



REPUBLIC OF KENYA

High Court at Meru

Criminal Case 4 of 2013

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DANIEL SALAT LORIEN.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

LESIIT J.

R U L I N G

The Application is a Notice of Motion dated 13th February, 2013. It has been brought pursuant to Article 159(2) (d) of the Constitution and section 357(1) of the Criminal Procedure Code. It seeks:

- 1. That the Appellant/Applicant be admitted on bail pending the hearing and final disposal of the appeal.**
- 2. That in the alternative, the sentence of 15 years meted out to the Appellant/Applicant be suspended pending the hearing and final disposal of this appeal.**

The Application is supported by two grounds:
(i) That the Appellant's/ Applicant's appeal has overwhelming chances of success.

(ii) That the Appellant/Applicant will turn up for the appeal when required.
The Application is grounded further by an affidavit sworn by Mr. B. G. Kariuki advocate of even date.

Mr. Lekoona advocate urged the application on behalf of the Applicant. Counsel urged that the appeal filed by the applicant had high chances of success. He urged that the learned trial magistrate ignored the

Applicants evidence that the complainant's apparent age was 18 years. That secondly DNA evidence was adduced contrary to the express provisions of S.122 (a) (c) and (d) of the Penal Code, as no order was made by a police officer of the rank of Inspector or above or consent given by the Appellant.

The state was represented by Mr. Moses Mungai. Mr. Mungai opposed the application. The learned State Counsel submitted that the Applicant was convicted of a serious offence and sentenced to 15 years imprisonment. Mr. Mungai submitted that the Applicant had not demonstrated that his appeal has an overwhelming chance of success. The learned State Counsel urged that there were no exceptional circumstances to warrant the Applicant to be given bail pending appeal. Mr. Mungai urged that the Applicant could not have been deceived about the age of the complainant because he knew her before and knew that she was in Primary School and that in the circumstances the statutory deceit of age of the complainant cannot stand. In regard to the DNA test the learned State Counsel submitted that the test was conducted to prove the paternity of the child that it belonged to the Applicant and that he also admitted the same in his defence.

I have carefully considered this application, the grounds upon which it is based and finally the submissions by both counsels. The issue is whether the Applicant has satisfied the conditions provided for the granting of bail pending appeal under section 357 of the Criminal Procedure Code.

In **DOMINIC KARANJA V. REPUBLIC [1986] KLR 612** the Court of Appeal considered conditions that must be satisfied by an Applicant seeking bail pending appeal to enable the court grant the application. The court held:

(a) “The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

(b) The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

(c) A solemn assertion 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.

(d) Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.

Unlike an application for bail pending trial where the applicant has a constitutional right to be considered innocent until proved guilty (Article 49 of the Constitution) an applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In an application for bail pending appeal the principle consideration is whether the appeal has a likelihood of success (**Ademba vs Republic 1983 KLR PG 442** and **Somo vrs Republic 1972 EA 476**). The other considerations are whether there Exist Exceptional Circumstances That Would Justify The applicant being granted bail pending his appeal. The other grounds upon which bail may be granted is where there is an anticipated delay in the hearing of appeal, which ground should be considered together with other factors which constitute good grounds for granting bail pending appeal (see **Chimambhai 1971 EA 343**)

When considering an application for bail pending appeal the court has discretion in the matter. However, that discretion must be exercised judicially. The Applicant in this case was convicted of one count of arson contrary to section 8 (1) and (4) of the Sexual Offences Act. He was sentenced to 15 years imprisonment on the 6th December, 2012. Mr. Lekona's submissions that certain evidence was not properly admitted in court is a matter for determination by the court but cannot be used as a ground to support the application for bail pending appeal. It is a triable issue with a potential of being contentious and for which this court cannot say at this stage that it may or may not succeed in the Applicant's favour.

Regarding Mr. Lekoona's submission to the effect that the Applicant has a possible statutory defence, I do agree with Mr. Mungai that given the fact that the applicant was a neighbor of the complainant that

statutory defence may not succeed on appeal. In any event it is question of fact which will have to be tested by the Appellate Court. It is not a point which, per se, is an exceptional or an unusual circumstance that would warrant the court, in exercise of its discretion grant the application sought. It is also not a ground that one can say guarantees the Applicant overwhelming chance of success in this appeal. I have perused the record of the proceedings and without prejudicing the pending appeal, the appeal may be arguable. However, I do not see overwhelming likelihood of success. The offence of defilement is a serious offence and carries a minimum sentence of 15 years imprisonment. I have personal knowledge of the fact that dates for the hearing of appeal are open and that this appeal is likely to be heard before the Applicant has served a substantial part of his sentence.

I have come to the conclusion that this application has no merit. Accordingly I dismiss it in its totality.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF MAY, 2013

**LESIIT, J
JUDGE.**