



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 65 OF 2014

(Being an appeal from conviction and sentence in Criminal Case No. 1675 of 2012 of the Chief Magistrate's Court at Machakos, P. M. Mugure, R. M.)

GABRIEL MWAKA MUSAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant, Gabriel Mwaka Musau was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.
2. In the alternative, the applicant was charged with the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.
3. The applicant pleaded not guilty. After a full hearing, the applicant was convicted in the main count and sentenced to 25 years imprisonment on 4th April, 2014.
4. The applicant was aggrieved by both the conviction and sentence and appealed to this court. The applicant's application dated 2nd March, 2015 is for bail pending the hearing and determination of the appeal.
5. It is stated in the affidavit in support of the application that the applicant is incapacitated and wishes to undergo treatment while at home. The applicant has further deponed that he is a law abiding citizen with no previous criminal records. That the applicant has a permanent place of abode in Kikunuania sub-location, Kathiani Sub-County, Machakos County and will attend court and abide by any conditions that the court may impose. It is also contended that the appeal has overwhelming chances of success.
6. During the hearing of the application, the learned counsel for the applicant relied on written submissions. This court has considered the same.
7. The application is opposed. The learned counsel for the state in his written submissions argued that there are no sufficient grounds to show that the appeal has overwhelming chances of success. On the assertion that the applicant is incapacitated, it is submitted that medical care is provided in prison throughout the country including referral to Government Hospitals which include Kenyatta National Hospital.

8. 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 Yulichia Guyo –vs- Republic Cr. Application No. 16 of 2010**).

9. 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.”**

10. I have carefully considered the application and perused the proceedings and the judgment of the lower court. I have also considered the written submissions filed by the counsel for the applicant and by the counsel for the State.

11. Although the appeal may be arguable, I have not seen any overwhelming likelihood of success. As the appeal is yet to be heard, I will avoid taking a stand on the issues raised at this stage. (See for example **JORAM NJOROGE NG’ANG’A VS R. BUNGOMA HCRA 185/12**).

12. On the question of incapacity, although I sympathize with the applicant, his condition has not been shown to be an exceptional or unusual circumstance where there exists medical facilities for prisoners. The record herein reflects that the applicant has been accorded medical treatment at Machakos General Hospital and at Kenyatta National Hospital.

13. The assertions that the applicant is a law abiding citizen with a fixed place of abode and will not abscond do not constitute exceptional and unusual factors. (See for example **DOMINIC KARANJA case, supra**).

14. With the foregoing, I am satisfied that the applicant has not met the conditions for the grant of bail pending appeal. Consequently the application is dismissed.

15. The proceedings herein have been typed and the record of appeal compiled. The appeal had been fixed for hearing on 20th May, 2015 but the applicant opted to proceed with this application. I direct the Deputy Registrar to fix the appeal for hearing again on priority basis.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 27th day of August, 2015.

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JUDGE