



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 1 OF 2014

MARTIN KAGUNDU NJAGI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Sentence and Conviction of Chief Magistrate Embu in Criminal Case No. 1388 of 2012 on 10th January, 2014)

R U L I N G

By a notice of motion dated 11th February 2015, the appellant seeks for orders for bail pending appeal. He was dissatisfied with the judgment of Embu Chief Magistrate where he was convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act in Criminal Case No. 1388 of 2012.

The applicant in addition to his supporting affidavit relied on the amended petition filed on 12/2/2015. The grounds in support of the application as argued by Mr. Eddie Njiru for the applicant are as follows:-

- (a) That the fact that this appeal was admitted for hearing shows that it raises weighty issues which should be considered as a good basis for granting bail pending appeal.*
- (b) That penetration was not supported by any medical evidence and as such was not proved.*
- (c) That the ingredient of the offence were not proved considering the inconsistencies in the prosecution's case.*
- (d) That since the appellant has been out on bond during the trial and he is therefore not a flight risk if released on bail pending appeal.*

The respondent opposed the application. Ms. Matere argued that all the ingredients were proved. As for penetration, the doctor's evidence read as a whole proves that there was penetration which may be either partial or complete as defined in the Sexual offences Act. The respondent contended that existence of inflammation and a smelly discharge is sufficient to prove penetration. The doctor assessed the injury as grievous harm and indicated that the probable type of weapon was a sexual organ.

The appellant has now lost presumption of innocence on conviction and what he requires to prove before the court is that his conviction was unsafe and that the appeal has high chances of success. The appellant has failed to demonstrate high chances of success and neither has shown any special circumstance to justify granting appeal.

In the authority relied on by the appellant of **JEREMIAH M. NGATIA VS REPUBLIC Nyeri HCRA No. 110 of 2011** the cases of **SOMO VS REPUBLIC [1972] EA 476** and the Ugandan Supreme court case of **ARVIND PATEL VS UGANDA Supreme Court Criminal Appeal No. 1 of 2003** the following principles to be considered by the court in granting bail pending appeal were discussed:-

1. *That the applicant must satisfy the court that his case has high chances of success; or*
2. *That special circumstances exist which justify that granting bail pending appeal.*
3. *That substantial delay in determining the appeal is likely to occur.*

The applicant herein relies on the evidence of the doctor in which he argues that it demonstrated that there was no penetration found on examination. I have looked at the P3 form which states that there was inflammation in the external genitalia of the complainant and a smelly discharge. It then concludes that no penetration was noted. The doctor did not go a step further as he is required to do to investigate the cause of the inflammation and the smelly discharge.

However, the doctor classified the injury as grievous harm and gives the probable type of weapon as a sexual assault. The magistrate found that the medical evidence corroborated that of PW1 on the penetration. With the medical evidence on record, I find that the appeal is arguable but cannot be said to have high chances of success.

The applicant did not tender any evidence of any special circumstance in his situation which would justify granting bail pending appeal. On expeditious disposal of the appeal, I would confidently say that the diary of this court cannot be said to congested as far as hearing dates for criminal appeals are concerned.

All considered, I find this application merited only to the extent that the applicant has shown that he has an arguable appeal. It is hereby allowed on the following terms:-

- (a) *That the appellant maybe released on bail upon executing bond of Shs.500,000/= with one surety of a similar amount.*
- (b) *That he attends monthly mentions before the Deputy Registrar pending disposal of the appeal.*
- (c) *That he does not leave the jurisdiction of this court without its permission.*

DELIVERED, SIGNED AND DATED AT EMBU THIS 19TH DAY OF MARCH, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for State

Appellant/Applicant