



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**MISC. CRIMINAL APPLICATION NO. 93 OF 2013**

**BETWEEN**

**JOSEPHAT MACHOKA NYABWABU.....APPLICANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from conviction and sentence of Hon. J. Mitey, RM, dated and delivered on 28<sup>th</sup> October 2013 in the original Keroka PMCR NO.571 of 2012)**

**RULING**

1. What is before me is the Notice of Motion dated 9<sup>th</sup> December 2013, brought under the provisions of **Section 357 (1) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, Article 49 of the Constitution** and all other enabling provisions of the law. The applicant prays for an order releasing him on bail/bond pending the hearing of his appeal, being Criminal Appeal No.126 of 2013, on such terms as the Honourable Court shall deem fit and proper in the circumstances. In the alternative, and without prejudice to the prayer for bail/bond, the applicant herein, Josephat Machoka Nyabwabu prays that his above mentioned appeal be certified as urgent and therefore requiring to be heard and disposed of on priority basis.
2. The application is premised on the grounds set out on the face and also the supporting affidavit sworn by the applicant on 9<sup>th</sup> December 2013. In brief, the applicant contends that he is a student at South Eastern Kenya University, and was meant to have reported back for studies on 20<sup>th</sup> January 2014 and that if he remains incarcerated for much longer, he will lose a substantial part of his studies during the semester commencing 20<sup>th</sup> January 2014.
3. The Respondent did not file any replying papers to the application due to what the court could discern was laxity on their part. However at the hearing of the application on 4<sup>th</sup> February 2014, counsel for both parties made their oral submissions.
4. Mr. Oguttu Mboya for the applicant submitted that the pending appeal has such overwhelming chances of success that this court ought to allow the application. Counsel submitted that the contention of the appeal having overwhelming chances of success is premised on a number of factors, namely that the trial court failed to consider the applicant's defence during the crafting of the judgment and that the trial court failed to appreciate that the complainant's story as to what befell her was not believed by her neighbours.

5. Counsel also submitted that there exist special circumstances to warrant the applicant being released on bond/bail pending appeal, namely that the applicant herein is a student who should be allowed to continue with his studies despite having been convicted and sentenced to a term of imprisonment.
6. Thirdly, counsel submitted that the applicant who was on bond during the trial religiously obeyed the terms of the bond until his case was heard and determined. That the applicant's obedience of the bond terms during the trial speaks well of him and is a good indicator that it is safe for him to be released on bond pending appeal.
7. Finally counsel submitted that the right of the applicant to be released on bond is secured in the Constitution without any restrictions. Reliance was placed on the persuasive authority in the case of **Somo –vs- Republic [1972] EA 476** in which the Court held that the most important consideration for the court dealing with applications for bail/bond pending appeal is whether the appeal has an overwhelming chance of being successful so that where such a chance exists, there would be no justification for depriving the applicant of his right to bail/bond. The court also held, in the same case that matters such as the good conduct of the applicant, or the fact that the appeal has been admitted to hearing or that the offence did not involve personal violence are not exceptional or unusual circumstances to persuade a court to grant bail.
8. It is thus clear that the most important factor to determine whether or not bond should be granted pending appeal is whether there are any exceptional or unusual circumstances in the case.
9. In response, Mr. Ochieng, prosecution Counsel from the office of the DPP submitted that the applicant has failed to demonstrate that his appeal has a high chance of success; that there is no evidence of the applicant's good character and finally that the right to bail/bond pending appeal is not absolute as it is subject to the discretion of the court.
10. Briefly, the facts giving rise to the instant application are that the applicant herein was arraigned before the Principal Magistrate's Court at Keroka in Criminal Case number 571 of 2012 on one count of rape contrary to **Section 3 (1)** as read with **Section (3)** of the **Sexual Offences Act, No.3 of 2006**, it being alleged that on the 2<sup>nd</sup> day of May 2012 at [particulars withheld] in Masaba North District within Nyanza Province he intentionally and unlawfully caused his penis to penetrate the vagina of N.K. without her consent. The applicant denied the charge and thereafter went through a full trial during which the prosecution called 4 witnesses, among them the complainant (PW1) and Mr. Joel Ongaro, PW4, a Clinical Officer working at Kijauri Level 4 Hospital.
11. The applicant, who was found to have a case to answer testified and also called one witness in his defence. After a careful analysis of all the evidence that was placed before it, the learned trial court found that the prosecution had proved its case against the applicant beyond any reasonable doubt. The applicant was found guilty as charged, convicted and sentenced to ten (10) years imprisonment as provided under **Section 3 (3)** of the **Sexual Offences Act, No.3 of 2006**.
12. The applicant was aggrieved by both conviction and sentence and filed CRA No.126 of 2013. The appeal is yet to be admitted. There are 15 grounds of appeal, but they are for detailed consideration on another day. It is on the basis of these grounds that counsel for the applicant contends that the appeal has overwhelming chances of success; on both conviction and sentence.
13. The courts have in a number of cases expounded and elucidated the principles for granting of bond pending appeal. One such case is **Dominic Karanja –vs- Republic [1986] KLR 612** where the court stated, *inter alia*, that the principles governing bail pending appeals are different from those governing bail pending trial. In the application for bail pending trial, the presumption of innocence casts the burden on the prosecution to show why the accused person should not be granted bail. In an application for bail pending appeal, the presumption of innocence is no longer operative. The courts have held that the presumption at that stage is that the accused was properly convicted and the burden is on him to show why he should get bail pending appeal.”

