



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 160 OF 2013**

**HESBON KIBISU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Hesbon Kibisu, was convicted for the offence of Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He was said to have defiled a girl who was eight (8) years old.

Following his conviction, the applicant was sent to jail for life.

He has challenged the conviction and the sentence in an appeal to the High Court. Whilst waiting for the said appeal to be heard and determined, the applicant has asked this court to grant him Bail or Bond.

When canvassing the application, Mr. Omboto, the learned advocate for the applicant, submitted that the Respondent could only make submissions on issues of the law. That was because the Respondent did not file any affidavit to answer to the applicant's affidavit.

Secondly, the applicant submitted that his appeal had overwhelming chances of success.

Meanwhile, the medical condition of the applicant was described as being inappropriate for the conditions in jail.

The applicant said that if he was granted Bond, he would not abscond, because he was a family man, and that his family is resident in Kenya.

In an endeavour to demonstrate that his appeal had a high chance of success, the applicant pointed out the numerous contradictions in the case of the prosecution.

One such point emanated from the fact that the offence was said to have been committed on 28th August 2012, yet it was not reported until 7th September, 2012. In effect, the report was made about 12 days after the incident.

Meanwhile, the victim of the alleged Defilement was also not admitted on 28th August, 2012. She was admitted on 5th September, 2012.

As there was no explanation about why she was not admitted in hospital between 28th August, 2012 and 5th September, 2012, the applicant submitted that that was reason enough to cause doubt on the alleged

defilement.

Another alleged contradiction is said to arise from the fact that whilst the victim was infected with a Sexually Transmitted Disease, the applicant had no such infection when he was tested.

Thirdly, the applicant was shown to have been unwell and thus incapable of sustaining an erection. He had no testicles, and his wife testified about his inability to perform sexually, for six (6) years. In those circumstances, the applicant believed that his appeal had very good chances of success.

Finally, the applicant drew the court's attention to the refusal by the mother of the victim, to record a statement. That piece of information was said to have been provided by the Investigating Officer.

As far as the applicant was concerned, the conduct of the victim's mother confirmed that the reason for his being arrested and charged was the fact that the victim's father had differences with the applicant.

In answer to the application, Ms. Ruto, Learned state counsel, submitted that the appeal did not have any chances of success.

As regards the medical condition of the applicant, it was stated that the applicant did not demonstrate that he required specialised treatment.

Accordingly, the respondent was of the view that there were no special circumstances to warrant the grant of bail.

The respondent also said that the applicant had had an opportunity to undertake medical examination which could have verified whether or not he was unable to perform sex. However, as the applicant did not take up the said medical examination, the respondent was of the view that there was no proof of the applicant's inability to commit the offence of defilement.

Whilst conceding that the medical report indicated that the applicant did not have one testicle, the respondent submitted that that did not imply that the applicant could not commit the offence.

The evidence on record was said to have been sufficient to sustain the conviction.

And the fact that the applicant tested negative for STD, whilst the complainant tested positive for STD was attributed to the fact that the applicant had had an opportunity to be treated.

I have given due consideration to the application. The first issue concerns the burden of proof.

During the trial of an accused person, the onus of proof vests exclusively upon the prosecution. It is they who have to produce sufficient, relevant and admissible evidence which proves all the ingredients of the offence, and which also proves that the offence was committed by the accused person.

The accused does not have any obligation to prove his innocence. Indeed, the law recognises that an accused person has the right to choose to remain absolutely quiet. If he chooses to say nothing, that fact cannot be held against him, unless the evidence tendered proved that it is he who committed the offence.

However, after a person has been convicted, he is presumed to have been lawfully convicted. At that stage, therefore, if he sought for Bail pending the hearing and determination of his appeal, the convicted person was under a duty to demonstrate to the court the reasons why he considers himself to be a worthy candidate for Bail or Bond.

The prosecution need not justify the denial of Bail, at that stage. Therefore, the failure by the Respondent herein to file a replying affidavit was not reason enough to justify the grant of an order for Bail Pending appeal.

The applicant should prove that his appeal had a probable chance of success. The reason for that requirement is that if an appeal did not have a meaningful chance of success, the appellant would remain behind bars, for good reason. There would then be no reason for granting him Bail pending the hearing of his appeal, if the applicant would more probably than not, end up back in prison when the appeal was determined.

The converse was equally true. When an applicant demonstrated that his appeal had overwhelming chances of success, it would be wrong to keep him in custody when his appeal was pending.

But there are many instances wherein the court handling the application for Bail pending appeal, may not have a very clear picture as to the appeal's chances of success. In such circumstances, some courts would choose to expedite the hearing of the appeal, so that the matter was determined once and for all. That course of action may be more attractive than having that court conduct an in depth analysis of the pending appeal, because that may end up limiting the discretion of the court that would ultimately determine the appeal in question.

In this case, the appeal is arguable. Buy it is not easy to assess whether or not it had overwhelming chances of success, unless this court literally undertakes the task of actually adjudicating on the pending appeal.

In the circumstances, I decline the appellant's request for bail pending appeal. However, I do direct that the hearing of the appeal be fast-tracked. I will therefore assign a hearing date for the appeal immediately after I sign this Ruling.

**DATED, SIGNED AND DELIVERED AT ELDORET**

**THIS 29TH DAY OF APRIL, 2014**

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**FRED A. OCHIENG**

**JUDGE**