

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 32 OF 2013

KENNETH KIMALEL KOECH APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

By the Notice of Motion dated 30th July, 2013, Kenneth Kimalel Koech, the Appellant herein, sought for *inter alia* to be admitted to bail pending appeal. The Motion is supported by the Appellant's affidavit. When the motion came up for interpartes hearing, Mr. Rogoncho, learned State Counsel, informed this court that the Director of Public Prosecutions was not opposing the application for bail.

Mr. Mutai, learned advocate for the Appellant, relied on the grounds set out on the face of the motion and the facts deponed in the affidavit of the Appellant. The appellant avers that he is aggrieved by the trial court's decision to convict and sentence him to serve 20 years imprisonment hence this appeal. He has put forward a total of nine (9) grounds in his Petition of appeal to challenge the aforesaid decision. It is the appellant's argument that he has an appeal with overwhelming chances of success hence he should not be kept in custody while awaiting for the outcome of his appeal.

I have carefully considered the material placed before me plus the proceedings of the trial court. The record shows that the appellant was tried and convicted for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. He was thereafter sentenced to serve 20 years imprisonment. The principles to be considered in an application for bail pending appeal are well settled. **First**, the appellant must show that there are exceptional circumstances in his case. **Secondly**, the Appellant's appeal should not be frivolous nor vexatious. **Thirdly**, that the appeal has overwhelming chances of success.

Let me apply the above principles to this appeal. It is obvious by looking at the face of the Motion, that the appellant has not shown that his case has exceptional or unusual circumstances to warrant this court determine the application in his favour on that principle. However, a critical look at the proceedings vis-a-vis the petition of appeal, it is clear that the appeal is not frivolous nor vexatious. The grounds set out on the face of the petition are arguable points. Perhaps, the pertinent question which this court must grapple with, is whether or not the appeal has overwhelming chances of success. The Appellant has stated that on appeal he will be able to show that he was convicted on uncorroborated and insufficient evidence. The record shows that the prosecution tendered the evidence of five witnesses to support the charge. The first witness was the complainant. When she first took the witness box she gave a totally different story from what she had recorded at the police station. This prompted the court prosecutor to apply for her to be remanded in custody. The court granted the order and the complainant was remanded in custody at Kericho Juvenile Remand Home from 18th December, 2012 until 27th December, 2012 when she was released. On 20.3.2013, it would appear the complainant learnt her lesson and was able to give evidence favourable to the prosecution. In the proceedings there is no evidence to show who and how the appellant was arrested. According to the complainant, the appellant was beaten up and arrested by her brother, G R, and escorted him to Silibwet A.P. Camp. No officer from that A.P. camp nor G R was summoned to testify. The police officer who re-arrested the appellant at Bomet Police Station was not summoned to testify. In short, there is doubt as to how and where the appellant was arrested. There is no credible evidence to show whether or not the house where the complainant was found, belonged to the Appellant. There was need to corroborate the evidence of the complainant in the circumstances of this case. It took the intervention of the court by placing the complainant in remand for a week in order for her to give

evidence in support of the charge thus contradicting her earlier evidence. It is clear her evidence needed corroboration to make it credible. The medical evidence tendered in my view cannot be said to corroborate her evidence. There was need to create a nexus to link the appellant with the offence. In short, I am convinced the appellant has shown that he has an appeal with overwhelming chances of success. On this principle, I will grant him the order he has sought.

In the end , I order that Kenneth Kimalel Koech be admitted to bail pending appeal. He should be released from custody upon depositing cash bail of Kshs. 50,000/= or in the alternative upon signing a bond of Kshs. 150,000/= with one surety of like sum before the Deputy Registrar of this court.

Dated, signed and delivered in open court this 8th day of August, 2013

J.K. SERGON

JUDGE

In open court in the presence of Mr. Rogoncho for the

Director of Public Prosecutions.

N/A for Mutai for the Applicant

N/A for the Applicant