



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**  
**CRIMINAL APPEAL NO. 17 OF 2015**

**EDWARD MUSA OPONDO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

This application is for admission of the applicant to bail pending appeal. It is dated 20<sup>th</sup> day of November 2015 and is brought by Edward Musa Opondo, the appellant and is also filed under **Section 557 of the Criminal Procedure Code**.

The applicant was charged with attempted defilement contrary to Section 9(1) of the Sexual Offences Act, No. 3 of 2006. He was tried in the principal Magistrate's Court at Keroka and convicted.

He was accordingly sentenced to 10 years imprisonment on 29/09/2015.

The applicant now the appellant, being aggrieved by his conviction and sentence, he lodged an appeal to the High Court challenging his conviction and sentence whilst awaiting the hearing and determination of his appeal, the appellant through a notice of motion dated 20<sup>th</sup> November, 2015 has requested this court to admit him to bond pending the conclusion of his appeal.

The applicant seeks the following orders:

1. **The learned trial magistrate erred in law and misdirected herself fundamentally in the first instance by placing the appellant on his defence when the prosecution had not made out a prime take case against the appellant.**
2. **The learned trial magistrate erred in law and herself fundamental in relaying on uncorroborated evidence.**
3. **The learned trial magistrate misdirected herself the burden of proof to the appellant.**
4. **The learned trial magistrate erred in law in not making distinction between identification and recognition and basing she is conviction on identification**
5. **The learned trial magistrate grossly misdirected herself in not considering the Alibi defense of the appellant and instead shifted the burden of proof.**

His grounds are listed as:

- a. **The Appellant was convicted and sentenced on the 29<sup>th</sup> September 2015 to 10 years imprisonment in respect of Keroka Criminal Case No.1160B of 2015 vide judgment delivered by Honourable N. Kahara.**

- b. That the Appellant being dissatisfied and aggrieved by the finding of the Honourable Court has since lodged the appeal herein.
- c. That the conviction of the Appellant was founded on a single uncorroborated “alleged “witness/victim of who was a minor.
- d. That the minor’s evidence which was admitted and relied by trial court was inadmissible in law as the same was not tested as to its varsity.
- e. The admission and reliance of the aforesaid evidence was contrary to the laws of Evidence Act Chapter 80 Laws of Kenya, the Criminal Proceedings Act and the Constitution of Kenya.
- f. Consequently the conviction and sentencing of the Appellant was irregular at best and in the full glean of the evidence illegal.
- g. The Appellant is a husband and a family man whose kin have always depended upon him for their sustenance.
- h. The conviction herein is bound to deny and deprive the Appellant the opportunity to provide for his kin.
- i. That Appellant is bound to suffer substantial loss/or prejudice, as a result of the sentence.
- j. That Appellant is similarly of a sickly nature and prison setting will only exacerbate his condition.
- k. On the other hand appeal lodged by the Appellant herein raises salient and pertinent issues of law and hence same has overwhelming chances of success.
- l. The loss to be suffered by the Appellant herein, if the sentence is not suspended, shall not be compensable by any monetary award, whatsoever.
- m. Consequently, it is in the interest of justice that the instant application be heard and allowed.
- n. The instant application will obviate injustice to the Appellant.
- o. That this is a just application to grant the orders sought after.

The application is supported on affidavit sworn on 20<sup>th</sup> November, 2015.

In his submission Counsel for the applicant contends that the appeal lodged has a high chance of success, the ground (k) thereof.

Two, that the applicant is sickly and his continued being in prison whose condition will but exacerbate his sickly situation, is another of his grounds.

The prosecutor opposed an application, he stated that the reliance of the applicant on uncorroborated evidence of a minor, is obliterated by **Section 124 of evidence Act**.

Secondly, the assertion that the conditions in prison is appalling as it is, would make the convict’s sickly situation worse, cannot be used to admit and convict to bail necessarily.

## **FINDINGS**

This court, having listened to both submissions by both counsels, is unable to see the grounds of admission to bail. It appears to this court that the applicant was relying heavily on the issue of uncorroborated evidence of a minor. **Section 124** of evidence act is as clear as day light, it says:

*“Notwithstanding the provisions of Section 19 of the oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.*

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”*

A mere assertion that the case has overwhelming chances of success, is not enough, it must be

accompanied by some evidence, leading the court, to accept, reasons which make a probable cause for the said belief that there is a high chance of success of the appeal even without getting into the merit or otherwise of the appeal itself. Some evidential persuasion is necessary. There is none here.

Two principles guide the court on issue of bail/bond pending appeal one, the applicant must demonstrate that his appeal has high or overwhelming chances of success.

Two, to show exception or special circumstances exist to warrant the grant of bail pending appeal.

**See, Dominic Karanja .v. Republic 1986 KLR. 612, Ragbir Singh Lamba .vs Republic 1958 E.A. 337 and Jivraj Shah .v. Republic 1986 KLR 605**

These principles are predicted on the fact that once an accused person has been convicted of an offence by a court of competent jurisdiction, his constitutional right to presumption of innocence is extinguished and he is deemed to have been lawfully convicted unless and until his conviction is overturned on appeal.

Accordingly, therefore this court denies this application and finds no merit in it.

Therefore the application be and is hereby dismissed.

It is so ordered.

**Dated this 20<sup>th</sup> day of January, 2016.**

**C.B. NAGILLAH**

**JUDGE**

**In the presence of:**

Nyamwange hold brief for Momanyi Gichuki for the applicant

Malesi for the respondent

Mercy - Court clerk.