



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 33 OF 2013
LESIIT, J

SILAS MUTEMBEI MUKINDIA.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Senior Resident Magistrate C.Ndubi at Nkubu, criminal case No. 1607 of 2011).

RULING

1. The Applicant Silas Mutembei Mukindia was convicted of a sexual offence and in particular of Indecent Act contrary to section 6 of the Sexual Offences Act. He was sentenced to 5 years imprisonment on 8th February, 2013.
2. The Application for bail pending appeal is dated 22nd October, 2013. It is grounded on six grounds on the face of the application as follows.
 1. **That I pleaded not guilty.**
 2. **That the trial magistrate erred in fact by not putting into consideration that my father bought a piece of land from the complainant's grandfather earlier on at a cheaper price and it has always been their dream to acquire back the same in whatever cost because we had turned down their proposal of selling it back.**
 3. **That the trial magistrate erred in law and fact by not putting into consideration that both the complainant (PW1) and the prosecution witness's PW2 & PW3 are either cousins or relate in away.**
 4. **That the trial magistrate erred in law and fact by not understanding that I was the one who demanded for this case to proceed to the court of law because they wanted to finish it locally by me paying sixty thousand to the complainant.**
 5. **That the learned trial magistrate erred in law and facts by convicting me to 5 years imprisonment without the need to observe that medically there is no evidence to connect me with the commission of the offence in question.**

6. **That the trial magistrate erred in law and fact by not considering that there was contempt of court by complainant claiming that he was penetrated which was proved null and void by the medical report.**
7. **That the learned trial magistrate erred in law and fact by convicting the Applicant based on evidence that was only assessed but not factual.**
8. **That the learned trial magistrate erred in law and fact by not considering that that I was newly married to a beautiful wife by church wedding and that is the last thing that could cross my mind.**
9. **That the learned trial magistrate erred in law and fact by failing to consider that there is no any form of resistance offered by the complainant at the time of incident according to his statement. This puts a lot of question marks. To my understanding someone of 17 years and in fourth form purely understands himself and could offer some form of resistance by either fighting his way out or by screaming out for help.**
10. **That the learned trial magistrate erred in law and facts by failing to resolve material contradictions riddled with PW4 saying that the complainant was 22 years of age contrary to his own statement that he was 17 years of age.**
11. **That the conviction of the Applicant was against the weight of evidence.**
12. **That the learned trial magistrate erred in law and facts by conducting the trial partially and irregularly.**
13. **That I pray to be present during the hearing and determination of this appeal.**

3. I have considered the submissions by the Applicant's counsel Mr. Igweta. Counsel submitted that if the application was not allowed and the Applicant granted bail, he was likely to serve a substantial part of the sentence before his appeal is heard. Counsel urged that the appeal had high chances of success.
4. Mr. Moses Mungai for the state opposed the application. The learned state counsel submitted that the appeal did not have overwhelming chance of success. Counsel also urged that the Applicant was unlikely to serve his sentence before his appeal was heard.
5. The Applicant has already been convicted of an offence and so cannot argue that he is innocent until proved of the offence. That assumption is not applicable where the Applicant has been convicted of an offence.
6. At this stage the burden lies with the Applicant to establish that the appeal has high chances of success and that the Applicant is likely to serve a substantial part of his sentence before his appeal is heard. For this proposition I am guided by Case of **Somo vs. Republic 1972 EA 476** where court held.

iii. the most important ground is that the appeal has an overwhelming chance of being successful; in that case there is no justification for depriving the application of his freedom;

In **Chimambai versus Republic 1971 EA 343** where court held:

- i. **anticipated delay in the hearing of the appeal together with other factors constitute good grounds for granting bail pending appeal (R. v. Akbarali Juma Kanji)**
7. Mr. Igweta urged the Applicant's appeal had a high chance of success. No details were given but he relied on the supporting affidavit. At paragraph 4 the Applicant challenges the conviction without medical evidence to support the prosecution case. In regard to this point I have considered the entire evidence. I am satisfied that this ground may be arguable but not necessarily one that can be an overwhelming ground of success.

8. Then at paragraph 5 the Applicant urges that there were contradictions in the prosecution case. There are no details of the alleged contradictions either in counsel's submissions or the supporting affidavit. I find that nothing turn on this point.
9. At paragraph 6 the Applicant avers "*that I am sickly and on medication*". He proceeded to attach SMM2 copies of treatment notes. I have perused all the notes. None of them are legible at all. The nature of the Applicant's sickness or the course of treatment cannot be deciphered from the same. I think that the Applicant attached illegible documents deliberately and I draw the inference that it was because he knew they do not assist or advance his case. When asked for the original copies, counsel for the Applicant said that the copies he had were equally illegible.
10. An Applicant for bail pending appeal can succeed in his application if he is able to establish exceptional or unusual circumstances. For this proposition I am guided by **Jivraj Shah vs. Republic** [1986] KLR 605 as follows:

1. ***The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.***
2. ***If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged and the sentence or substantial part of it will have been serve by the time the appeal is heard, conditions for granting bail will exist.***

11. Since as I observed earlier the nature of the illness is not sufficiently disclosed I am unable to find that there are unusual or exceptional circumstances upon which I can conclude that it will be in the interest of justice to grant bail. The Applicant has not succeeded to establishing this ground either.

12. I am privy to the information that dates for the appeal cases are available and that the court diary is open for appeal cases. The Applicant is unlikely to serve a substantial part of his sentence before his appeal is heard.

13. Having considered this application I find the same without merit and dismiss it accordingly.

SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF

NOVEMBER, 2013.

LESIIT, J.

JUDGE