OF 2015, where Justice Mwita cited the provisions of section 357 (1) of the Criminal Procedure Code and expressed that the applicants' counsel in that case had argued that;

“ the applicant's appeal has over whelming chances of success and specifically pointed out that the proceedings are flawed because the trial magistrate never complied with the provisions of section 200 of the criminal procedure code”.

M/s Ocholla, counsel for the state did not oppose the application for the appellant to be released on bond pending appeal. She agreed with the appellant's counsel that the prosecution failed to prove their case against the appellant beyond reasonable doubt and hence the appeal had a high chance of success. She submitted that she was also relying on the grounds raised by Mr Gikandi in the appellant's application for bail pending appeal and adduced that the inconsistencies in the evidence of Pw1, victim and Pw2 , her mother were so glaring. She also faulted the trial magistrate in finding that the prosecution had proved the 2<sup>nd</sup> count of indecent act to a child against the appellant when there was evidence of penetration as brought out by the PRC and P3 forms (Exhibit P1 and P2 ) and the evidence of the two doctors, Pw3 and Pw4. For instance, she juxtaposed the definition of indecent Act at Section 2 (1) of the sexual offences Act under which the appellant was convicted for with the evidence of Pw3 at page 12 lines 9-10 of the record of proceedings.

Section 12 (1) defines and indecent act as;

“..an unlawful intentional act which causes;

(a) any contact between any part of the body a person with the genital organs, breasts, or buttocks of another, but does not includes an act that causes penetration”.

Pw3 at page 12 lines 9-10 of the record of proceedings said;

“for the injuries defilement could have occurred because of the lacerations around the valva”.

Having listened to the submission by both counsel with regard to the Appellant's application for release on bond/ bail pending the hearing and determination of his appeal, I have also re-evaluated the evidence that was adduced before the trial court and the judgment by the trial magistrate in consideration of the said application.

I find that both counsel are in agreement that the appellant's appeal has overwhelming chances of success.

In the case of SAMUEL MACHARIA NJAGE VRS REPUBLIC, CRIMINAL APPEAL NO. 50 OF 2013, at page 7 Justice Aduodha had this to say:

“The court has recently observed in the case of Jeremiah Mwangi Ngatia Vrs Republic, Criminal appeal No 110 of 2011, that the court in considering where 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.

The appellant/applicant is prima facie a convict and his constitutional freedom and rights are thus significantly circumscribed by his conviction. He no longer enjoys the absolute presumption of innocence available to persons facing trial at the first instance. In admitting such a person to bail the court ought to, in addition to principles governing admission to bail pending appeal, bear in mind that possible dilemma of resending such a person to prison in the event that his or her appeal fails. The principles of admission to bail pending appeal in Kenya have for over 40 years been clustered around the decision of SOMO Vrs Republic (1972) E.A 476. According to his case, the applicant must be demonstrate the existence of overwhelming chances of success. The applicant ought to be in a position to persuade the court that has or her appeal is so strong, so meritorious that at the end, the probabilities will favour acquittal. To discharge this burden, the appellant will need to raise some crucial issues of law or an issue as to the mode of application of evidence”.

This holding is in tandem with the submissions of both counsel in the instant case. The applicant in his appeal intends to attack his conviction on the grounds of the quality of evidence that was used to find him guilty of the offence he was convicted for and the failure by the trial magistrate believing in his defence. His appeal has a likelihood of success.

It is worth noting that the appellant was admitted to bail in the sum of Ksh 300,000/= with a surety of a similar amount at his trial. He is a convict and his conviction is prima facie valid until set aside.

In the circumstances;

(a) the applicant/appellant is admitted to bail in the sum of Ksh 200,000/= with one surety of a similar amount.

(b) in the alternative the appellant maybe released upon payment of ksh 150,000/= plus one surety Ksh 150,000/=

(c) the surety to be approved by the Deputy Registrar of this court.

(d) The applicant/appellant to report to the said registrar once a month during the pendency of his appeal and must be present at the hearing of his appeal unless such attendance is dispensed with by the court.

It is so ordered.

**Ruling read, signed and dated this 21<sup>st</sup> day of March, 2017.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/s Ocholla for the state

Mr Mushelle holding brief for Mr Gikandi

Appellant – No appearance

C/clerk- Kiarie