



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 224 OF 2014**

**PIUS MUTISYA KITING'O .....APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By way of Notice of Motion dated 2<sup>nd</sup> December 2014 the applicant seeks to be released on bail pending appeal. In the alternative the prayer is for suspension of execution of the conviction and sentence imposed by the trial court pending hearing and determination of the appeal.
2. The application is premised on grounds that the applicant was convicted on the 6<sup>th</sup> November 2014 and sentenced to serve 20 years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act; An appeal has been preferred which has overwhelming chances of succeeding; if the appeal is not heard soon the applicant will have served a considerable portion of the sentence by the time it is heard which will render the appeal nugatory unless conviction and sentence are stayed; There are no compelling reasons why the applicant should not be admitted to bail; the applicant is not a flight risk having been out on bail during trial before the subordinate court; no prejudice will be caused if the applicant's prayers are allowed; and the conviction of the applicant was improper on the material placed before the court as the result of the DNA tendered in court was not considered by the court.
3. An affidavit in support of the application was deponed by Simon Soi Kingoo an advocate of the High Court of Kenya who is in conduct of the matter who basically reiterated what transpired before the trial court and what is stated in the grounds of the application.
4. The learned state counsel Mr. Shijenje left the issue to the discretion of the court.
5. Conditions to be satisfied before bail pending appeal is granted were stated in the case of **Dominic Karanja v Republic (1986) KLR 612** where the court stated that:

***“(a) the most important issue was that if the appeal had such overwhelming chances of success, there is not justification for depriving the applicant of his liberty and the ..... relevant considerations would be whether there were exceptional or unusual circumstances.***

***(b) the previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health perse would also not constitute an exceptional circumstance where there existed medical facilities for***

***prisoners.***

***(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.”***

6. An applicant seeking to be released on bail pending appeal is a person who has been convicted therefore the issue of innocence as provided by Article 49 of the constitution does not arise. Therefore the allegations of there being no compelling reason that should deter the court from granting the order sought does not hold any water.
7. The burden is therefore upon the applicant to establish if indeed the appeal has a high chance of succeeding such that at the point of the appeal being determined he will have served a substantial part of the sentence. ( see **SOMO V REPUBLIC 1972 EA 476**). The basis of the allegation of the appeal having a high chance of succeeding is that the DNA report contradicted evidence adduced by the complainant as it turned out that the appellant was not the biological father of the child conceived following the defilement. From the record of the lower court the alleged results were not produced in evidence being contested. An order was made for the test to be repeated. The court in convicting the applicant relied on evidence produce before it. This being a sexual offence where the court can convict having believed the complainant it cannot be asserted authoritatively that the appeal has an overwhelming chance of succeeding.
8. With regard to the alternative prayer, a sentence can only be suspended if the appellant is released on bail. In the premises, having considered the application I decline to grant the applicant bail pending appeal.
9. Accordingly the application is dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 21<sup>ST</sup> day of MAY 2015.**

**L.N. MUTENDE**

**JUDGE**