



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL CASE NO. 132 OF 2016**

**M G..... APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The appellant *M G* was tried and convicted of the offence of defilement contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act*. He was sentenced to life imprisonment.
2. He was aggrieved by his conviction and sentence. He proffered an appeal to this court in his petition of appeal filed on 5<sup>th</sup> March, 2017 which was wrongly described as a “Memorandum of Appeal”.
3. Pending the hearing and conclusion of his appeal, the appellant through his advocates on record *Ms Kamau Kiplagat & Co. Advocates* presented a Notice of Motion dated 22<sup>nd</sup> November, 2016 seeking that he be admitted to bond pending the hearing of his appeal.
4. The application is premised on grounds that the applicant is entitled to bond as a constitutional right under *Article 49 of the Constitution of Kenya*; that he is mentally retarded and mentally ill and requires specialized care; that his appeal may take an inordinately long time to be heard and that it is in the interest of justice that the application be allowed.
5. The application is supported by two affidavits sworn by the applicant on 22<sup>nd</sup> November, 2016 and 5<sup>th</sup> March, 2016. In the affidavits, the applicant replicated most of the grounds anchoring the motion. He in addition claimed that his appeal has high chances of success and that he was ready to abide by any bond terms imposed by the court.
6. At the hearing, the applicant was represented by learned counsel *Mr. Mwaka* while learned prosecuting counsel *Ms Oduor* appeared for the state. In his submissions, *Mr. Mwaka* expounded on the grounds supporting the motion and the depositions in the affidavits sworn by the applicant. In his bid to demonstrate that the appeal had high chances of success, he invited the court to note that in the course of the trial, different directions had been issued under *Section 200(3)* of the *Criminal Procedure Code (CPC)* by different magistrates and that the magistrate who wrote the judgment did not consider the evidence adduced by the witnesses before they were recalled. He also claimed that there were contradictions in the evidence of the prosecution witnesses and that the appellants defence was not considered. He invited the court to note that the appellant was out on bond during the trial and he did not abscond.
7. *Ms Oduor* on her part submitted that the appeal had no chances of success. In her view, the appellants guilt had been proved beyond any reasonable doubt; that the applicant had not established exceptional

circumstances to warrant his admission to bond pending appeal. She implored me to dismiss the application for lack of merit.

8. I have carefully considered the grounds of appeal, the evidence tendered before the trial court; the judgment of the learned trial magistrate and the rival submissions by counsel. I wish to deal first with the applicant's claim that he has a constitutional right to bond pending appeal under *Article 49* of the *Constitution*.

9. *Article 49* of the *Constitution* provides for several rights to arrested persons.

*Article 49 (1) (h)* which is the provision that deals with the right to bond states as follows;

***Article 49 (1) "An arrested person has the right –***

***(a) .....***

***(b) .....***

***(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".***

10. As I have previously held in *Charles Mukabi V Republic HCRA (ELD) No. 48 of 2016* and *Joseph Garang Korir V Republic HCRA (ELD) No. 129 of 2010*, *Article 49 (1) (h)* of the *Constitution* only provides for the right to bail or bond to arrested persons who are either waiting to be charged with a criminal offence or those who have been charged and are awaiting trial. It does not apply to convicted persons. It does not therefore grant appellants the right to bond or bail pending appeal. Consequently, the appellant's averment that he has a constitutional right to bond pending appeal is misplaced.

11. The other key ground advanced by the applicant in support of his application is that his appeal has high chances of success. The main consideration that the court ought to have in mind when exercising its discretion in determining whether or not to grant bond pending appeal is whether an applicant had demonstrated that his or her appeal has high overwhelming chances of success. The other secondary consideration is whether there are unusual or exceptional circumstances that would entitle an applicant to the orders sought: See *Dominic Karanja V Republic (1986) KLR 612*; *Somo V Republic (1972) EA 476*.

12. I am alive to the fact that there is a pending appeal. At this stage therefore I cannot comment on the veracity of the evidence presented before the trial court as doing so might prejudice the hearing of the appeal.

13. My perusal of the record of appeal shows that the same is not properly prepared. Some pages of proceedings before the lower court are either missing or wrongly paginated. This made it very difficult to follow the proceedings and evidence adduced in the lower court.

14. Be that as it may, I have been able to ascertain that the trial was conducted by three different magistrates namely *Hon. B.N Mosiria* (SRM); *Hon. Rose Ndombi* (RM) and *Hon. N.C Adolo* (PM) who concluded the trial. It has been submitted by *Mr. Mwaka* that the two succeeding trial magistrates gave different or contradictory directions under *Section 200 (3)* of the *CPC* and that this together with the alleged contradictions in the prosecution's case gave the appellant's appeal overwhelming chances of success. Though this court is unable to ascertain the veracity of this claim at this stage given the current state of the record of appeal, it is my view that it is the province of the court that will hear the appeal to make a finding of fact whether the provisions of *Section 200(3)* of the *CPC* were correctly complied with during the trial and in the event that it were not, whether non-compliance was sufficient ground to vitiate the appellant's conviction. It will also be the duty of the appellate court to determine whether the alleged contradictions in the prosecution case was material as to adversely affect the prosecution case.

15. On my part, upon considering the pieces of evidence available on the lower court's record as

produced in the record of appeal, I am not persuaded to find that the appellant's appeal has overwhelming chances of success.

16. I have considered the applicants claim that he is entitled to bond pending trial as he is a mental patient and that he requires specialized treatment. I have noted the two letters annexed to the applicants supporting affidavit authored by *Dr/Prof Benson Ngakinya*, a psychiatrist at Moi Teaching & Referral Hospital. The letters

confirm that the applicant is a mental patient but they do not indicate that he requires specialized care that cannot be provided when he is serving sentence. It is important to note that the 2<sup>nd</sup> medical report is dated 5<sup>th</sup> September, 2016. There is no current medical report showing the appellant's current state of health.

It is therefore my finding that the applicant has not demonstrated that his mental illness is an exceptional circumstance that would warrant his admission to bond pending appeal.

17. Lastly, the fact that the applicant was out on bond during the trial and did not abscond cannot assist him in the instant application since circumstances have now changed. During the trial, he was merely a suspect but he is now a convict. The presumption of innocence no longer holds true.

Besides, as was held by the Court of Appeal in *Dominic Karanja V Republic (Supra)*, an appellant's pledge that he will not abscond if granted bond is not a sufficient ground for grant of bond pending appeal.

18. In view of the foregoing, I am satisfied that the application is devoid of merit. It is accordingly dismissed.

19. Given the unsatisfactory state of the record of appeal, this court on its own motion grants the appellant leave to file and serve a properly paginated supplementary record of appeal containing all the proceedings of the lower court before the appeal is placed before a judge for directions on admission.

Orders accordingly.

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 31<sup>st</sup> day of May, 2017.**

In the presence of:-

The appellant

Mr. Muchiri for the state

Mr. Lobolia court clerk

No appearance by Mr. Mwaka for the appellant