



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Coram: F.A. Ochieng J
CRIMINAL APPEAL NO. 222 OF 2014
JOSEPH KIPROTICH MARAKWEN.....APPELLANT
- VERSUS -
REPUBLIC.....RESPONDENT

[Being an appeal from the Judgment of Hon. B. Kasavuli, Ag. Senior Resident Magistrate dated 22/7/2013 at the Chief Magistrate's Court – Eldoret in Criminal Case No. 2370 of 2012].

RULING

1. **JOSEPH KIPROTICH MALAKWEN** was convicted for the offence of Indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act.
2. Following his conviction, the applicant was sentenced to **TEN (10) YEARS** Imprisonment.
3. He has now lodged an appeal before the High Court to challenge both the conviction and the sentence.
4. Whilst awaiting the hearing and determination of the appeal, the applicant has come to this court, seeking Bond. He wishes to be given the opportunity to prosecute his appeal whilst he was outside the prison walls.
5. The applicant told me that his young children required him, because without him they were suffering.
6. The applicant pointed out that during his trial, he was out on Bond, and that he did not fail to attend court.
7. If granted Bond now, the applicant stated that he would comply with the terms and conditions which the court may impose.
8. Accordingly, the applicant asked me to grant him Bond pending the hearing and determination of his appeal.
9. The learned state counsel, Ms. Mumu, opposed the application.
10. In her considered view, the applicant did not demonstrate any unusual or special circumstances that

would warrant Bond or Bail.

11. The Respondent submitted that the evidence on record was so overwhelming that the appeal was unlikely to succeed. I was therefore asked to reject the application.

12. When called upon to reply to the submissions made by the Respondent, the applicant told this court that because he did not commit the offence for which he had been convicted, he was sure that his appeal would succeed.

13. I have given due consideration to the application.

14. In determining this application I have to ensure that I do not usurp the function of the Judge who will ultimately hear and determine the appeal.

15. However, I am also alive to the fact that the most important issue in an application for Bond pending appeal, is whether or not the appeal had overwhelming chances of success. The rationale for that requirement is that if an applicant's appeal was most probably going to succeed, it would be unfair to have him continue to serve the sentence whilst waiting for the said appeal to be heard.

16. Another issue that needs to be taken into account is any unusual circumstances that may be raised by the applicant. For instance if he had an ailment which could not be easily managed in prison.

17. However, it is necessary to emphasize that ill-health is not, of itself, not necessarily an unusual circumstance. It has been so held because the prison facilities are supposed to provide medical care and attention to inmates. Prisons provide medical care either within their own clinics or in conjunction with the public Hospitals located nearby.

18. In this case, the applicant has not indicated any special or unique circumstances attributable to him.

19. The fact that he has young children, who may be suffering because he was in custody, is not anything unique or special.

20. Nonetheless, I note that the Clinical Officer who examined the complainant testified that he did not find any evidence of defilement on the girl.

21. Of course, that is why the applicant was not convicted for the offence of defilement. He was convicted for the offence of an Indecent Act with a child.

22. Of greater significance are the findings by the Clinical Officer as follows:

“The hymen was broken and she was sexually active”

23. When it is borne in mind that the complainant had testified that she had never engaged in any sexual intercourse before the material day, the testimony of the Clinical Officer does not appear to be in consonance with that of the complainant.

24. I cannot help but ask myself if the complainant was trust-worthy in respect to the rest of her testimony. I say no more.

25. It appears to me that the appeal has a probable chance of success. I can place it at no more than that. But, in this case, that may be sufficient to warrant the grant of Bail, in my considered view.

26. Therefore, I do now grant to the applicant, Bond pending the hearing and determination of his appeal. He will execute a personal Bond of Kshs. 200,000/- with one surety of similar sum.

DATED, SIGNED and DELIVERED at ELDORET this 25th day of July, 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ms. Oduol for State.

Appellant in person