



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 2 OF 2015.

ALISI TEREWA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

R U L I N G.

1. The application before me was brought by way of Notice of Motion. It was certified as urgent on 18th September, 2015. The applicant was instructed to file a supplementary affidavit and to take a hearing date at the registry and serve the respondent, which he did.

2. The applicant seeks orders for his release on bail pending the hearing and determination of his appeal on the grounds that:-

- i. *The appellant/applicant was convicted and sentenced to serve life imprisonment on the 4th September, 2015.*
- ii. *The appellant/applicant is dissatisfied with the decision and has filed this appeal.*
- iii. *The appeal is arguable, is not frivolous and has overwhelming chances of success.*
- iv. *The appellant/applicant is ready and willing to comply with any bond terms that may be imposed on him by the Honourable Court.*
- v. *The appellant/applicant is not a flight risk.*

Applicant's submissions

3. Mr. Milimo, learned counsel for the applicant relied on the supporting affidavit dated 17th September, 2015 and supplementary affidavit dated 28th September, 2015 sworn by the applicant.

4. Mr. Milimo submitted that the applicant was sentenced to life imprisonment on 4th September, 2015, by the Butali Senior Principal Magistrate. It was submitted that the appeal filed by applicant is arguable with overwhelming chances of success as the victim gave unsworn testimony and there was no eyewitness. It was further argued that prosecution witnesses contradicted each other.

5. It was submitted that investigations were shoddy. The applicant is 66 years old and on a special diet. He is also taking herbal medicine and that he is not a flight risk as he was out on bail during trial. He is willing to raise any sureties that the court may order.

Respondent's submissions

6. Mr. Oroni, prosecuting counsel opposed the application and submitted that it is trite law that courts can

convict on the evidence of a single witness as the court did. The offence being one of defilement of a 7 year old girl, the applicant was convicted and sentenced to life imprisonment. The argument that he has high chances of success can only be canvassed at the hearing of the appeal.

7. Mr. Oroni further submitted that although the applicant had deposed in his affidavit that he is diabetic there was no document attached to the affidavit to show that he has a medical problem. Mr. Oroni sought for the appeal to be heard.

Determination of the application

8. The grounds upon which an applicant may be released on bail pending appeal are well established in the oft quoted cases of **Mundia vs. Republic (1986) KLR 623**, **Ademba vs. Republic (1983) KLR** and **Somo vs. Republic (1972) EA 476**. **For an applicant to benefit from bail pending appeal, he must show that his appeal has overwhelming chances of success, that there are exceptional and unusual circumstances; and that the appeal is likely to be delayed such that the applicant may serve his sentence or a substantial part thereof by the time the hearing is reached among other considerations.**

9. In the case of **Dominic Karanja vs. Republic (1986) KLR**, the Court of Appeal considered conditions an applicant should satisfy before he can be granted orders for bail pending appeal. The court held that:-

- i. *The most important issue was that if the appeal had such overwhelming chances of success, there is no justification of depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;*
- ii. *The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute exceptional circumstances where there existed medical facilities for prisoners;*
- iii. *A solemn assertion by the 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."*

10. In the instant case, the applicant was convicted for the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act. An applicant who applies for bail pending appeal stands on the premise that he has already been found guilty of an offence and has been convicted accordingly. Although this court has the discretion to release an applicant on bail pending appeal, the discretion must be exercised judiciously. The applicant herein was convicted of a very serious offence and he stands to serve life imprisonment if his appeal does not succeed. The word of the applicant that he is not a flight risk is not sufficient in face of the sentence meted out to him. Further, the applicant did not submit a medical report to show that he is undergoing treatment and that his medical condition cannot be treated in the prison clinic.

11. A perusal of the proceedings in the lower court shows that the applicant has an arguable appeal. I do not see him having overwhelming chances of success on appeal. I however do not wish to pre-empt his appeal as that will be for the court that will hear his appeal to determine.

12. I therefore find that the applicant has failed to satisfy this court on the principles set out in the cases cited in this ruling. I find the application devoid of merit and it is dismissed accordingly.

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this 25TH day of **JANUARY**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Applicant.**

..... **for the Respondent.**

..... **Court Assistant.**