



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 85 OF 2014

(From original conviction and sentence in Criminal Case No. 250 of 2011 of the Senior Resident Magistrate's Court at Tawa, W. K. Cheruiyot – Ag. SRM)

BRIAN MBUVI KITAVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, Brian Mbuvi Kitavi has applied for bail pending the hearing and determination of the appeal herein.
2. The Applicant was convicted and sentenced to serve 20 years imprisonment for the offence of defilement of a child contrary to Section 8(1) as read with subsection 8(3) of the Sexual Offences Act.
3. The particulars of offence are that on the 15th day of December in Mbooni East District within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of ANK, a child aged 14 years.
4. In the affidavit in support of the application, it is stated that the Applicant is dissatisfied with the judgment and sentence and has lodged the appeal herein. That the Applicant is a 23 year old young man who is a college student and is desirous of continuing with his education. That the Applicant is sickly and was on medication at the time of conviction and sentence. The Applicant has further stated that he was out on bond during his trial in the lower court and never absconded. He undertakes to abide by any conditions of bond that may be set by this court.
5. In an application for bail pending appeal, the issue rests in the court's discretion depending on the circumstances of each case. There is no constitutional requirement to grant bail pending appeal. The court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on law by the Constitution and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong. It is not, therefore, surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances. (*See Isaac Yulicha Guyo –vs- Republic Cr. Application No. 16 of 2010*).
6. As stated by the Court of Appeal in **Dominic Karanja –vs- Republic [1986] KLR - “The**

most important consideration is if the appeal has overwhelming chances of success, there was no justification for depriving the Applicant of his liberty. The other consideration is if there is existence of exceptional and unusual circumstances.”

I would also add that the court has to put into consideration the added fact that, having been convicted, the Appellant would most likely have an incentive to abscond if released on bail.

7. Having carefully considered the application and having perused the proceedings and judgment of the lower court, I am not convinced at this stage that the appeal has overwhelming chances of success. This court has however not yet had the benefit of hearing submissions on the actual appeal.

No unusual circumstances have been shown to exist upon which this appellate court can conclude that it is in the interest of justice to grant bail.

With the foregoing, the application has no merits and is dismissed.

Appeal to be fixed for hearing on priority basis.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 18th day of June, 2015

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B. THURANIRA JADEN

JUDGE