



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 49 OF 2013**

JOAKIM FUNDI MUGO .....APPELLANT

VERSUS

REPUBLIC ..... PROSECUTOR

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 278 OF 2013 AT THE PRINCIPAL MAGISTRATE'S COURT AT RUNYENJES BY HON. M.O. OBIERO (AG PM) ON 5/9/2013**

**R U L I N G**

This is the Appellant/Applicant's application dated 2/10/2013. The Applicant seeks an order releasing him on bond pending appeal. His application is supported by the grounds set out on the face of the application plus the supporting affidavit of the Appellant/Applicant. The Appellant was charged with the offence of Defilement contrary to section 8 (1) (2) of the Sexual Offences Act with an alternative charge of Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act. He was convicted on the alternative count and sentenced to ten (10) years imprisonment. The Prosecution called a total of five (5) witnesses. The Appellant gave evidence and called four (4) defence witnesses.

It is the Prosecution case that PW1 aged eight (8) years was sent to the shop by her grandmother (PW2) to buy milk. This was at 9am. She found the shopkeeper (Appellant) who pulled her into the shop in a room and defiled her on his bed. He gave her shs.45/= and told her not to disclose to anyone. What betrayed her was the finding of shs.45/= by PW2 in her jacket pocket. This was in the evening of the same day. She was taken to hospital the next day. The P3 was disregarded by the learned trial Magistrate for the reason that it was filled in the absence of PW1. But the learned trial Magistrate found him guilty of the alternative count. He believed her and has given reasons.

The Appellant raised an *alibi* and called four (4) witnesses (his wife included) to confirm his story. The learned trial Magistrate did not believe him. The general assumption is that an Appellant has been convicted by a properly constituted Court and the conviction has not been set aside/quashed on appeal.

In the case of *MUTUA –V- REPUBLIC [1988] KLR 497*. The Court of Appeal gave some guidelines on the considerations to be observed when dealing with an application of this nature. These are;

- i. *Whether the appeal has overwhelming chances of appeal.*
- ii. *Whether there are exceptional or unusual circumstances raised.*

Another consideration is *whether the Appellant was likely to serve his complete sentence before the appeal is heard.*

The learned State Counsel did not oppose the application saying the record had issues to be tackled during the appeal.

I have considered the submissions and done an overview of the evidence. It is clear that the Appellant was convicted on the evidence of a single witness (PW1 aged 8 years). She gave her evidence on the oath and was cross-examined. The Appellant gave sworn evidence and called four (4) witnesses to show that he was not at the scene. This Court will have the task of evaluating all this evidence to confirm if the Prosecution proved its case. This appeal would go either way. I will therefore allow the application. The Appellant to be released upon executing a bond of shs.200,000/= with a surety in similar sum. The Deputy Registrar to approve the surety and the Appellant must come for mentions until his appeal is heard.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20<sup>TH</sup> DAY OF NOVEMBER 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**M/s Ingahizu for State**

**Mr. Gachuba for Mogusu for Appellant**

**Njue – C/c**