



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 15 OF 2015

JAMES MACHARIA WAMBUI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (S. Jalang'o) at Baricho, Criminal Case No. 710 of 2013 dated 24th April, 2015)

RULING

1. **James Macharia Wambui** is the appellant/applicant herein who has moved this Hon. Court vide a Notice of Motion dated 17th November, 2015 for bail pending appeal.
2. The applicant has grounded his motion on the following grounds:
 - i. *That he was convicted and sentenced to serve 15 years imprisonment vide P.M.'s court Criminal Case No. 710/13 at Baricho but has appealed against both the sentence and conviction.*
 - ii. *That the appeal has high chances of success.*
 - iii. *That the appellant will have suffered a substantial part of the sentence by the time this appeal is heard and determined.*
3. The applicant further based his application on the supporting affidavit sworn on 17th November, 2015 where he deposed among other things that he has a health condition that requires daily medication and annexed a copy of a medical treatment to demonstrate that he had gone for treatment at the Nyeri Provincial General Hospital on 9th November, 2015 for treatment.
4. **Mr. Ngigi**, learned counsel for the applicant submitted that the appeal filed had high chance of success and pointed out what in his view was a discrepancy on the charge sheet as opposed to the evidence tendered. To this end, he faulted the evidence tendered submitting that the same did not support the particulars on the charge against the accused especially on the question of the age of the complainant at the trial. He further submitted that the age of a complainant in a sexual offence case is material as it determines the sentence to be meted out against the offender. He submitted that the age of the complainant in the charge sheet was given to be 15 years while the evidence tendered established that the age of the complainant at the material time was in fact 16 years. He quoted the case of **Ben Maina Mwangi – Vs Republic [2006] eKLR** to buttress his point that the appeal had high chances of success.
5. The Respondent through Mr. Omooria opposed the application stating that in his view the charge sheet was not defective. He replied that the appellant was correctly convicted for committing defilement to a girl aged 16 years as per the doctor's evidence including a birth certificate that was produced as part of the evidence at the trial. He further submitted that the fact that the charge

- sheet was inconsistent with the evidence tendered in respect to the age factor was not fatal to the prosecution as what was produced as evidence was as conclusive in so far as the age of complainant was concerned. He opined that the appellant's chances in the appeal are remote. On the issue of the authority cited by the appellant's counsel, the Respondent replied that the authority was not binding but of persuasive value. He urged the Court not to consider the authority as the facts were different from this case.
6. This Court has carefully considered the application and the grounds upon which it is made. The principles to be applied in an application for bail pending appeal is somewhat different from the principles that normally apply in application for bond pending trial which is a constitutional right enshrined under **Article 49 (1) (h)** of the **Constitution**.
 7. In an application for bail pending appeal, the Court of Appeal in the cases of **JIRVAJ SHAH – VS- REPUBLIC (1986) KLR 605 and DOMINIC KARANJA –VS- REPUBLIC (1986) K.L.R. 612** laid down the following criteria to be applied in consideration of granting bail to a convicted person pending appeal:
 - a. ***The existence of exceptional or unusual circumstances upon which an appellate court can fairly conclude that it is in the best interest of justice to grant bail.***
 - b. ***Where it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law and that substantial part of the sentence will have been served by the time it is heard.***
 - c. ***The previous good character of the applicant and the hardship if any facing his family were not exceptional or unusual factors neither is a solemn assertion by an applicant that he will not abscond if released on bond sufficient ground for releasing a convicted person on bail pending appeal.***
 8. This Court has further considered the decision in the case **of RAGHBIR SINGH LAMBA –VS- REPUBLIC (1958) E.A. 337** where Spry Ag. Judge held *inter alia* as follows:

“Neither the complexity of the case nor the good character of the applicant nor alleged hardship.....justified the grant of bail but had the court been satisfied that there was an overwhelming probability that the appeal would succeed, the application would have been granted.....the principle to be applied is where there are exceptional and unusual reasons.”
 9. I have considered the main ground that the appellant's counsel spiritedly argued to demonstrate that the appeal is likely to succeed but I am not convinced that the application meets the criteria set above. The applicant has sworn that he is asthmatic which is not denied but as demonstrated by the annexed treatment chit in his supporting affidavit, he got medical attention while in prison. There is nothing to show that he is unlikely to be given the same medical attention if need was to arise.
 10. This Court is also not convinced that he will suffer substantial part of his sentence by the time his appeal is heard. This Court is optimistic if all factors were to remain constant that the appeal pending herein will be heard and determined in the course of this year. The appellant was sentenced to serve 15 years in prison and one year cannot by any stretch be described as “substantial part of his sentence.”
 11. The appellant could be having an arguable appeal but this Court is not convinced that the same at this stage (without delving much on the appeal itself for obvious reasons) entitles the appellant to be granted bail.

The application lacks in merit and it is declined.

Dated and delivered at Kerugoya this 28th day of January, 2016.

R. K. LIMO

JUDGE

28.1.2016

Before Hon. Justice R. Limo

State Counsel Omayo

Court Assistant Willy Mwangi

Ngigi for appellant present

Omayo for State present

COURT: Ruling signed, dated and delivered in the open Court in presence of Ngigi, Counsel for appellant and Omayo for State.

R. K. LIMO

JUDGE