14. The above is indeed the law and in the instant case, the applicant must discharge that burden by satisfying the court that there are good reasons for him to be released on bond pending appeal. Similar views were expressed by the Court in the case of **Abdi –vs- Republic [1991] KLR 171** to the effect that bail pending appeal is to be granted only in very unusual or exceptional circumstances and that in determining whether or not to grant bond, the court must act with utmost circumspection. Some of the matters to be considered by the court, would include a consideration of all the facts relating to the application, all the matters material to the trial at the lower court, grounds submitted in the petition and the chances of success and of course the nature of the trial. In this regard, the courts are cautioned to carefully evaluate the proposition that the appeal has high chances of success. In the **Abdi Case** (above) the court was quick to point out that the length of time it would take to have the appeal prosecuted and determined is by itself not sufficient ground for granting the application for bond/bail pending appeal.

15. I have now carefully perused the lower court record, considered all the submissions made and the law, and the issue that arise for determination is whether in light of all the above, the applicant has shown:-

*a. that his appeal has high chances of success and*

*b. that there exist unusual or exceptional circumstances to warrant the grant of bond pending appeal.*

16. With regard to the first issue, I do not find from a reading of the lower court record and the judgment of the trial court that the applicant's appeal has high chances of success. It is not a case that a court can take one look at and say that it has overwhelming chances of success. In the circumstances, the answer to the first issue is that the appeal lodged by the appellant does not have overwhelming chances of success.

17. Concerning the second issue, the applicant's case is that he conducted himself well during the trial by religiously obeying the bond terms and secondly that the fact that he is a student is a rare and peculiar circumstance which should be considered in his favour. In my humble view, and as rightly held in the case of **Abdi –vs- Republic** (supra) the fact of being a university student is not a rare or exceptional circumstance to warrant the granting of bond/bail pending appeal. That ground therefore fails.

18. In the premises, the application for bond as per prayer (2) of the Notice of Motion fails. The applicant is however at liberty to pursue this appeal in the normal channels with a view to having the same heard and determined within reasonable time.

19. It is so ordered.

**Dated and delivered at Kisii this 26<sup>th</sup> day of February, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:

Mr. Ochwangi (present) for Appellant/Applicant

M/s Mbelete (present) for Respondent

Mr. Bibu - Court Clerk