



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 65 OF 2019**

**(From Original Conviction and Sentence in Sexual Offence Case No. 889 of 2018 by the Principal Magistrate’s Court at Hamisi)**

**JOHN AMUGUNE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The appellant was convicted by Hon Dennis Ogal, Senior Resident Magistrate, on 30<sup>th</sup> May 2019, of rape contrary to section 3(1)(a)(b) of the Sexual Offences Act, No. 3 of 2006, as read with section 3(3) of the same Act, and was accordingly sentenced to ten (10) years imprisonment. He subsequently filed the appeal herein against the conviction and sentence.

2. I am called upon to determine an interlocutory Motion dated 24<sup>th</sup> July 2019, where the appellant seeks to be admitted to bail pending appeal. He avers that his appeal has overwhelming chances of success, and maybe rendered nugatory by delay, that he would abide by bail terms if the application is granted and that he fears that it may take a while for his appeal to be heard by the High Court.

3. The application was argued on 3<sup>rd</sup> December 2019. Mr. Mbaka urged that the appellant was subjected to an unfair trial as he was not afforded legal representative at state expense. It was further submitted that it was a constitutional right for a convict to be admitted to bail pending appeal. He cited *James Ndungu Kagiri vs. Republic* [2016] eKLR and *Peter Hinga Ngaitho vs. Republic* [2015] eKLR. Ms. Omondi, Prosecution Counsel, submitted that the appellant was a convict, his circumstances had changed. She stated that bail pending appeal maybe a constitutional right, but it is still at the discretion of the court.

4. Bail pending appeal is provided for under section 357 of the Criminal Procedure Code, Cap 75, Laws of Kenya. It is undoubtedly a right that accrues to the appellant herein, and I need not reproduce the provision verbatim in this ruling.

5. It was stated by the Court of Appeal in *Mutua vs. R* (1988) KLR 497, that: -

*‘It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the applicant at liberty either from the point of view of his welfare or of the state unless there is real reason why the court should do so.’*

6. A court faced with an application for bail pending appeal has to exercise discretion judicially upon taking into account various factors, which include whether the appeal has overwhelming chances of success (see *Ademba vs. Republic* (1983) KLR 442, *Somo vs. R* (1972) EA 476 and *Mutua vs. R* (supra), whether exceptional or unusual circumstances exist to warrant the court’s exercise of its discretion (see *Raghibir Singh Lamba vs. R* (1958), and whether there is a high probability of sentence being served before the appeal is heard (see *Chimabhai vs. R* (1971) EA 343).

7. The appellant addressed me extensively on violation of fair trial principles as his principal ground for seeking grant of bail pending appeal. I note though that that is the principal ground of appeal. Addressing

my mind to that issue would be tantamount to determining the appeal prematurely. The appellant made no attempt to demonstrate whether any exceptional or unusual circumstances exist to warrant his being admitted to bail pending appeal. I note that the sentence is of ten years imprisonment. He has a long way to go. There is no chance that the appeal will take more than ten years to determine. Indeed, the court will be able to dispose of it within six months.

8. I find no merit in the application dated 24<sup>th</sup> July 2019, and I hereby dismiss it. I shall allocate the appeal a date, at the delivery of this ruling, for mention for the purpose giving directions on its disposal.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17<sup>th</sup> DAY OF January, 2020**

**W MUSYOKA**

**JUDGE**