



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL NO. 205 OF 2014

PATRICK NZIOKA DAVID.....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, Act No 3 of 2006 at the Kithimani Principal Magistrate's Court in S.O.A Case No. 28 of 2011. He pleaded not guilty, was tried and convicted, and sentenced to serve twenty (20) years imprisonment. The Applicant subsequently filed an appeal against the judgment of the trial Court by way of a Petition of Appeal dated and filed in Court on 5th November 2014. He also filed an application by way of a Notice of Motion of the same date as amended on 22nd October 2015 seeking orders that the Applicant 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 5th November 2011 by his Advocate, Andrew Makundi, which are that the appeal has overwhelming chances of success, and that it is only fair and just that the Applicant be released on bond/bail pending hearing of the appeal lest he serves the whole or substantial part of the sentence.

The Applicant's learned counsel also filed written submissions dated 18th January 2015, wherein reliance was placed on section 357 of the Criminal Procedure Code and the decisions in **Jivraj Shah vs Republic [1986] KLR 605**, **Somo vs Republic, [1972] EA 476** and **Jeremiah Mwangi Ngatia –VS- Republic, Criminal Appeal No. 110 of 2011 (unreported)** on the applicable law and principles as to grant of bail pending appeal. It was submitted that injustice will be occasioned if the Applicant is not released on bail pending appeal, because he will serve a considerable and substantial part of the sentence before the appeal herein is determined as he had already served 17 months since 7/5/2014 when he was sentenced to 20 years imprisonment.

Further, that the appeal has reasonable prospects of success as it was evident that an high vaginal swab was not carried out and therefore there was no evidence of penetration by the Applicant; there were material inconsistencies in the evidence of PW1, PW2 and PW4 ; the clinic health card produced in trial as exhibit 1 was not sufficient proof of the age of the complainant because there was no age assessment done; the charge sheet was defective; and that the judgment pronounced by the trial court did not confirm with mandatory provisions of Section 169 (1) of the CPC. Lastly, that the Applicant was undefended in the lower court and there is a probability that he did not prepare his defence well.

The learned Prosecution Counsel, Rita Chelangat Rono opposed the application in a replying affidavit she swore on 14th January 2015 , wherein she deponed that the Applicant has not demonstrated that his

appeal has high chances of success. Further, that Article 49 of the Constitution no longer applies to the Applicant since he was tried and convicted in a court with competent jurisdiction, and 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. The counsel put the Applicant on notice that the state shall at the hearing of the appeal seek enhancement of the sentence, as the trial court was lenient on the current sentence.

The learned Prosecution counsel filed written submissions dated 14th January 2015, wherein she contended that it is now trite that a person convicted and sentenced no longer enjoys the absolute presumption of innocence available to persons facing trial at the first instance. Further, that the 20 years jail term handed to the applicant can be a motivator for taking a flight. Reliance was placed on the decision in the case of **Somo vs Republic, [1972] EA 476** that in bail pending appeal the applicant must demonstrate the existence of overwhelming chances of success. It was submitted that the grounds raised by the Applicant in his petition, and which are said to raise overwhelming chances of success are arguable during the hearing of appeal.

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 **Raghibir 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 7th May 2014 to imprisonment for twenty years, and has therefore served almost two years 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 Amended Notice of Motion dated 22nd October 2015.

There shall be no order as to costs.

It is so ordered.

DATED AT MACHAKOS THIS 15TH DAY OF FEBRUARY 2016.

P. NYAMWEYA

JUDGE