

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 4 OF 2013

MUSEMBI MUTISO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

1. By an application dated **5th November, 2013**, the Applicant seeks to be released on bail pending appeal. The application is supported by an affidavit deposed by the applicant whereby he states that following his conviction on **9th January, 2013**, he filed an appeal but his case has not been listed for hearing. His appeal has high chances of succeeding and he is ready to comply with any conditions set by the court.
2. The State Counsel **Mrs Abuga** opposed the application. She argued that the applicant had not demonstrated that his appeal had an overwhelming chance of success; that the court had to balance his liberty and justice; and that he will serve a substantial part of his sentence prior to the appeal being heard.
3. The Appellant was charged with two (2) counts.

(i) Defilement contrary to **Section 8 (1)** of the **Sexual Offences Act No. 3 of 2006**.

(ii) Committing on unnatural offence contrary to **section 162 (a)** of the **Penal Code**.

He was convicted of both counts and sentenced to **life imprisonment** on the first count. The second count was left in abeyance.

4. In the case of ***Dominic Karanja versus Republic [1986] KLR 612*** the Court of Appeal held 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 considerations would be whether there were exceptional or unusual circumstances”.

5. A consideration of the evidence adduced cannot be dismissed as so weak that would result into the appeal succeeding. The fundamental right of being released on bail enshrined in **Article 49(1) (h)** of the Constitution in respect of accused persons is not applicable to the applicant who has been convicted and sentenced. In the premises, I find the application lacking merit.
6. Accordingly, it is dismissed.

DATED, SIGNED and DELIVERED at MACHAKOS this 27TH day of FEBRUARY 2014

L.N. MUTENDE

JUDGE