



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL NO. 123 OF 2015

JOHN MUTUA NZIOKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant was charged in the Chief Magistrate’s Court at Machakos Criminal Case No.1148 of 2013 with the offence of defilement contrary to section 8(1) and (4) of the Sexual Offences Act. He was convicted of the offence by the trial court, and sentenced to 15 years imprisonment on 5th August 2015.

The Applicant subsequently filed an appeal against the judgment of the trial Court by way of a Petition of Appeal filed in Court on 18th August 2015. He also filed an application by way of a Notice of Motion dated 4th April 2016, which was supported by an affidavit the Applicant swore on the same date. The Applicant is seeking orders that he be granted bond/bail pending the hearing and determination of this appeal.

The main grounds for his application are that his appeal has an overwhelming chance of success, and he has a permanent place of abode at Kavete village, Ngiini sub-location in Mitaboni Location in Machakos County, hence he is not a flight risk. Further, that he is of high moral standing and a law abiding citizen with no criminal records. The Applicant also deponed that he is ready and willing to abide with the terms set by the Court, and that there are no compelling reasons not to admit him to bond/bail,

The Applicant’s learned counsel, D.M. Mutinda & Company Advocates, filed written submissions dated 5th May 2016, wherein they relied on Article 49 (1)(h) of the Constitution, and the decisions in **Anthony Gathogo Kiama & 2 Others vs R, (2009) e KLR** and **Charles Owanga Aluoch vs Director of Public Prosecutions ,(2015) e KLR** for the position that the Appellant’s appeal has merit and a high chances of success. In particular, it was submitted that the trial magistrate disregarded the Applicant’s defence as the complainant presented and carried herself as person who is over 18 years of age.

The Prosecution did not file any response to the Applicant’s application despite being given ample opportunity to do so.

I have considered the pleadings and submissions by the Applicant. The learned counsel for the Applicant relied on Article 49(1)(h) to argue that there are no compelling reasons not to release the Applicant on bond/bail. Article 49(1)(h) of the Constitution in this regard states as follows:

“49. (1) An arrested person has the right—

...(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

The said provisions therefore apply only to arrested persons pending their charge and trial, since they have a constitutional right to be considered innocent until proved guilty, and not to a person who has been tried, found guilty and convicted of an offence. The provision of law that applies to bond/bail pending appeal is section 357 of the Criminal Procedure Code which provides as follows:

(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

In **Mutua vs R, [1988] KLR 497** the Court of Appeal stated thus as regards the exercise of the Court's discretion in an application for bond/bail pending appeal:

“ 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 **Ragbir 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 Applicant has argued that his defence about being deceived about the complainant's age was not considered. I have perused the judgment of the trial Court and note that this defence was indeed considered and found not to be believable. I have also perused the record of the trial Court, and note that the Applicant who was DW1, and DW2 who was the Applicant's mother, testified that the complainant had indicated that she was over 18 years old. Further, the complainant who was PW1 stated in her testimony upon cross-examination, that she did tell the Applicant's parents that she was 21 years old.

I am therefore satisfied in light of this evidence that this is a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly allow the application in the Notice of Motion dated 4th April 2016 on the following terms:-

1. That pending the hearing and determination of the appeal herein, the Applicant be released on his own bond of Kshs.500,000/= (Kenya Shillings Five Hundred Thousand) with one (1) surety of a like amount;
2. The surety shall be approved by the Deputy Registrar of the Machakos High Court;
3. The Applicant will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until his appeal is heard and determined.
4. The Applicant shall be required to attend court for the hearing of the appeal without fail.
5. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and sureties called to account.

There shall be no order as to costs.

It is so ordered.

DATED AT MACHAKOS THIS 3RD AUGUST 2016.

P. NYAMWEYA

JUDGE