



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 43 OF 2015

HUSSEIN DIDA.....APPELLANT/APPLICANT

V E R S U S

REPUBLIC RESPONDENT

RULING

The applicant herein Hussein Dida was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act number 3, 2006. He was sentenced to serve 20 years imprisonment by Principal Magistrate's Court Isiolo. The appellant filed an appeal to this court on 7th April 2015 by way of petition of appeal dated 27th March 2015.

By a Notice of Motion Application filed in court on 19th May 2015, he prays that this court do admit him to bail pending the hearing and final determination of his appeal upon such terms and conditions that the honourable court may appear just and reasonable in the circumstances of this case.

In the alternative, he urged the court to suspend the sentence he is currently serving pending the hearing and determination of this appeal or further orders of this court.

The said application is premised on the following grounds:

1. **The applicant was charged, tried and convicted in the Chief Magistrates court in Isiolo Case No. 207 Of 2012 and sentenced to 20 years imprisonment;**
2. **The applicant being dissatisfied with the aforesaid judgment and sentence has pursuant to leave granted 5th May 2015 by this honourable court appealed against the conviction and sentence;**
3. **As demonstrated in the petition of appeal the applicant has an arguable appeal with overwhelming chances and prospects of success;**
4. **The hearing of the applicant may delay due to other pending appeals, which rank in priority in time to the applicant's appeal and due to the limited number of judges at the station;**
5. **That no prejudice will be occasioned to the prosecution.**

Mr. Igweta urged that if the application is not allowed, the applicant is likely to serve a substantial part of the sentence before the appeal is heard.

Mr. Mulochi, Learned Counsel for the State swore an affidavit in opposition to the application where he deposed *inter alia* that the appellant had not satisfied the court that there is overwhelming probability that the appeal would succeed. Consequently, he urged the court to find the Notice of Motion to be unmerited and instead favour the appellant with an early date for the hearing of the appeal

Before the court considered this application, it called for a pre-bail report. According to the pre-bail report, community members and the local administration had no problem with the applicant being considered for bail because he is not considered a threat to them.

I have carefully considered the rival submissions by the parties and the pre- bail report.

There is a wealth of authorities on the conditions precedent to the grant of bail pending appeal some of which I will refer.

In **Abdi V. Republic (1991 KLR 171)** the court held.

1. **“An application for bail pending appeal is to be granted in *rare and exceptional circumstances.* (Emphasis mine.)**
2. **To admit an applicant to bail is the discretion of the court which must be judicially exercised keeping in sight all the facts relating to the application, all the matter material to the trial at the lower court, the grounds submitted in the petition and the chances of success and the nature of the trial.**
3. **The time it would take for appeal to be prosecuted and determined is by itself not a sufficient ground.**

In **Jivraj Shah v. Republic (1986) KLR 605** the court considered another ground to be.

“If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard.”

This being an application for bail pending appeal, the applicant has already been found guilty by the trial court and is serving sentence. It is unlike an application for bail pending trial where the applicant has a constitutional right to be considered innocent until proved guilty. In this application, one of the principle considerations is whether the appeal has a likelihood of success. See **Ademba V. Republic (1983) KLR 442**.The applicant had deposed that his appeal has high chances of success. In **Some V. Republic 1972 EA 476** court held:

“iii) the most important ground is that the appeal has an overwhelming chance of being successful; in that case there is no justification of depriving the applicant of his freedom.”

In **Dominic Karanja V. Republic 1986 KLR 612**, the court of appeal said:

- a. **The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor 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 per se 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.**

The onus rests on the applicant to demonstrate that his appeal has high chances of success. In this case the applicant did not attempt to discharge that burden. A cursory perusal of the proceedings and judgment of the trial court does not show that the decision of the trial court was without basis and the appeal may result in an outright acquittal. I wish to observe that the applicant was only convicted in October 2014 and was sentenced to 20 years in prison. The proceedings have already been typed and the record of appeal is ready. I do not anticipate any delay in hearing the appeal and so the appellant is unlikely to serve a substantial part of the sentence before the appeal is heard.

In such an application for bail pending appeal, the court is called upon to exercise its discretion which is to be exercised judicially. Even though the pre-bail report was favourable to the applicant, in the exercise of my discretion, I am satisfied that the applicant has not satisfied any of the conditions precedent to the grant of bail pending appeal. I decline to grant the application and the applicant should remain in prison pending the hearing and determination of his appeal. Since the record of appeal is ready, the same can be placed before the Judge for admission and thereafter appeal can be listed for hearing. The application is hereby dismissed.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF NOVEMBER, 2015.

R.P.V. WENDOH

JUDGE

16/11/2015

PRESENT

Mr. Mungai for State

Mr. Nyanyire Holding Brief for Mr. Kiogora for Appellant

Ibrahim/Peninah, Court Assistant

Present, Appellant