



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 5 OF 2014

SHADRACK MUTIE NDAKA ACCUSED/APPLICANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon M.A.O Opanga Ag. SRM delivered on 2/10/2013 in Kithimani Principal Magistrate Sexual Offence Case No. 11 of 2012)

(Before Hon. B. Thurairaja J)

R U L I N G

1. This is an application for bail pending appeal. The Applicant was charged with the offence of “sexual assault contrary to **section 5 (1)** as read with **section (2)** of the **Sexual Offence Act No. 3 of 2006.**”

The particulars of the offence were that “on the 26th day of April 2012 at 1230 hours in, **[particulars withheld] Yatta District** within **Machakos County**, unlawfully used his finger to penetrate the anus of **C R J**, a minor aged 2 years and 4 months.

2. After a full trial the Applicant was convicted and sentenced to ten (10) years imprisonment. It is deponed in the affidavit in support of the application that the Applicant will honour the terms of bail and attend court when required.

3. The application was opposed by the State. The honourable counsel for the State submitted that the victim is a child who is a neighbour to the Applicant. That the child will be intimidated by the presence of the Applicant. It was further stated that the appeal has no overwhelming chances of success.

4. The Applicant in his response stated that he hails from Yatta area and is not a neighbour to the complainant.

5. Bail pending appeal is generally a matter of the court’s discretion. There is no Constitutional requirement to grant bail pending appeal. Indeed, the presumption is one of validity of the conviction and sentence imposed. *See Isaac Tulicha Guyo –vs- Republic (Criminal App. No. 16 of 2010).*

6. The most important consideration in granting the orders sought herein is whether the appeal has overwhelming chances of success such that there is no justification of depriving the Applicant his liberty. The court can also consider if there is the existence of any exceptional or unusual circumstances (*See*

Dominic Karanja –vs- Republic 1986 (KLR) 612.

7. Having carefully considered the facts of this application, I am unable to comment on the claim that the appeal has high chances of success. There is nothing in the petition of appeal that points to the likelihood that the appeal herein is likely to succeed. This court is yet to hear the submissions on the actual appeal. No unusual or exceptional circumstances have been demonstrated to exist in this case.

8. In the premises therefore, the Appellant’s application has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of April, 2015

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JUDGE