



**No. 56/2013**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 107 OF 2012**

**ERICK MUMO KYUMU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 663/2011 by Hon. R. Yator, RM on 31/7/2012)*

**RULING**

1. **Erick Mumo Kyumu** the applicant herein seeks to be released on bail pending appeal. The application is based on grounds that the appeal has an overwhelming chance of success; serving sentences imposed would mean he will suffer and be inconvenienced; no compensation would suffice his incarceration; and there were exceptional and/or unusual circumstances that required him to be released on bail.
2. In his affidavit in support of the application, he states that he was convicted by Makueni Court in Criminal Case No. 663/2011 whereby he was sentenced to 24 years imprisonment; the trial magistrate violated his rights by passing a hefty sentence; his continued incarceration is a violation of his constitutional rights.
3. Learned Counsel for the applicant **Mr. Mutie** relied on his written submissions. He stated that the case against the applicant had not been proved to the required standard therefore there was no justification in depriving the applicant his liberty. He relied on the case of ***Dominic Karanja versus Republic [1986] KLR 612.***
4. Relying on the case of ***Ndungu versus Republic [1985] KLR***, he argued that the court relied on an undated document which should not have been accepted in evidence. The magistrate relied on hearsay evidence contrary to the law and there was no corroboration of the evidence adduced as stated in the case of ***Thuo versus Republic [1988] KLR 764.***
5. In a reply thereto learned State Counsel **Mr. Mwangi** opposed the application relying on the case of ***Jivraj Shah versus Republic (unreported).*** He argued that there must be exceptional or unusual circumstances that would enable the court conclude that it is in the interest of justice to grant bail. The court must also take into consideration if a substantial part of sentence has been served before conclusion of the appeal. The court must also consider if the appeal has overwhelming chances of success.
6. He submitted that the applicant had been recognised by the complainant since the offence was committed at 3.00 pm and the two (2) were blood cousins. The court found her to be a truthful witness. Her evidence did not have to be corroborated for it was a sexual offence. The age of the

- child and the injuries sustained in the anus in respect of the second count had been proved.
7. Further, he argued that the appeal was going to be concluded before a substantial part of the sentence imposed would have been served.
  8. I have considered rival submissions by both counsels.
  9. In the cited case of ***Dominic Karanja versus Republic [1986] KLR 612***, the Court of Appeal held that:-

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

10. A perusal of proceedings and judgment thereof reveal that the complainant was a cousin to the appellant. She recognised him. The act is said to have been committed at 3.00pm in broad daylight. She could not have been mistaken as to his identity.
11. In citing the case of ***Ndungu versus Republic [1985] KLR 487***, counsel for the applicant argued that the documents ought not to have been accepted. The issue raised is a technicality which will be addressed at a later stage during the hearing of the substantive appeal as it is only in respect of the second count. The issue of corroboration raised is a matter that will also be addressed during the hearing of the substantive appeal. But, it is important to note that it is not a requirement in sexual offences.
12. Taking into consideration the evidence adduced, I am not persuaded that the appeal has an overwhelming chance of success. Secondly, there are no unusual circumstances alluded to that would make this court exercise its discretion. The application is therefore dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 21ST day of JUNE, 2013.**

**L.N. MUTENDE**

**JUDGE**