

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 78 OF 2011

PATRICK KIRUMA

KANIARU.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant was tried and convicted by the lower court of the offence of **defilement** contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** (the act). In the Alternative, he was charged with **indecent act with a child** contrary to **section 11(1)** of the **Act**. After a full trial, the applicant was convicted of the main charge and sentenced to life imprisonment. That has aggrieved the applicant who has preferred this appeal and in the meantime he has brought the present application to be admitted to bail pending appeal. He has deposed that the appeal has extremely high chances of success; that in the lower court, the applicant was on bond and did not abscond.

Counsel for the respondent opposed the application on the grounds that the applicant has not demonstrated exception circumstances to warrant the granting of the orders sought and further that the applicant having been convicted is a flight risk.

A person convicted by the subordinate court may be admitted to bail by this court under **section 357(1)** of the **Criminal Procedure Code**. The circumstances under which this court will exercise its discretion to grant a person already convicted of an offence by a court of competent jurisdiction has been the subject of numerous decisions. For instance in **Issack Tulicha Guyo V. Republic**, Criminal Application No.16 of 2010, the Court of Appeal reiterated that:

“The court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by the Constitution and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong. It is not, therefore, surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances”.

See **Michael Otieno Ademba V. Republic** (1982-88) 1KAR 263.

The second consideration before bail can be granted is that the applicant must satisfy the court that, *prima facie*, from the totality of the circumstances, the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard. **Jivraj Shah V. Republic**, (1986) KLR 605.

From the averments in this application, it is clear that the applicant has not claimed that there are exceptional or unusual circumstances. He has relied on the second ground, that the appeal has high chances of success. To determine such a question is quite tricky, bearing in mind that the court seized of the application is not considering the appeal. The court hearing an application for bail pending appeal must avoid making definite determinations of either fact or law as doing so may embarrass the fair hearing of the appeal.

Without expressing opinion one way or another, I have perused the proceedings and I am unable to say with the confidence of the applicant that his appeal has “*extremely*” high chances of success. Secondly, in view of the life sentence imposed by the trial court, the temptation to abscond is

high.

For these reasons, the application fails and is dismissed accordingly.

Dated, Signed and Delivered at Nakuru this 25th day of November, 2011.

**W. OUKO
JUDGE**