



**REPUBLIC OF KENYA**

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

**Coram – D. K. Kemei – J**

**CRIMINAL APPLICATION NO 203 OF 2018**

**HUDSON OGANGO ONZELE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By an application brought by way of a chamber summons under Section 356 and 357 of the Criminal Procedure Code Cap 75, Laws of Kenya, the Applicant herein seeks the following primary order:

a) **THAT** the Applicant be admitted to bail or bond pending the hearing and determination of the appeal herein.

2. The application was supported by the affidavit of the applicant.

3. The deponent alleges that he was convicted of the offence of defilement contrary to section 8(1) of the Sexual Offences Act by the Principal Magistrate's court at Kajiado and sentenced to 25 years' imprisonment that was enhanced to a life sentence by the High Court at Machakos on appeal in **Criminal Appeal No. 133B of 2009**.

4. The deponent alleges that the matter is in the Court of Appeal.

5. The Respondent herein filed grounds of opposition dated 18.7.2019 that were to the effect that the appellant is a convict who has not demonstrated that his appeal has overwhelming chances of success and that bond pending appeal would defeat the objective of conviction and sentence.

6. The application was canvassed vide written submissions. The applicant submitted that he be granted bail. In rejoinder, he invited the court to invoke Section 356, 361 and 379 of the Criminal Procedure Code and to consider the case of **Aboud Rogo Mohammed & Another v R (2011) eKLR**. He submitted that his appeal had overwhelming chances of success.

7. The state in reply submitted while placing reliance on the case of **Samuel Macharia Njagi v R (2013) eKLR** that there is no demonstration that the appeal has chances of success neither is there a demonstration that there are special or exceptional circumstances that warrant the grant of the order sought.

8. Having carefully considered the application and the oral submissions of the parties, I find that the only issue for determination is **whether the Applicant should be granted bail pending appeal to the court of appeal**.

9. The appellant has made reference to Section 357 (1) of the Criminal Procedure Code that states that:

***“After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”***

10. In the case of **Jivraj Shah versus Republic [1986] KLR 605** that has been cited by the applicant the principles for grant of bail pending appeal were established as:

***i. The existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the***

*interest of justice to grant bail.*

*ii. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.*

*iii. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.*

These grounds can be narrowed down and stated as whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the Appellant on bail pending appeal.

11. In this case the Applicant has argued that the appeal has overwhelming chances of success. There is no copy of the said appeal and more importantly it is trite law that it is not for the court to delve into the merits of each ground but it should suffice that all the grounds are examined, and a conclusion is made that *prima facie* the prospects of success are dim or high.

12. In absence of the said grounds, I am unable to speak on the success of the appeal.

13. I have also carefully considered the provisions of the cited law, they are to the effect that this court can only grant bail and bond in an appeal that is pending before it and an appeal from the decision of the subordinate court; the record is clear that there is no appeal pending before this court and thus hence the cited provisions are of no relevance to the instant application.

14. The conditions for grant of bail pending appeal have been stated in various authorities. A convicted person who knows he or she has little chance of succeeding on appeal is unlikely to wait patiently to serve what might be a severe sentence of imprisonment. If bail is to be granted to a person serving a severe sentence, very stringent conditions must be imposed. Bail pending appeal maybe granted when there are exceptional and unusual circumstances which depend on the facts of each case. Thirdly, bail may be granted if there is an overwhelming probability of the appeal succeeding. Last but not least bail would be granted if it is unlikely that the appeal would be heard until the end or after the expiration of the sentence appealed against.

15. In **Raghibir Singh Lamba v R [1958] 1 EA 337** (High Court of Tanganyika) Spry Ag J at page 338 held that the burden is on the prosecution pending trial why the accused should not be released on bail. The onus shifts to the accused to show why he or she should be released on bail pending appeal after his or her conviction and sentence.

16. In **Girdhar Dhanji Masrani v R [1960] 1 EA 320** Sheridan J, held that different principles should apply to applications for bail pending appeal after conviction compared to applications for bail pending trial.

17. A person applying for bail pending appeal lacks one of the most important elements normally available to a person seeking bail before trial which is the presumption of innocence (See **Harris J in Chimambhai v Republic (No. 2) [1971] 1 EA 343 (High Court of Kenya at Mombasa)**). In **Kaguma v Republic [2004] 1 EA 68** it was reiterated by the Court of Appeal of Kenya following earlier precedents that **"The most important issue here is if the appeal has such overwhelming chances of success the there is no justification for depriving the Applicant his liberty"**

18. Having found that there is no pending appeal before this court, this court became functus officio after delivering its judgement that the applicants seeks to challenge. In this regard the application for Bail pending appeal would be addressed by the Court of Appeal where the appeal is pending as averred by the applicant. Entertaining the application as sought by the applicant is not appropriate as this court will be sitting on appeal in a matter that it is already functus officio.

19. In the premises, I find no merit in the Applicant's application for bail pending appeal filed on 23.10.2018. The same is ordered dismissed.

It is so ordered.

**Dated and delivered at Machakos this 14<sup>th</sup> day of May, 2020.**

**D. K. Kemei**

**Judge**