



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 48 OF 2016**

**CHARLES MUKABI ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The appellant *Charles Mukabi* was charged with the offence of defilement Contrary to *Section 8(2)* of the *Sexual Offences Act* and an alternative count of committing an indecent act with a child contrary to *Section 11(1)* of the same Act.

2. After a full trial, he was convicted of the alternative charge. He was sentenced to ten years imprisonment. Being aggrieved by his conviction and sentence, he lodged an appeal to this court through a petition of appeal dated 24<sup>th</sup> March, 2016. Whilst awaiting the hearing of his appeal, the appellant through his advocates *Ms. Manani, Lilan, Mwetich* and *Company Advocates* presented a Notice of Motion dated 21<sup>st</sup> June, 2016 seeking that he be admitted to bail pending the hearing and determination of his appeal.

3. The application is premised on grounds that the appeal has high chances of success and that it would be in the interest of justice that the application is allowed because if the appeal is successful, the appellant will have served a sentence he ought not to have served in the first place.

4. At the hearing of the application, learned Counsel *Miss Adhiambo* represented the appellant while learned prosecuting counsel *Ms. Mokuu* appeared for the state.

In her submissions, *Ms. Adhiambo* re-iterated that the appellant's appeal has high chances of success since in her view, the learned trial magistrate committed a fatal error by convicting the appellant without having considered his defence; that bail pending appeal is a constitutional right; that there were contradictions in the evidence adduced by the prosecution which the trial court should have resolved in the appellant's favour. Counsel also contended that if the application was not allowed, the appellant will serve a substitutional part of his sentence before his appeal is heard. She urged the court to allow the application.

5. The application is contested by the state. *Ms Mokuu* in her submissions invited the court to dismiss the application for want of merit. She submitted that bail pending appeal was not a constitutional right as *Article 49(1)(h)* only applies to accused persons and not convicted persons like the appellant.

Counsel asserted that the appellants appeal does not have any chances of success as the prosecution had proved the charge with respect to which the appellant stands convicted beyond any reasonable doubt; that the appellant was sentenced to ten years imprisonment and that therefore there was no possibility that he will have served a substantial part of his sentence before his appeal was heard and determined.

6. I have considered the application, the grounds of appeal, the rival submissions made by both learned counsel and the evidence presented before the trial court. I wish to start by stating that under *Section 357 of the Criminal Procedure Code*, this court has wide discretion in deciding whether or not to admit an appellant to bond pending appeal. This is however a discretion that must be exercised judiciously in accordance with the law.

7. That said, I wish to deal first with *Ms. Adhiambo's* submission that the application should be allowed as bail pending appeal is a constitutional right. I am unable to agree with this submission because in my understanding, there is no provision in our Constitution that guarantees to appellants a right to bond pending appeal. The only provision in the constitution that provides for the right to bail or bond is *Article 49 (1) (h)* which deals with the right to bail of arrested persons who are either waiting to be charged with a criminal offence or those that have already been charged and are awaiting trial. *Article 49* of the Constitution does not apply to convicted persons. It only safeguards the right of arrested persons to bond pending trial. It does not therefore grant to appellants the right to bail pending appeal.

In the premises, the appellant's claim that he has a constitutional right to bond pending appeal is misplaced.

8. Having found that the appellant does not have a constitutional right to bond pending appeal, I now turn to examine the principles that guide the court in the exercise of its discretion under *Section 357* of the *Criminal Procedure Code*. These principles have been restated in a long line of authorities both in the High Court and the Court of Appeal.

In *Jivraj Shah V Republic (1986) KLR 605*, the Court of Appeal held inter alia that bond pending appeal should be favourably considered where an applicant had established that there were unusual or exceptional circumstances upon which the court could fairly conclude that it was in the interest of Justice to grant bail. Secondly, that bail may be granted where it appeared prima facie from totality of the circumstances that the appeal was likely to be successful on account of some substantial point of law to be urged and that the sentence or a substantial part of it will have been served by the time the appeal is heard.

9. Similarly, in *Dominic Karanja V Republic (1986) KLR 612*, the Court of Appeal held that the most important consideration should be whether an applicant had demonstrated that his appeal had overwhelming chances of success because if that was established, there would be no justification for depriving the applicant his liberty.

10. After considering the application in view of the holdings in the cases cited above, although at this stage it would be imprudent to comment on the credibility and veracity of the evidence adduced by the prosecution for fear of prejudicing the hearing of the pending appeal, I note that the appellant's conviction was mainly based on the evidence of the complainant who identified him as her assailant.

The minor was 5 years old. The appellant in his defence gave an alibi defence and called two witnesses. It will be the true province of the appellate court that will hear the appeal to re-evaluate the evidence adduced in the trial in its entirety to arrive at its independent conclusion regarding whether all the elements of the charge in respect of which the appellant was convicted were proved beyond any reasonable doubt.

11. Having said that, I think it is important to mention that a look at the trial courts judgment reveals that the learned trial magistrate did not give sufficient consideration to the appellant's defence and considering that the appellant's main grievance in this appeal is that the learned trial magistrate erred in law in failing to consider his defence. I find that the appellant has demonstrated that his appeal is not only arguable but

is one that raises a substantial point of law that gives it a probability of success.

**12.** I must however hasten to add that this is not to say that the appeal is one that must succeed but taking into account the totality of the evidence adduced before the trial court, I am satisfied that it is in the interest of justice to grant the appellant the orders sought. In the premises, I grant the appellant bond pending appeal on the following terms; He shall be released upon executing a personal bond of Kshs.500,000/- together with surety of a similar amount. The surety shall be approved by the Deputy Registrar of this court. The appeal shall be mentioned before the Deputy Registrar on 26<sup>th</sup> October, 2016 for purposes of allocation of a hearing date.

It is so ordered.

**C. W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 11<sup>th</sup> day of October, 2016**

In the presence of:

Appellant

Ms Adhiambo for the Appellant/Applicant

Ms Oduor holding brief for Ms Mokuu for the state