



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 638 OF 2011

EVANS AMENYA KERIDO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The applicant **Evans Amenya Kerido** has brought an application under **Section 357** of the **Criminal Procedure Code** and **Article 60(1)** of the Constitution. He seeks prayers that the applicant be released on such reasonable terms and conditions of bail as the court may stipulate. In the alternative he prays that there be a stay of execution of the conviction and sentence passed by the trial court, in **criminal case No. Kibera 3443 of 2009**, pending the hearing and determination of appeal **No. 264 of 2011**.
2. Mr. Abele learned counsel for the applicant, urged that the applicant's appeal has overwhelming chances of success because the applicant was convicted and sentenced to 20 years imprisonments, in a trial where the complainant's age was not established either by medical evidence or by a birth certificate, in a charge of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act**.
3. In his submissions the complainant had told the court that she was born in December 1993, while her mother testified that she was born in 1994.
4. He also wanted the court to note that the applicant was not a flight risk because he had been on bond during his trial in the subordinate court and he did not flee.
5. The state opposed the application through learned state counsel Mr. Muriithi. Mr. Muriithi urged that there was no evidence of a pending appeal because none was attached to the application, and the application itself was not filed within the said appeal. Secondly, that the application had been brought under the wrong provisions of the law.
6. Lastly Mr. Muriithi urged that the age of the complainant was not in issue during the trial. That whereas the complainant stated that she was born in 1993, it should be noted that she was a minor at the time of her testimony, and that her mother and other medical witness Dr. Muhombe both testified that she was 15 years old at the time of the offence. In any case, no witness testified that the complainant was an adult.
7. I have perused the grounds of the application and the submissions from both learned counsels in this

matter. Mr. Muriithi is correct in stating that the applicant has not brought this application within the appeal he seeks to prosecute while out on bail, nor has he attached the said appeal to his application.

8. Section 375 Criminal Procedure Code under which he has come provides in part:

“After the entering of an appeal by a person entitled to appeal, the High Court or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of his sentence or order appealed against shall be suspended pending the hearing of his appeal.”

The section therefore, foresees the entering of the appeal before the provisions of **Section 357 Criminal Procedure Code** can be invoked. I have to agree with learned counsel Mr. Muriithi that there is no evidence that such an appeal has been entered besides the word of learned counsel Mr. Abele from the bar.

9. This indeed is a court of record and nothing would have been easier than for the applicant to avail the record of such an appeal in support of this application.

10. Article 61(1) of the Constitution which has been cited by learned counsel for the applicant is completely misplaced, as it relates to classification of land.

For the foregoing reasons I find that there is no way of establishing, from the material before me that the applicant’s appeal has overwhelming chances of success. It shall be remembered that bail pending appeal is not automatic because the applicant no longer enjoys the presumption of innocence having lost it when he was convicted. The loss of his job, which is threatened as submitted by learned counsel on his behalf does not amount to exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail. The applicant is serving a lawful sentence at this juncture.

Reasons wherefore the application is dismissed.

SIGNED DATED and **DELIVERED** in open court this **23rd** day of **March 2012**.

L. A. ACHODE

JUDGE