



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 41 OF 2011

(From original conviction and sentence in Adult Criminal Case No.97 of 2006 in the Children's court at Nakuru – H. M. NYAGA, SRM)

J.O.O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

J.O.O was convicted of the offence of defilement under **Section 145(1)** of the **Penal Code** and sentenced to 8 years imprisonment on 17/11/06. He has filed an appeal against both the conviction and sentence. The appellant has also filed an undated Notice of Motion, filed in court on 14/2/2011, seeking to be admitted to bail pending appeal and that the sentence be suspended.

In the same application, the applicant had sought to have an age assessment. The same was done at the Nakuru Provincial General Hospital and the doctor assessed the appellant to be at least 18 years of age. The main ground for preferring the appeal is that the appellant was under age at the time of sentence and that appeal has high chances of success. Counsel also urged that the appellant had been on bond and never absconded. It was also submitted that he has already served half of his sentence and is not likely to abscond.

Mr. Omutelema, the Senior Principal State Counsel, opposed the application for reasons that there is overwhelming evidence on record against the appellant. As to the allegation that the appellant was under age at the time of conviction, counsel urged that the medical report indicated that he is at least 18 years.

The main ground for seeking bail is that the appellant was convicted when under age i.e. 18 years. A part from the averments of counsel that the appellant is now 21 years, and the doctor's assessment that he is at least 18 years, it was not disclosed at the hearing what the appellant's age is. I find there to be no conclusive evidence on the appellant's age. Besides that evidence was not availed at the hearing in the lower court otherwise it would have been considered then. It is not a question to be considered at this stage when seeking bail.

It is true that the applicant has already served about 5 years. The court has no idea why this application was not brought soon after the sentence in November 2006 was imposed. I therefore find no reason why the application cannot wait to be determined which issues should be considered on appeal.

As to whether there are high chances of success that is a matter to be considered at the hearing of the

appeal.

Having served a substantial part of the sentence, it is my view that after the record of appeal is prepared, the appeal should be admitted to hearing and the court will give a hearing date on priority basis. I decline to allow the appellant bail at this stage and direct that the counsel do have 7 days in which to prepare the record of appeal for the court to give a priority hearing date. The application for bail is dismissed.

DATED and DELIVERED this 25th day of March 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

The appellant present – in person.
Mr. Omwega for the respondent.
Kennedy – Court Clerk.