



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MACHAKOS**  
**CRIMINAL APPEAL NO. 71 OF 2016**

**JOHN KYALO MUMO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant was charged with the offence of defilement contrary to section 8(1) and(3) of the Sexual Offences Act at the Machakos Chief Magistrate's Court Criminal Case No. 264 of 2015. He pleaded not guilty, was tried and convicted, and sentenced to serve twenty (20) years imprisonment. Being aggrieved, he filed an appeal against the judgment of the trial Court by way of a Petition of Appeal dated and filed in Court on 12<sup>th</sup> October 2016. The Applicant also subsequently filed an application by way of a Notice of Motion dated 20<sup>th</sup> February 2017 seeking orders that he be admitted on bond/bail pending the hearing and determination of his appeal.

The main grounds of the application are set out in an affidavit sworn on 20<sup>th</sup> February 2017 by his Advocate, Martin M. Muithya, which are that the appeal has overwhelming chances of success, and that if the Applicant is not released on bond/bail pending hearing of the appeal, his appeal will be rendered nugatory as he serves the whole or substantial part of the sentence. Further, that the Applicant is not a flight risk, because:-

- a) he had been admitted to bail during the trial in the subordinate court, and fully complied with the terms and conditions thereof
- b) he has just started his family, with a young wife and child and wholly depended on him.
- c) he was self- employed as a motor cycle (commonly known as boda boda) taxi operator operating in his home area and from his home .

The Applicant's learned counsel also filed written submissions dated 9<sup>th</sup> May 2017, wherein the above arguments were reiterated, and the counsel relied on the lack of credibility of PW1 in the trial Court, and non-satisfactory evidence adduced therein to argue that the Applicant's appeal has high chances of succeeding.

The learned Prosecution Counsel, Mogoi Lillian, opposed the application in a replying affidavit she swore on 3<sup>rd</sup> April 2017 , wherein she deponed that the Applicant has not demonstrated that his appeal has high chances of success. Further, that the solemn assertion by an Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

According to the prosecution counsel, the sentence of 20 years imprisonment is too high hence a sufficient motivation for the Applicant to take flight once released on bond pending appeal, and the Applicant ought to set down his appeal for hearing at the earliest opportunity and in the event the same is successful, no prejudice will be suffered in view of the lawful sentence imposed by the trial Court.

The learned Prosecution counsel wholly relied on her replying affidavit and did not file written submissions.

I have considered the pleadings and submissions by the Applicant and Prosecution. I note that unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proved guilty, an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In **Mutua vs R, [1988] KLR 497** the Court of Appeal stated thus:

**“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”**

A different test from that applied in bail pending trial is therefore applied in bail pending appeal. When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

- a) Whether the appeal has overwhelming chances of success. See **Ademba vs Republic (1983) KLR 442, Somo vs R [1972] E.A 476, Mutua vs R [1988] KLR 497** in this regard;
- b) There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. In this regard see **Ragbir Singh Lamba vs R [1958] E.A 337; Somo vs R (supra.); Mutua vs R (supra.)**
- c) There is a high probability of the sentence being served before the appeal is heard as held in **Chimabhai vs R, [1971] E.A 343.**

In the instant application, the grounds raised by the Applicant that show his appeal has a high chance of success must be subjected to examination *vis-a-vis* the evidence produced in the trial Court and legal principles. Therefore, it cannot be established at this stage and in the absence of such analysis if the Applicant has an overwhelming chance of success.

The Court also notes that the Applicant was sentenced on 29<sup>th</sup> September 2016 to imprisonment for twenty years, and has therefore served less than one year of his term. It is therefore quite unlikely that he may serve a substantial part of his prison term before the appeal is heard and determined. I also note that the offence the Applicant was convicted of carries a minimum mandatory sentence of twenty years imprisonment and does not have the option of a fine.

Given the above circumstances, I am satisfied that this is not a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly decline to grant the prayer for bond pending appeal in the Applicant's Notice of Motion dated 20<sup>th</sup> February 2017.

There shall be no order as to costs.

It is so ordered.

**DATED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF JUNE 2016.**

**P. NYAMWEYA**

**JUDGE**