



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.78 OF 2016**

**AMOS WAMALWA OMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING OF THE COURT**

1. What is before me is a Notice of Motion dated 8/12/2016 filed by the Appellant/Applicant seeking for an order that he be granted bail pending the hearing and determination of the appeal herein.

2. The Application is supported by the Affidavit of his learned Counsel Robert M. Nyakundi sworn on even date and further on the following grounds namely:-

***(a) The Applicant has been tried, convicted and sentenced to Twenty (20) years imprisonment.***

***(b) The Applicant being dissatisfied with the Judgement and sentence has lodged an appeal.***

***(c) Given the time it will take to hear the Appeal and the nature of the sentence it is only fair and just that the Applicant be admitted to bail pending the hearing and determination of the appeal.***

***(d) The Applicant is ready to abide with the terms and conditions of bail if granted.***

***(e) The Applicant's appeal has high chances of success.***

3. The Application is opposed by the Respondent who filed grounds of Opposition as follows:-

(a) That the Applicant was charged, convicted and subsequently sentenced by the Principal Magistrate's Court at Kangundo to serve Twenty (20) years imprisonment for the offence of defilement of his own plea of guilty.

(b) The state opposes the Application for bond pending appeal on the ground that the Appellant has not demonstrated that his appeal has any chances of success.

(c) The assertion that his appeal has high chances of success is misconceived, unmerited and premature and should not be granted. Since the success of appeal can only be proved upon the full hearing of the appeal.

(d) The solemn assertion by an Applicant that he will not abscond if released on bond, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

(e) That in any event the Applicant/Appellant has failed to satisfy the extreme high standard for bail pending appeal as per the cardinal principles of criminal law.

(f) That an order to strike a balance between the competing interest of the public and that of the Applicant/Appellant to be released on bond pending appeal, the Application is for dismissal.

(g) The Application is frivolous, vexatious, incompetent and improperly before court and is thus an abuse of the court process.

4. With the leave of the court, parties filed written submissions. It was submitted for the Appellant that he is a standard eight (8) drop out and his actual age was not accurately established before being convicted and sentenced as he is likely to be underage. It was further submitted that the plea of guilty was out of ignorance as he lacked legal advice. It was further submitted that the victim's age was not established and that she had consented to the sexual act. Finally it was submitted that the Applicant's appeal has high chances of success and the Application be allowed since the Appellant will abide by the bail conditions.

5. It was submitted for the Respondent 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 should not be let loose on the community. It was further submitted that the Appellant is prima facie a convict and his Constitutional freedoms and rights is significantly circumscribed by his conviction. He no longer enjoys the presumption of innocence such as a person facing trial at the first instance. It was further submitted for the Respondent that the Appellant has not demonstrated that his appeal has high chances of success since he had pleaded guilty to the charge and was given a lawful sentence and thus no appeal can lie as provided for under Section 348 of the Criminal Procedure Code.

6. Finally, it was submitted for the Respondent that the Appellants solemn assertion that he will abide by the terms and conditions of bond and will not abscond if released on bond and even if supported by sureties is not sufficient ground for releasing a convicted person on bond pending appeal. The case of **DOMINIC =VS= KARANJA [1986] KLRK 612** was relied upon.

7. I have considered the Applicant's Application as well as the grounds in support thereof. I have also considered the submissions by learned counsels for the parties. The only issue for determination is whether or not the Applicant has demonstrated that his appeal has exceptional circumstances and has overwhelming chances of success. The record of the lower court reveals that the Applicant pleaded guilty to the charges as well as the facts as read out to him and thus an unequivocal plea of guilty was entered for him by the lower court which subsequently convicted and sentenced him to the minimum possible sentence in law. The lower court record shows that the plea was properly taken and therefore the plea of guilty entered does not entitle the Applicant to challenge or raise an appeal against the conviction pursuant to the Provision of Section 348 of the Criminal Procedure Code. He can only appeal against the sentence. The memorandum of Appeal filed by the Applicant seeks to appeal against both conviction and sentence which is not permissible under Section 348 of the Criminal Procedure Code as he pleaded guilty. The said appeal is yet to be heard and thus the merits or otherwise cannot be gauged at this juncture. Again the provisions of Section 348 of the Criminal procedure Code which allows only appeal against sentence further militates against the Applicant's Application for release on bond pending appeal since the sentence already imposed by the lower court is lawful in all respects. The Applicant has raised the issue that he is a class eight drop out whose age was not established and it might turn out that he is underage. However a perusal of the lower court record reveals that the Applicant was taken for age assessment whereby the doctor found his age to be about 21 years. It was then that the trial court proceeded to sentence him. Hence I find there are no exceptional circumstances on the part of the Applicant to merit the bond pending appeal. Again the issue that the Appeal might take long to be heard is easily taken care of by an order that the appeal be fastracked. The Applicant has also indicated to this court that he shall abide by the terms and conditions of bond issued by the court. However a solemn assertion by an Appellant that he will abide by the terms and conditions of bond and that he will not abscond if released even if supported by sureties is not sufficient ground for releasing a convicted person on bond pending appeal (see the case of **DOMINIC KARANJA =VS= REPUBLIC [1986] KLR 612**).

8. The Appellant is already a convict and serving sentence and hence he does not enjoy the presumption of innocence until proven guilty like persons facing trial at first instance. The Applicant's sentence of imprisonment has not been set aside and which greatly weighs down against his Application to be released on bond pending appeal as he has not demonstrated that the sentence imposed on him is unlawful in any way.

9. In the result, it is the finding of this court that the Appellant/Applicant's Application lacks merit. The same is dismissed. The Appeal herein be heard on priority basis.

10. Dated, signed and delivered in court at Machakos this 17<sup>TH</sup> day **MAY** 2017.

**D. K. KEMEI**

**JUDGE**

**In the presence:**

Amos Wamalwa Ombo – Applicant .

Machogu for Respondent ..

C/A: Kituva

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