



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 29 OF 2013

LAWRENCE KIPNGETICH TOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This ruling is the result of the motion dated 7th August 2013, in which Lawrence Kipngetich Too, the Appellant herein, seeks to be admitted to bail pending appeal. The application is not opposed by the office of the Deputy Public Prosecution. This court is duty bound to consider whether the application meets the requirements needed in such applications.

On the face of the motion the applicant states that he has an appeal with overwhelming chances of success. He has pointed out that during the hearing of the appeal he will be able to show that the sentence meted out against him is harsh and excessive. It is also stated that the appellant was convicted on the basis of unreliable evidence which did not establish the offence beyond reasonable doubt. The appellant further avers that on appeal he will show that the trial magistrate shifted the burden proof to him.

I have considered the oral submissions of learned counsel and the material placed before me. The record shows that the appellant was arraigned before the Bomet S.P.M.'s court to face a charge of two counts.

In the first count, the appellant faced a charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. In the second count, the appellant faced a charge of abduction contrary to **Section 18(b)** of the **Sexual Offences Act No. 3 of 2006**.

The Appellant pleaded not guilty when taken for plea. The prosecution summoned four (4) witnesses to testify in support of the charge. At the close of the prosecution's case the trial magistrate immediately placed the accused (appellant) on his defence. The Appellant opted to give unsworn testimony. Upon giving his evidence, the appellant told the trial court that he will summon two independent witnesses to testify in support of his defence.

At this juncture, Honourable Kwena, the learned Senior Principal Magistrate ruled that the appellant had admitted the charge and that the DNA evidence connected the appellant with the offence. She promptly recorded a plea of guilty and the next day she sentenced the appellant to serve 20 years imprisonment. Being aggrieved, the appellant preferred this appeal.

On appeal, the appellant put forward the following grounds:

1. **The learned Magistrate erred in law and in fact in convicting the appellant whereas it was clear that the evidence adduced to prove the charges against him was seriously at variance with the particulars of the offence as stated in the charge sheet.**
2. **The learned Magistrate erred in law and in fact in that she erroneously admitted as evidence hearsay evidence. This prejudiced the appellant and particularly as the learned magistrate relied on the same inadmissible evidence.**
3. **The learned Magistrate erred in law and in fact in that she incorporated into her judgment matters not canvassed before her at all.**
4. **The learned Magistrate erred in law and in fact in that she shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the actual age of the complainant.**
5. **The judgment was bad in law and never considered the appellant's unsworn evidence at all. It was biased and never analysed evidence before the court.**
6. **The sentence awarded was bad in law as no reasons were given for the same sentence and also the learned magistrate denied the appellant the chance to call his witnesses.**
7. **The learned Magistrate erred in law and in fact in convicting the appellant of the offence of defilement whereas there was no evidence at all to prove whether the appellant did intentionally and unlawfully cause his hands to come into contact with the breast and vagina of the complainant.**
8. **The sentence was harsh and excessive in all the circumstance of the case.**

Prima facie, it is clear in my mind that the appellant's appeal has overwhelming chances of success. Issues relating as to whether or not the plea was equivocal will obviously arise during the hearing of the main appeal. In the end I am convinced the prosecution properly conceded the application.

I hereby admit the appellant to bail/bond pending appeal. The appellant should be released upon signing a bond of Kshs. 100,000 with one surety of like sum. In the alternative the appellant can be released upon depositing a cash bail of Kshs. 50,000/=. Mention on 1st October 2013 for further orders and directions.

Dated, signed and delivered this 20th day of September, 2013.

J.K.SERGON

JUDGE

In open court in the presence of

Mr. Mutai for the Director of Public Prosecution

N/A for Mr. Motanya for Applicant

Mr. Koech- court clerk