REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 119 OF 2019

ALFAYO MUSUNGU.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant/appellant has filed a notice of motion dated 2nd December, 2019 seeking to be released on bail pending the hearing and determination of the appeal filed herein. The application is based on the grounds that the appeal stands a high chance of success; that the applicant suffers from a terminal illness and that he is ready to comply with any terms that the court may impose in granting bail.

2. The state/respondent did not file any response to the application despite being given sufficient time to do so.

3. The application is made under Sections 356 and 357 of the Criminal Procedure Code which grants the court power to release a convicted person on bond/bail pending the hearing and determination of an appeal.

4. The principles under which a court may grant a convict bond/bail pending appeal were stated by the Court of Appeal in **Jivraj Shah Vs Republic (1980) eKLR** where the court stated that:

> ***"(a) The principal consideration in an application for bail pending appeal is 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.***
>
> ***(b) If it appears prima facie from the totality of the circumstance 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.***
>
> ***(c)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 weight and relevance of the points to be argued."***

5. In **Somo Vs Republic (1972) EA 476** the said court held that the most important ground is that the appeal has an overwhelming chance of being successful, in which case there is no justification for depriving the applicant of his freedom.

6. It has also to be borne in mind when considering an application for bond pending appeal that the applicant has at that stage been convicted of the offence and therefore that the presumption of innocence until proven guilty does not apply. In **Douglas Mutunga Muthenya Vs Republic (1988) KLR 497**, the Court of Appeal held 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 or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so."***

7. The applicant was convicted of the offence of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offices Act No. 3 of 2006 and sentenced to 10 years imprisonment. The evidence against him was that on the 25th December, 2017 he locked the complainant in his house and attempted to defile her in the process of which he touched her vagina. They were found in the house by the complainant's father in the company of policemen. The applicant was arrested and subsequently charged with the offence. He was tried and found guilty. The complainant was at the time of the commission of the offence aged 16 years.

8. In sentencing the applicant the trial magistrate stated that Section 11 (1) of the Sexual Offences Act provides for a minimum sentence of

10 years. That the section is couched in mandatory terms and thus imposed the minimum sentence of 10 years.

9. I have considered the grounds in support of the application. The appellant was given the minimum sentence of 10 years. The Supreme Court in the case of **Francis Karioko Muruatetu & Another –V- Republic (2017) eKLR** stated that mandatory sentences are unconstitutional. The Court of Appeal in **Evans Wanjala Wanyonyi (2019) eKLR** held that the minimum sentences provided in Section 8 of the Sexual Offences Act are unconstitutional in view of the Supreme Court decision in the *Muruatetu case*. In that case a court may, in cases involving sexual offences, impose a sentence other than the minimum sentence in an appropriate case. The trial court in this case did not consider whether there were circumstances that mitigated against the imposition of the minimum sentence. In case the appeal is eventually unsuccessful, there is likelihood of the sentence being interfered with. A substantial part of the sentence may be served by the time the appeal is heard. I am inclined to grant the applicant bail on this ground.

10. In the premises, the applicant is granted bond of Ksh. 200,000/= with one surety of similar amount.

Delivered, dated and signed at Kakamega this 8th day of October, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for the Applicant/Appellant

No appearance for the Respondent

Applicant/Appellant - Absent

Court Assistant - Polycap