



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 24 OF 2019

SHUKRI DUBOW YUSSUF.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was charged with offence of defilement contrary to Section 8 (1) (2) of Sexual Offences Act for defiling a boy child aged 6 years. He was convicted and sentenced to what trial court considered a mandatory sentence of life imprisonment on 2/7/019.
2. He has now lodged an appeal to challenge the conviction and sentence. Meanwhile he has filed a Notice of Motion dated 29/1/020 seeking bail pending appeal. He supports the same application on grounds on the Notice of Motion.
3. In summary he deposes that the accused herein was charged and convicted with the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act under Wajir Magistrates Court Sexual Offence Case No. 16 of 2019 and sentenced to life imprisonment. That the appellant being aggrieved and dissatisfied with the said conviction and sentence appealed to the High Court at Garissa on 15th July, 2019 being Criminal Appeal No. 24 of 2019 .
4. The matter is now pending hearing and determination. That the firm of Billy Amendi & Co. Advocates based in Nairobi are now on record for the appellant in the said appeal matter. That the convict/appellant is serving sentence at the Kamiti Maximum Security Prison within Nairobi, the jurisdiction of this court.
5. That the appellant is a man of no financial means and relies on his brothers and well-wishers to raise fees for the appeal, and advocate for representation and it is convenient for the case to proceed in the High Court at Nairobi as it will be less costly and the fact that he is serving sentence in Nairobi.
6. That it is apparent that the option of non-custodial sentence was not considered prior to sentencing giving the court's inherent powers to exercise judicial discretion and the mitigation of the appellant disregarded.
7. That it is his considered view that the accused ought to have been charged under Section 162 of the Penal Code given the evidence that was adduced and not Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006 and or there is a conflict of laws.
8. That it is clear that this is the appellant's first offence and a non-custodial sentence would have been ideal and or a lesser sentence. The only consideration in a bail application is whether the appellant is ready to abide by the terms of the bail and the appellant here is ready to abide by any term this Court is to set and the would be surety being a man of high standing authority in the society.
9. That it will be generally convenient for all the parties involved in the case to transfer the appeal suit to High Court at Nairobi and the prosecution will not suffer prejudice.
10. That this appeal is arguable and has overwhelming chances of success and therefore it is in the interest of justice that the appellants be granted bail pending hearing and determination of the appeal or in the alternative execution of the sentence herein be suspended otherwise the appeal with the rendered in nugatory since by the time it is heard and determined, the appellant is likely to have served some of the sentence.
11. That it is fair and just and for expeditious delivery of justice that this Court grant the orders sought herein. He has also sworn via his advocate Billy Amendi an affidavit on 29/1/020. The prosecution has opposed the application on the ground that the factors for grant of bail pending appeal have not been demonstrated.
12. The only issue herein is **whether the applicant has established threshold for grant of bail pending appeal?**

13. Once a trial court has made a determination and found an accused guilty of the offence, he is no longer considered innocent for his guilt has already been established. In this regard, if such a convict dissatisfied with the outcome, his recourse is to appeal against the decision.

14. Consequently, the conditions applicable for bail pending trial and bail pending appeal are not the same. After trial and conviction, an accused can no longer be presumed as innocent and bail is no longer an automatic right.

15. Such an applicant must demonstrate that his appeal has overwhelming chances of success to be entitled to bail pending appeal. Of course, there may be other considerations such as poor health of an applicant which the prisons authorities may not be able to deal with in prison or that the sentence is too short that by the time the appeal is concluded, the term may have been served.

16. In the case of **Jivraj Shah vs Republic [1986] KLR 605**, the Court of Appeal held: -

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interests of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged, and the sentence or substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.”

17. In **Dominic Karanja vs Republic [1986] KLR 612** the Court of Appeal also held: -

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo v. Republic [1972] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.”

18. The burden is on the applicant to prove that he should be granted bail pending the hearing of his appeal. He should demonstrate that the appeal has overwhelming chances of success.

19. The court finds that the applicant has not made a case for grant of bail pending appeal thus the court makes the following orders;

i. The application is dismissed and appeal to be heard on priority basis.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 2ND DAY OF APRIL, 2020.

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C. KARIUKI

JUDGE