

156/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 217 OF 2013

ANDREW MULIKA KITHUSI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The application dated 26th September 2013 brought by **Andrew Muluka Kithusi**, hereinafter “the Applicant” is for bail pending appeal. It also seeks issuance of any order that is just and prudent to meet ends of justice in the case. It is premised on grounds that the applicant has already lodged an Appeal No. 217 of 2013; the appeal cannot be heard expeditiously as there are other matters pending before court; he is a family person with a duty to take care, maintain and educate young ones; he has an arguable appeal and has high chances of succeeding; he is likely to serve an illegal sentence of imprisonment for an offence he never committed and he will be prejudiced if orders sought are not granted.
2. The applicant was charged with the offence of **defilement** Contrary to **Section 8(1) (3) of the Sexual Offences Act of 2006**. In the alternative he faced an offence of committing an **indecent act** with a child, Contrary to **Section 11(1) of the Sexual Offences Act of 2006**. He was tried, convicted and sentenced to **30 years** imprisonment on the main count. Being aggrieved by the conviction and sentence he filed an appeal against the same; hence this application.
3. At the hearing of the application, learned counsel for the applicant, **Mr. Konya** submitted that the appeal had high chances of succeeding as the **Senior State Counsel; Mr. Omirera** had even advised the **DCIO Makueni** not to prosecute the case. He argued further that the trial magistrate convicted on evidence of a single witness whose evidence was unreliable.
4. Learned Counsel for the State, **Mr. Mwangi** opposed the application on the grounds that the prosecution had discharged its burden of proof therefore the State had an arguable case with overwhelming chance of succeeding. He urged the court to deny the applicant bail.
5. The principles of granting bail pending appeal were succinctly enunciated in the case of **Dominic Karanja versus Republic [1986] KLR 612** where it was stated thus:-

“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 consideration would be whether there were exceptional or unusual circumstances”.

6. It was therefore the duty of the Applicant to demonstrate to this court that he had an arguable case with high chance of succeeding. I have perused the evidence adduced in the Lower Court, and the judgment thereof. It cannot be authoritatively said that the applicant has an arguable case. Secondly, it has not been demonstrated that there are exceptional circumstances that this court would take into consideration and grant prayers sought to ensure ends of justice are met.
7. In the premises, I find the application lacking merit. It is dismissed.

DATED, DELIVERED and SIGNED this 15th day of JANUARY, 2014.

L.N. MUTENDE

JUDGE