



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
MISCELLANEOUS CRIMINAL APPLICATION NO. 360 OF 2013
CLAMUEL MWENESI NGAUYA.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

R U L I N G

1. The applicant has brought this Notice of Motion dated 5th November 2013, under **Articles 49 and 50** of the **Constitution**. In the application the applicant seeks orders admitting him to bail/bond pending the hearing and determination of **Criminal Appeal No. 137 of 2013** filed following his conviction in **Cr. Case No. 2010 of 2011**, at the Kibera Chief Magistrate's Court.
2. In the said **CM Cr. Case No. 2010 of 2011**, the applicant was tried and convicted on the offence of defilement contrary to **Section 8(3)** of the **Sexual Offences Act**. He was sentenced to 20 years imprisonment.
3. The grounds of the appeal are that the learned trial magistrate erred in law and fact by passing the judgment whereas the prosecution's case was full of glaring inconsistencies, the complainant's and applicant's samples by the government chemist were not tendered in court, disregarding the doctor's evidence, the prosecution did not prove their prosecution to the required standard. That therefore the appeal has overwhelming chances of success.
4. The learned state counsel Mr. Kabaka, opposing the application on behalf of the state, urged that the filed appeal showed no likelihood of success and neither are there any exceptional circumstances that would warrant the applicant being released on bond pending appeal. Mr. Kabaka contended that the prosecution's case was not fraught with glaring inconsistencies since it was cured by the production of the medical report by **PW3** and **PW6**, which confirmed that the victim was examined and found to have been defiled.
5. Mr. Kabaka further urged that the two doctors' reports supplemented each other since they confirmed that there was evidence of assault and that the hymen of the complainant was broken. That the prosecution's case was proved beyond reasonable doubt because the applicant was found by **PW5** in his house on the sofa naked, lying on top of the complainant and on checking the complainant found that she had been defiled. Finally the court ordered that the applicant be served with witness statements at his own expense before commencement of the trial.

6. 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.

7. 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**;

8. 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**.

9. 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 20 years 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 **23rd** day of **July 2014**.

L. A. ACHODE

JUDGE