



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. E008 OF 2021

FELIX KIPRONO KOSGEI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

The Applicant, **FELIX KIPRONO KOSGEI** was convicted for the offence of **Defilement** contrary to **Section 8 (1) (3)** of the **Sexual Offences Act**. He was then sentenced to 10 Years Imprisonment.

1. The Applicant has lodged an appeal to challenge both the conviction and the sentence.
2. Having lodged the appeal, the Applicant has also lodged an application for Bail or Bond pending appeal.
3. When canvassing the application Mr. Morata, the learned advocate for the Applicant, submitted that the appeal has high chances of success.
4. He said that there were glaring inconsistencies in the decision rendered by the trial court.
5. Secondly, he said that the evidence on identification did not meet the required standards.
6. Thirdly, he talked about material contradictions and inconsistencies on the dates when the offence was allegedly committed; as well as about the timelines and the places where the offence was committed.
7. The Applicant also noted that whilst **PW1** talked about injuries to the head, the police talked about strangulation: yet the P3 Form indicated that there were no injuries on the head and on the neck.
8. It was on that basis that the Applicant expressed the opinion that his appeal has high chances of success.
9. The Applicant also submitted about the special circumstances in this case, which were that he would have suffered incarceration before his appeal was heard and determined.
10. He pointed out that during trial, he was out on bond, and he never failed to attend court when required.
11. He informed the Court that he was a sickly man, who has serious “*underlying conditions*”, which put him at high risk of contracting infection from Covid 19.
12. The Applicant has 3 children, and he was their sole bread-winner. Therefore, he said that he could not be a flight-risk.
13. When answering to the application, Ms Odumba learned prosecuting counsel submitted that the Applicant had not demonstrated any special circumstances.
14. In that respect, I do share the views of the Respondent, because incarceration in prison after being convicted for an offence, and upon being sentenced to imprisonment, is not capable of being construed as special circumstances.
15. Similarly, the fact that the Applicant was the sole bread-winner for his 3 children is not special.

16. As regards the Applicant's alleged "*serious underlying conditions*", which would thus pre-dispose him to a greater risk of contracting the Covid 19, the Applicant did make out a persuasive case.

17. There is no basis upon which the Court could reach the conclusion that the Applicant was at a greater risk of contracting Covid 19.

18. In any event, this Court takes Judicial Notice of the fact that the Prison Service has generally done a marvelous job in safeguarding inmates from the Covid 19. In all probability, therefore, I find that the Applicant was unlikely to be at any greater risk of contracting the virus, if he is incarcerated.

19. I appreciate the fact that the Applicant was out on bond during the trial, and that he never flouted the bond terms. That is definitely, a credit to the Applicant.

20. Nonetheless, the mindset of an accused person who, by law, is presumed to be innocent until it is proved otherwise; and a convicted person facing a sentence of imprisonment for 10 years, may be quite different.

21. The Respondent described the Applicant as a flight-risk. But there is no material which the Respondent made available to the Court, to enable me evaluate whether or not the Applicant was a flight-risk. In the circumstances I decline to hold that the Applicant was a flight-risk.

22. As regards the alleged inconsistencies in the evidence, the Respondent was right when it submitted that it is whilst determining the appeal that the court will make the substantive determination of the issue.

23. However, it is equally true that if an Appellant was able to demonstrate some plain and obvious inconsistencies or contradictions in the evidence, the court may well find that the chances of the appeal succeeding were probably high. If the Court were to be convinced that the appeal had high chances of success, it would be inclined to grant bail or bond pending appeal.

24. In this case I have, on a prima facie basis, noted no material inconsistencies or contradictions which were either so plain or obvious as to enable me say that the appeal has high chances of success.

25. Therefore, I find no merit in the application for bond or bail pending the hearing of the appeal. I therefore dismiss the application.

26. Notwithstanding the dismissal of the application, I direct that the appeal be set down for hearing on a date available in my diary.

DATED, SIGNED and DELIVERED at KISUMU

THIS 21ST DAY OF JULY 2021

FRED A. OCHIENG

JUDGE