



REPUBLIC OF KENYA

High Court at Busia

Criminal Appeal 68 of 2012

RICHARD KIPANDE STEPHENAPPELLANT/APPLICANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1) Richard Kipande Stephen (hereinafter the Applicant) asks this Court to admit him to bail pending the hearing of his Appeal. The Applicant is serving a prison term of 15 years which was imposed on him in Busia Criminal Case No.1626 of 2011 (**Republic –vs- Richard Kipande** Stephen). He had been convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

2) In this Application, the Applicant has stated that his appeal is arguable and raises triable issues. When he addressed Court, the Applicant asked that it be considered that he is an orphan with many dependants. He said that his continued incarceration is causing hardship to those dependants who include his wife and 3 children. He asserted that he will, if released on bail, faithfully attend Court. He also cited his Court attendances during trial where he had been released on a bond of Kshs.100,000/=.

3) Mr. Kelwon appearing for the State was opposed to the application and argued that it was not enough for the Applicant to give assurance that he will not abscond. He further stated that family hardship is not a ground upon which bail pending appeal can be granted.

4) This application takes a well beaten path. The principles restated in the case of **Dominic Karanja –vs- Republic** (1986) KLR 612 capture the well settled principles upon which a Court should determine an application of this nature. There, the Court of Appeal stated:

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: (see Somo v Republic [1972] E A 476). A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal. “

There lies the answer to the Applicant’s request.

5) I start with the less important consideration. This Court is told that because of his imprisonment the Applicant’s family is suffering hardship. As held by the Court of Appeal, hardship facing a convict’s family would not amount to exceptional or unusual circumstance. Indeed, it is unlikely that any family

whose breadwinner and loved one has been kept away because of a prison term would not face some form of distress. If this was a reason to release a convict on bail pending appeal then applications of this nature would be granted as a matter of course.

6) It is not for this Court to doubt the Applicant's assurance that he will not abscond if released. It must nevertheless be accepted that, unlike when he was facing trial, the Applicant has been convicted by a Court of Law and is serving a long sentence and there could be greater temptation to abscond. Again, that assurance alone would not be sufficient ground for this Court to release a convicted person on bail pending appeal.

7) A more critical consideration is whether the appeal has overwhelming chances of success. I have had opportunity of studying the proceedings of the lower Court and I am unable to say that the Applicant has demonstrated that his appeal has overwhelming chances of success. It is not the business of this Court to foretell the outcome of the pending appeal. And it cannot possibly do that. I must nevertheless, without finality of any sort, assess its viability.

8) The Court observes that the Applicant was found in the same house as the complainant, a girl of 14 years, at the time of the incident. The age of the girl was confirmed by a certificate of birth that was produced in evidence and medical examination taken after the date of the incident showed that her hymen was not intact. On the sentence, an offender under Section 8(3) of the Sexual Offences Act is liable to imprisonment for a term not less than 20 years. The sentence imposed by the Court was that of 15 years imprisonment. This may have been less severe than the minimum sentence provided by the law. I highlight these not to dampen the prospects of the appeal but to demonstrate that at this stage, this Court cannot with certainty say that the appeal has overwhelming chances of success.

9) The upshot is that the application cannot succeed and is hereby dismissed.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 21ST DAY OF MAY 2013.

IN THE PRESENCE OF:

.....**COURT CLERK**
.....**FOR STATE**

F. TUIYOTT
J U D G E