



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 123 OF 2012**

**JAMES MAHINDA WAMBUGU .....APPELLANT**

**Versus**

**REPUBLIC .....RESPONDENT**

*(arising from the judgment of Hon. W.A. Juma, Chief*

*Magistrate in Nyeri Sexual Offence No. 46 of 2010)*

**RULING**

1. By a chamber summons dated 23rd October 2012 the Applicant moved the court under section 357 of the CPC for an order that the appellant be released on bail pending the hearing and determination of the appeal herein.
2. The appellant was charged with the offence of defilement contrary to section 8(1) of the Sexual Offences Act and was tried convicted and sentenced to life imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal.
3. When the application came up for hearing Mr. Njue for the state did not oppose on the basis that “voire dire” was not conducted during the trial and that the defence of alibi was not considered.
4. Mr. Chweya for the applicant submitted that the age of the minor complainant was never assessed and that the magistrate shifted the burden of proof upon the appellant and that the appeal has overwhelming chances of success.
5. In application of this nature the most important thing for the court to look at is whether the appeal has such overwhelming chances of success that there is no justification to deny the applicant of his liberty and the other is whether there were exceptional or unusual circumstances.
6. I have looked at the proceedings before the trial court and whereas the applicant has raised issues with the procedural lapses at the trial am of the view that Article 159 of the Constitution of Kenya now requires that the court looks at the justice of the case and not procedural technicality.
7. On the issue of exceptional circumstances I have noted that the applicant was sentenced to life imprisonment and therefore shall not have served substantial part of the sentence by the time the appeal is heard and I therefore do not see any prejudice the appellant will suffer if bail is denied at this stage.
8. I am of the opinion that whereas the appeal is arguable it can not at this stage be said that based on the procedural technicalities raised the appeal has overwhelming chances of success against the weight of evidence presented before the trial court and therefore dismiss his application herein for bail pending appeal at this stage.
9. I have however admitted the appeal herein and direct that the same be fixed for hearing in the next appeal circle of this court.

Dated at Nyeri this 17th day of October 2013.

J. WAKIAGA

JUDGE

Mr. Njue for the State.

The Appellant in person.

J. WAKIAGA

JUDGE