

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 334 OF 2013

MARY SYOMBUAAPPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

1. The Applicant was charged in two counts with the offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006**, in Makadara Criminal Case 1359 of 2010. She was sentenced to serve life imprisonment. She has appealed against both conviction and sentence and while the appeal was pending she brought this application under **Section 357** of the **Criminal Procedure Code**. She seeks an order admitting her to bail pending appeal, on the premise that her appeal invites overwhelming chances of success, that the appeal may take a long time to determine and that she has a medical condition that may jeopardise her health if she continues to remain in prison.
2. The upshot of the submission of Mr. Kihang’ua, learned counsel for the applicant is that the appeal is arguable, on the grounds that there is no provision in the Criminal Procedure Code for the re-opening of the prosecution case as was done in this case. Further that it carries with it overwhelming chances of success for reasons that there are many inconsistencies in the evidence on record. To therefore mitigate on the Applicant serving part, if not the whole of the sentence, he prayed that the court be pleased to stay the sentence and admit the applicant to bond/Bail pending the hearing of the Appeal.
3. In the applicant’s replying affidavit she also deponed that she is a single mother of one and the sole breadwinner of the family. Further, that she suffers from peptic ulcers, a medical condition that requires her to have specialised treatment regularly.
4. Mr. Mutua, the learned state counsel opposed the application on behalf of the respondent stating that there were no documents to demonstrate the veracity of her averment on her medical condition and that if she needed medical attention, she can be escorted to a medical facility from prison. He further contended that the victim demonstrated a close nexus with the applicant, who did not rebut the candid evidence of the minor. Mr. Mutua submitted that bail pending appeal is not an absolute right and depended on there being overwhelming chances of success. He argued that there was nothing to warrant the grant of the orders sought since the prosecution’s evidence was watertight and urged the court to dismiss the application.
5. The main issue for determination in an application such as the one before me is whether the appeal has overwhelming chances of success. If it does not then this Court would not grant bail pending appeal. This principle found expression in the case of **Mutua v Republic [1988] KLR 497**, in which Platt, Apaloo JJA and Masime Ag JA held that:

“The test was whether there were exceptional or unusual circumstances, the most important ground being whether the appeal had overwhelming chances of being successful”.

I therefore perused the lower court record including the judgment of the trial court to establish whether the appeal could be said to have overwhelming chances of success.

6. In exercising my discretion, I bear in mind that when the applicant was convicted by a competent court she lost the presumption of innocence conferred on her by the Constitution and that during the hearing of the pending appeal the burden will be upon her to show the court that the conviction was wrong. - See the case of **Isaack Tulicha Guyo vs. Republic, Court of Appeal, Nairobi Criminal Appeal No. 16 of 2010;**
7. Solemn assertions by an applicant that she 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 previous good character of the applicant and the hardships, if any, facing her or her family are not exceptional or unusual factors either. The intended appeal must in itself be shown to have overwhelming chances of success. See – the Court of Appeal decision in **Dominic Karanja v Republic [1986] KLR pg. 612.**
8. A copy of the memorandum of the intended petition of appeal was not annexed to this application to enable me assess the grounds of appeal for chances of success thereof. I have however, perused the lower court proceedings and without pre-empting the intended appeal I find that on the face thereof it cannot be said that the appeal has overwhelming chances of success. There is also no overwhelming probability that the sentence will be served before the appeal is heard since the appellant was sentenced to life imprisonment.

For the foregoing reasons, I find that the application before me is lacking in merit and decline to grant it. The application is dismissed.

SIGNED DATED and DELIVERED in open court this 26th day of **June 2014.**

L. A. ACHODE

JUDGE