



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Criminal Application 276 of 2012**

**D.C.W. ....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. This is a Notice of Motion dated 21<sup>st</sup> May 2012, brought under **Section 124** of the **Criminal Procedure Rules, Cap 75** laws of Kenya and **Article 49(i) and (h)** of the **Constitution** of Kenya. The applicant, **D.C.W.** seeks to be admitted to bail/bond pending the hearing and determination of appeal. The appeal stems from a conviction by T. Ngugi, the Principal Magistrate Makadara law court in **CM Cr. Case No. 2814 of 2006, Makadara**. In the said case the applicant was tried and convicted for the offence of incest contrary to **Section 20(1)** of the **Sexual Offence Act No. 3 of 2006**, and sentenced to life imprisonment.
2. Mr. Gakinya the learned counsel for the applicant relied on the grounds on the face of the application and urged that the applicant's appeal has very high chances of appeal. The learned counsel invited the court to consider that for the four years of trial, the applicant faithfully attended court. He also had exclusive custody of his young daughter, the complainant herein, and that the complainant is in fact undergoing difficulty in the absence of the applicant.
3. The learned counsel urged the court to consider this appeal as a pending matter and avail bond under the Constitution to the applicant. He further urged that the applicant is an old family man who is a pensioner, who is unlikely to abscond, and would abide by the conditions imposed by this court, in the form of bond terms.
4. Miss Maina the learned state counsel conceded the application for reasons that the charge sheet is defective, since it does not indicate that the penis penetrated the vagina.
5. I have perused the record and I am unable to appreciate the overwhelming chances of success that the appeal has, from the proceedings attached to the application. I note that there is no copy of the pending appeal, nor of the charge sheet adverted to, attached to the proceedings which accompanied the application, from which the grounds of appeal, or the defects of the charge sheet may be gleaned.
6. Upon conviction the presumption of innocence is lost. For that reason bail is no longer a constitutional right but may be granted pursuant to well established principles. The principles to be

considered in an application for bail or bond pending appeal are now settled. In the case of **Dominic Karanja v Republic [1986] KLR pg. 612**, the Court of Appeal held that:

**1. The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.**

**2. The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors.**

7. It shall be remembered that as stated above, bail pending appeal is not automatic because the applicant no longer enjoys the presumption of innocence, having lost it when he was convicted. The previous good character of the applicant and the hardships, if any, facing his family are not exceptional or unusual factors, neither is the applicant's observance of his bond term while on trial. These are not unusual circumstances upon which I can conclude that it is in the interest of justice to grant the bail sought, in light of the evidence on record and the conviction already in place.

For the foregoing reasons, I therefore find that the application before me is lacking in merit and decline to grant it. The application is dismissed.

**SIGNED DATED and DELIVERED** in open court this **14<sup>th</sup>** day of **November 2012**.

**L. A. ACHODE**

**JUDGE**