



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KABARNET**  
**CRIMINAL APPEAL NO. 129 OF 2017**

M A A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**[Appeal from original conviction and sentence in Eldama Ravine Principal Magistrate's Court No. 320 of 2015]**

**RULING**

[1] The appellant was convicted of the offence of Incest by male person contrary to section 20 (1) of the Sexual Offences Act, 2006 and sentenced to serve life imprisonment on 16<sup>th</sup> February 2017. The appellant now seeks bail pending appeal and contends that the appeal has overwhelming chances of success and urges that the appellant was convicted on the sole uncorroborated evidence of untruthful evidence of the complainant whose age was not determined and whose *voire dire* was not properly conducted while other prosecution witnesses just testified on matters of *hearsay*. The application for bail is opposed by Counsel for the DPP who urges the convicted status of the appellant and maintains that the appellant was properly convicted and that the appellant had not shown exceptional circumstances of release on bail pending appeal.

[2] Section 357 of the Criminal Procedure Code provides for bail pending the hearing and determination of an appeal from conviction and sentence as follows:

***“357. Admission to bail or suspension of sentence pending appeal***

***(1) 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:***

*Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.*

***(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been***

released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

(3) The Chief Justice may make rules of court to regulate the procedure in cases under this section.

[Act No. 22 of 1959, s. 37, Act No. 27 of 1961, Sch.]”

### **Principles**

[3] In MACHAKOS HC CRI. APPEAL NO. 56 OF 2015, **PETER WANJOHI NJIRAINI v. R**, this Court examined the principles for the grant of bail pending appeal as follows:

#### **“Principles for the grant of bail pending appeal**

3. Article 49 (1) (h) provides as one of the rights of arrested persons –

*“(h) to be released on bond or bail, on reasonable conditions, **pending a charge or trial**, unless there are compelling reasons not to be released.”*

4. Although the applicant’s right to presumption of innocence has been extinguished by his conviction by the trial court, the right to bail pending trial must meaningfully be taken to be co-extensive to the criminal trial process, which includes appeal. However, in determining whether there are compelling reasons for refusal of bail, the fact that the applicant is now a convict must be taken to be a compelling reason in that a convicted person is likely to abscond because his guilt has already been established and certainty of punishment which has already been imposed.

5. In **Boke Chacha v. Republic**, Kisii H.C. Cri. Appeal No. 244 of 2012, I considered the principles for the grant of bail pending appeal

*“According to authorities on bail pending appeal, bearing in mind that the applicant has now been convicted by a competent court and is on punishment for the conviction which stands until it is set aside on appeal, the criteria for consideration is:*

*a. Whether there exists exception or unusual circumstances which justify grant of bail in interests of justice. See **Jivraj Shah v. R**(1986) KLR 605.*

*b. Such exceptional circumstances exist where the appeal has overwhelming chances of success or where a set of circumstances exist which disclose substantial merit in the appeal and that the sentence or a substantial part of it will have been served by the time the appeal is heard. See **Jivraj Shah**, supra; **Mutua v. R** (1988) KLR 497; and **Somo v. R** (1972) E.A 476.*

*c. The previous good character of the applicant and the hardships facing his family, and his ill health, where there existed prison medical facilities for prisoners, are not exceptional or unusual circumstances. See **Dominic Karanja v. R** (1986) KLR 612.*

*d. A solemn assertion, even if supported by sureties, that the applicant will not abscond if released is not sufficient ground for releasing a convicted person on bail pending appeal. See **Dominic Karanja**, supra.”*

#### **Application of Principle to the present case**

[4] The Court has considered the Amended Petition and Grounds of Appeal primarily that the trial court relied on the evidence of a single witness who was untruthful and unreliable, and hearsay evidence and that the age of the complainant was not ascertained and the *voire dire* examination was not properly

conducted. The appellant may well have an *arguable case with a likelihood of success* on each of the grounds of appeal, (see ***Peter Hinga Ngatho v. R*** [2015] eKLR) but what is required for purposes of bail pending appeal is, with respect, overwhelming probability of success of the appeal.

[5] In order not to prejudice the fair hearing of the appeal, the Court is not able, and it is not desirable, to discuss in detail the merits of the appeal. However, having considered the submissions made by the appellant's counsel and counsel for the DPP as well as the record of proceedings of the trial court, I am not able to hold that the appeal has **overwhelming** chances of success and that the sentence is such that the appellant may have served the entire sentence before the hearing and determination of the appeal. In addition, there are no exceptional or unusual circumstances in the age or health of the appellant, or any hardship of his family to warrant grant of bail pending appeal to the appellant.

[6] I consider, however, that the appeal should be heard expeditiously, so that the merit of the appeal is determined and the appellant is released from prison early if his appeal is successful or settles down to serve his term, if unsuccessful.

[7] The Court notes that the appeal is already set for hearing on the 19<sup>th</sup> June 2017.

### **ORDERS**

[8] Accordingly, for the reasons set out above, the appellant's application herein dated 1<sup>st</sup> March 2017 for bail pending hearing and determination of the Appeal is declined.

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF APRIL 2017.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Ms. Cuna for the applicant

Ms. Macharia for DPP/