



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL CASE NO. 24 OF 2016**

**RODGERS OVITA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual offences Act** (the Act). He also faced an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the Act.
2. After a full trial, he was convicted of the offence of rape Contrary to **Section 3(1)** as read with **Section 3(3)** of the Act. He was sentenced to ten years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.
3. On 15<sup>th</sup> February 2015, the appellant through his advocates, *Ms. Alwanga and Company Advocates* presented a Notice of Motion in which he sought that he be admitted to bond pending the hearing and determination of his appeal.
4. The application is mainly anchored on the grounds stated on its face which are replicated in an affidavit sworn by the applicant in support of the motion. He contends that his appeal has high chances of success as he was convicted of the offence of rape yet he had been charged with the offence of defilement; that his constitutional rights were violated in the course of the trial as he was not given an opportunity to defend himself on the charge on which he stands convicted and that he stands to lose his job as a teacher if he remains in prison.

He in addition deposed that he was not a flight risk; that he was wrongly convicted as rape and defilement are two different offences and rape cannot be said to be a lesser offence of the charge of defilement.

5. The application is not opposed by the state. Learned prosecuting counsel *Ms. Mokuu* conceded in her submissions that the appellant had raised a substantial point of law in his appeal which gives it good chances of success.
6. Under **Section 357** of the **Criminal Procedure Code**, this court has wide discretion to release a convict on bond pending appeal on terms it deems fit. This discretion being a judicial one must however be exercised within the parameters allowed by the law.
7. There are two cardinal legal principles which guide the courts in exercising its discretion under **Section 357** of the **Criminal Procedure Code**. In order to be entitled to the exercise of the court's discretion in his favour, an applicant must establish that his appeal has high or overwhelming chances of success or that there are exceptional or unusual circumstances in his case that warrants his release on bond pending appeal.
8. In ***Jivraj Shah V Republic (1986) KLR 605*** the Court of Appeal when addressing its mind to the circumstances in which bond pending appeal may be granted held as follows;

***“The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interest of justice to grant bail. If 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 to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued...”***

9. I have read the proceedings before the lower court and the judgment of the learned trial magistrate. I confirm the appellant’s contention that though he had been charged with the offence of defilement with an alternative count of committing an indecent act with a child, he was convicted of the offence of rape and sentenced to ten years imprisonment.
10. I have considered the grounds of appeal in the petition of appeal filed on 15<sup>th</sup> February 2015, the evidence on record and the judgment of the learned trial magistrate. At this stage, I do not think it would be prudent to comment on the nature and veracity of the evidence presented before the lower court as doing so might prejudice the hearing of the appeal but I can say for now that I am satisfied that the appellant has raised substantial points of law which makes his appeal not only arguable but one which has a probable chance of success.
11. In view of the foregoing, I have come to the conclusion that the appellant has met the threshold for grant of bond pending appeal. The learned prosecuting counsel was right in conceding to the application.

In the premises, the application is merited and it is hereby allowed. The appellant shall be released upon executing a personal bond of Kshs. 300,000 with one surety of a similar sum. The surety shall be approved by the Deputy Registrar of this court.

It is so ordered.

**C. W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 28th day of April, 2016**

In the presence of:-

The appellant

No appearance for the Republic

Mr. Mogire for the appellant absent

Naomi – Court clerk