



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 253 OF 2013

*(From original conviction and sentence in Criminal Case No. 11 of 2007 of the
Chief Magistrate's Court at Naivasha, E. Boko – P. M.)*

PATRICK KIHARA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein was convicted and sentenced to serve 15 years imprisonment for the offence of defilement contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006. On the 4th October 2013 in the Chief Magistrate's court at Naivasha. He preferred an appeal against both conviction and sentence. On the 3rd April 2014, he filed an application seeking to be released on bail pending the hearing and determination of the appeal.

2. On the 16th March 2015 when the application came up for hearing, Learned State Counsel, Mr. Chirchir stated that he had no objection to the orders sought being granted. However on the 19th March 2015, Mr. Kiberion holding brief for Mr. Chirchir opposed the application.

In his oral submissions the Applicant appearing in person urged the court to grant him bail pending hearing of the appeal and put forth the following:

3. That for the seven years the case was pending before the trial court, while on bond, he never missed to attend court at any one time and that if granted, he will always attend court whenever required. He told the court that he suffers from a kidney sickness, a condition he termed as Elephantiasis and produced treatment card and notes from Kenyatta General Hospital to confirm the same. He stated that he is due to go for an operation for the said kidney problem and further treatment that is not possible while in prison.

4. It was his statement that his appeal has overwhelming chances of success and demonstrated that the P3 form which was the basis of the offence was not produced during the trial and that the Investigating Officer produced two different people's samples for purposes of taking DNA tests and that he did not establish that the said persons were one and the same for purposes of the DNA tests. He further alleged collusion between the complainant and the Investigating Officer which compromised the case against him. In his own words, he stated that he is aware that if released on bail, and this court eventually confirms the conviction and sentence, he will have to serve the balance of the jail term. He urged the court that his appeal has very high chances of success and that if not admitted to bail, he will suffer irreparable damage to his kidneys that the prison health facilities is unable to attend to.

5. The State in its opposition to the bail application submitted that the appeal has no chances of success and that the trial court's conviction and sentence were proper the same having been based on medical evidence, the DNA test and that there are no exceptional circumstances demonstrated by the Appellant and termed the kidney

ailment as not one of them. He urged the court to deny the application.

6. Bail is a constitutional right under Section 49(e) of the Constitution, to an accused person awaiting trial. The constitution is however silent on this right after conviction, and pending hearing of an appeal against the conviction and sentence. It is therefore under the courts discretion whether to grant or deny and upon consideration of all relevant circumstances under which the application is made.

7. In the case of **SOMO V. R (1972) EALR**, the principles to consider when granting bail are settled as:

(1) whether there are exceptional or unusual circumstances.

(2) whether the appeal has an overwhelming chance of success.

(3) whether the appellant is of good character, and whether appeal has been admitted for hearing, and

(4) that the appeal did not involve personal violence.

8. In Criminal Appeal No. 936 of 1968 **Harish Jetha -v- R**, a further principle was added whether the appellant is likely to attend court in instances where the sentence would tempt the appellant to flee from the jurisdiction of the court. Personal circumstances of the appellant too ought to be considered.

9. I have considered arguments by the learned state counsel Mr.Kiberion, submissions by the appellant and the legal provisions and principles that govern granting bail pending appeal. I have also looked at the trial courts proceedings that lead to the conviction and sentence, and the Amended Petition of Appeal filed on the 3rd March 2015. Without going into the merits and/or demerits of the same, it is apparent that serious issues are raised especially on the authenticity of the DNA sampling and results and a fact admitted by the prosecution

that the P3 form which is a necessary document was not produced during the trial.

10. I have noted that the appellant has a kidney condition and an operation has been recommended at the Kenyatta National Hospital. The Prison Health facility is available to the appellant but may not be appropriate to have the operation done there. In my view, this is a personal and exceptional condition and circumstance of the appellant that this court ought to consider in his favour. The appellant dutifully attended court for hearing of the trial case for seven years. I have heard him submit that he is aware that if the appeal is not successful he will serve the balance of the sentence. He is undergoing treatment for a kidney disease and is due for a operation. It is common knowledge that prison health facilities are not adequate for the proposed operation.

11. I am minded that the sentence imposed upon the appellant may tempt him to flee from the courts jurisdiction but taking into account the totality of the petition of appeal and the arguable grounds that may lead to a successful verdict, I shall exercise my discretion, that is unfettered, and that I ought to exercise it judiciously in the appellant's favour.

12. Having stated as above, I shall allow the application, and grant bail to the appellant upon the following terms and conditions:

- (1) that the appellant shall sign a personal bond of Kshs. 350,000/- with one surety of a similar amount.
- (2) that during the pendency of the appeal, he shall attend court for the mention of the case once every month.
- (3) that he shall undertake to attend court whenever required to do so.

(4) that failure to abide with any of the above conditions without lawful and excusable reason shall lead to an automatic cancellation of the bail. It is so ordered.

(5) mention on the 23rd April 2015.

Dated, signed and delivered at Nakuru this 27th day of March 2015

JANET MULWA

JUDGE

In the presence of:

Ms. Rugut for State

Appellant - in person, present

Omondi - Court clerk