



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 54 of 2012

DAVID MUTUGI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

LESIIT J.

R U L I N G

The Application under consideration is dated 10<sup>th</sup> July 2012. It is a Chamber Summons brought under section 357 of the Criminal Procedure. It seeks prayers 2 and 3.

1. ...

2. **The Appellant/Applicant be admitted to bail, pending appeal upon such terms and conditions as are just in the circumstances.**

3. **The Court do make any other or such better orders which it may deem fit to grant in the circumstances.**

It is based on two grounds.

**i. Appeal has overwhelming chances of Appeal.**

**ii. The Appeal has not been heard yet and if the Applicant is not released on bond, he shall have served a substantial part of the sentence before the appeal is heard and determined.**

It is supported by a supporting affidavit dated 18<sup>th</sup> July, 2012. The gist of the affidavit is the Applicants grievance that the learned trial magistrate totally ignored the evidence of PW2 who exonerated the Applicant and convicted him on the basis of circumstantial evidence. The Application is opposed. The state filed a replying affidavit sworn by Mr. Jackson Motende, learned State Counsel, dated 13<sup>th</sup> May, 2013. The gist of the affidavit is that even though PW2 did not point directly at the Appellant as the culprit, there was other evidence of PW1 and 4 which was believed. The learned State Counsel also avers that the chances of the appellant absconding was high in light of the sentence he was facing.

I have considered this applicant and the submissions of both counsels. The conditions and applicant must satisfy in order to move the court to grant bail pending appeal were considered in ABDULAH VS REPUBLIC 1971 EA 346 where the learned judge held.

**“Bail for a man who has been convicted and sentenced before his appeal his appeal has been heard will only be granted in exceptional circumstances.**

**The dangers against which the court must guard in the granting of bail pending appeal are that the appellant may in the meantime either abscond or commit further offences.**

**The court has discretion in the matter and must exercise it judicially on the particular facts in each application before it.”**

They were also considered in **ADEMBA V. REPUBLIC 1983 KLR 442** where it was held:

**“1. Bail pending Appeal may only be granted if there are exceptional or unusual circumstances.**

**2. The likelihood of success in the appeal is a factor taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.”**

The Appellant was convicted of defilement contrary to section 8(1) and (2) of the Sexual Offences Act and sentenced to life imprisonment. Mr. Gitonga urged that the appeal has very high chances of success counsel urged that the evidence of PW1 and raised material contradiction and demonstrated them counsel said that the complainant contradicted herself as to whether she was pushed through the window or door after defilement. He also took issue the 2 days delay by the complainant to report the matter to her father.

Mr. MONTender for the state while opposing the application urged that the issues raised by the appellants were not convincing and urged that the evidence before the lower court was very strong.

The Appellant has to show that his appeal has overwhelming chances of success. Having perused the record of the lower court, and having taken into account affidavit by the Appellant and State and both submissions I find no demonstration that the Appellant’s Appeal has overwhelming chances of Appeal.

In regard to unusual and exceptional circumstances none have been urged before me.

I am also privy to the fact that the Appellant is unlikely to serve a substantial part of his sentence before his appeal is heard.

I have come to the conclusion that this application lacks in merit. I accordingly dismiss it in its entirety.

**DATED, SIGNED AND DELIVERED THIS 23<sup>RD</sup> DAY OF MAY, 2013.**

**LESIIT, J**

**JUDGE.**