

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 384 OF 2013

NICHOLAS NGATIA WACHIRAAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The applicant herein **Nicholas Ngatia Wachira**, has brought this Notice of Motion dated 15th November 2013, under **Article 49(1) (h), Article 10, 20, 21, 22, 259 & Article 50(6)** of the **Constitution**. He is seeking orders of court admitting him to bail/bond pending the hearing and determination of **Criminal Appeal No. 313 of 2012**. The appeal stems from a conviction in **CM Cr. Case No. 1438 of 2009**, by Mrs. T. Mwangi, the Senior Resident Magistrate, Makadara law courts, for the offence of gang defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006**, in which he was sentenced to serve 12 years imprisonment.
2. The main thrust of this application, as urged by learned counsel M/s. Rashid on behalf of the applicant, is that bail is a constitutional right. That from the totality of the circumstances, the appeal is likely to succeed on account of some substantial point of law to be argued and that the sentence or a substantial part of it would have been served by the time the appeal is heard. Miss Rashid submitted that the main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which would result in the appeal being allowed. That the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.
3. Mrs. Rashid urged that the applicant's appeal has substantial points of law to be argued at the hearing and his appeal has overwhelming chances of success. She contended that the circumstances which disclose the merit of the appeal are that the prosecution's case was not established beyond reasonable doubt as it did not comply with **Section 36(1)** of the **Sexual Offences Act**. Further that the applicant has undergone inhuman and degrading treatment, and that his rights to fair trial have been infringed and violated contrary to the constitution.
4. Mrs. Rashid found several other faults with the judgment of the court. She argued that the learned trial magistrate did not consider the medical evidence which was adduced; that she convicted the appellant on a defective charge sheet; that her findings were not supported by the evidence on record and that she did not consider the defence evidence. She urged the court to allow the appeal.
5. Miss Ngetich, learned state counsel opposed the application. In her written submissions dated 14th May 2014 filed on behalf of the respondent, she argued that there was overwhelming evidence on record in support of both conviction and sentence. She also contended that there was nothing to warrant the grant of the orders sought since the prosecution's evidence was watertight. She urged the court to dismiss the application.
6. The principle consideration in an application for bail pending appeal as stated by the Court of Appeal in the case of **Jivraj Shah vs. Republic [1986] LLR 605**, to which Mrs. Rashid refer me was, *inter alia*, that bail pending appeal would be considered where there were existing

exceptional or unusual circumstances upon which the Court of Appeal could fairly conclude that it was in the interest of justice to grant bail. Secondly, that it may be granted where it appears, prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or substantial part of it will have been served by the time the appeal is heard. In that instance conditions for granting bail will exist.

7. I therefore perused the lower court record including the judgment of the trial court, and also assessed the grounds of appeal and the submissions thereon, to establish whether the appeal could be said to have overwhelming chances of success.
8. In exercising my discretion, I bear in mind that when the applicant was convicted by a competent court he lost the presumption of innocence conferred on him by the Constitution and that during the hearing of the pending appeal the burden will be upon him 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;**
9. Solemn assertions by an applicant that he 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 him or his 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.**
10. 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 12 years imprisonment.
11. 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 **30th** day of **July 2014**.

L. A. ACHODE

JUDGE