



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 113 OF 2015

JOHN BUNDI KOOME.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

The applicant herein is John Bundi Koome who was charged and convicted of the offence of defilement contrary to section 8(1) as read with **Section 8(2) of the Sexual Offences Act number 3, of 2006**. He was sentenced to serve life imprisonment by SRM's Court Githongo. The appellant filed an appeal to this court on 26th October 2015 by way of petition of appeal dated 21st October 2015.

By a Notice of Motion Application brought pursuant to **Section 356 of the Criminal Procedure Code CAP 75 of the Laws of Kenya and Article 49 (1) (h) of the Constitution**, the Applicant prays to be released on bond pending the hearing and determination of his appeal.

The gist of the application is that the intended appeal has overwhelming chances of success, that the appellant is not likely to abscond if admitted to bail as he was out on bail for one year prior to the conviction by the trial court, that the appellant is ready and willing to abide by whichever terms/conditions that the court may impose and that he has minor children who need his presence for their schooling and upkeep.

The application was opposed by Mr. Mulochi Learned Counsel for the State who urged that the chances of the appeal succeeding were nil and that the applicant had already been convicted by a competent court of law.

Mr. Ndubi, Counsel for the Applicant submitted that he was relying on the grounds on the face of the application, the affidavit in support sworn by the applicant and the annexed authorities.

There is a wealth of authorities on the conditions precedent to the grant of bail pending appeal some of which I will refer. In **Abdi V. Republic (1991 KLR 171)** the court held.

1. ***“An application for bail pending appeal is to be granted in rare and exceptional circumstances.***
2. ***To admit an applicant to bail is the discretion of the court which must be judicially exercised keeping in sight all the facts relating to the application, all the matter material to the trial at the lower court, the grounds submitted in the petition and the chances of success and the nature of the trial.***

3. ***The time it would take for appeal to be prosecuted and determined is by itself not a sufficient ground***".

In *Jivraj Shah v. Republic (1986) KLR 605* the court considered another ground to be.

"If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard."

The Appellant has deposed inter alia that his appeal has overwhelming chances of success and that he has minor children who need his presence for their schooling and upkeep. Whereas I sympathize with the applicant's predicament that he has inter alia minor children who depend on him, his condition is not exceptional or unusual.

This application, unlike an application for bail pending trial, where the applicant is presumed innocent until proved guilty, the applicant has already been convicted. The provisions of **Article 49 (1) (h) of the Constitution** are therefore not applicable in this instance.

In this application, the primary consideration is whether the appeal has a high (overwhelming) likelihood of success. See *Ademba V. Republic (1983) KLR 442*. The applicant had deposed that his appeal has high chances of success. In *Somo V. Republic 1972 EA 476* court held:

"iii) the most important ground is that the appeal has an overwhelming chance of being successful; in that case there is no justification of depriving the applicant of his freedom."

In *Dominic Karanja V. Republic 1986 KLR 612*, the court of appeal said:

"(a) The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

(b) 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 an exceptional circumstance where there existed medical facilities for prisoners.

(c) A 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".

The onus rests on the applicant to demonstrate that his appeal has high chances of success. The applicant did not attempt to discharge that burden. A cursory perusal of the proceedings and judgment of the trial court does not show that the decision of the trial court was without basis and the appeal may result in an outright acquittal. It is presumed that the applicant was convicted by a competent court of law and the presumption of innocence is therefore lost. The fact that the applicant was on bond during the trial and that he will abide by the courts order is not sufficient to have him released on bond pending appeal.

Another consideration for grant of bail is whether the applicant will serve a substantial part of the sentence before the appeal is heard. I have noted that the applicant was only convicted on 13th October 2015 and has only served a period of slightly over three months. The proceedings have already been typed and I do not anticipate any delay in hearing the appeal.

In such an application, the court is called upon to exercise its discretion which is to be exercised judicially. I am satisfied that the applicant has not satisfied any of the conditions required for grant of the bail pending appeal. I decline to grant the application and the applicant will remain in prison pending the hearing and determination of his appeal. The application is hereby dismissed.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

25/2/2016

PRESENT

Mr. Musyoka for State

Mr. Nyauchi Holding Brief for Mr. Ndubi for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused