



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NUMBER 21 OF 2019

SIMON KIPTOO RUTO.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant, Simon Kiptoo Ruto, was on 17/5/2019 convicted by Hon. Mwangi – SRM for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act in CRC 52/2018. The applicant is dissatisfied with both the conviction and sentence and lodged this appeal on 21/5/2019.

The applicant has filed the chambers summons dated 13/1/2020 seeking to be released on bond pending the hearing and determination of the appeal.

The grounds in support of the application are contained in his affidavit dated 13/1/2020 and grounds found in the body of the application. He contends that he was sentenced to 15 years imprisonment yet he is a man with a young family and the sole bread winner and needs to support them; that it may take a long time to have the proceedings typed, Record of Appeal prepared and the appeal heard and determined; that his appeal has high chances of success as evidenced by the grounds in petition of appeal. He prays to be released on bond so that he can await the typing of proceedings, admission of the appeal, hearing and determination.

The applicant's counsel, Waichungo Advocate filed written submissions in which it was urged that the key principles to consider in such an application are settled and they include;

- 1) *Whether the appeal has high chances of success;*
- 2) *Whether there is a possibility of delay in determination of the appeal;*
- 3) *Whether the applicant is a first offender.*

Counsel relied on the decision of *Somo v Republic(1972)EA 476* where the main principle, whether the appeal has overwhelming chances of success was espoused.

As to whether the appeal has high chances of success, counsel invited the court to look at the eight grounds raised in the petition of appeal. Counsel further relied on the case of *Charles Owangu Aluoch v Rep CRA 164/2013*.

In regard to delay, counsel argued that the Record of Appeal has not yet been prepared because proceedings have not been typed and it may take long to do so, hence the applicant will have served a substantial part of the sentence before the appeal is heard and determined; that due to the Covid-19 pandemic, work has been down scaled in courts which will occasion further delay. Counsel also submitted that the applicant is a first offender.

Ms Rugut, learned counsel for the State opposed the application through submissions filed in court on 12/10/2019. Counsel also relied on the principles for grant of bail as set out in *Jivraj Shah v Rep(1986)eKLR* which are as follows;

1. *The existence of exceptional or unusual circumstances upon which a court of appeal can fairly conclude that it is in the interest of justice to grant bail;*
2. *Whether the appeal has overwhelming chances of success;*
3. *Whether there is likelihood of the appellant having served a substantial part of the sentence by the time the appeal is heard and*

determined.

Counsel argued that the burden lies on the applicant to demonstrate that the appeal has overwhelming chances of success; that since the lower court proceedings were not availed, it is not possible to tell; that upon perusal of the judgment, it seems to demonstrate that all the law and evidence were exhaustively considered. Counsel also submitted that the applicant having been sentenced to 15 years imprisonment, is unlikely to serve a substantial part of the sentence before the record of appeal is ready and appeal heard and determined.

Counsel relied in the decision of *Dominic Karanja v Rep(1986) Klr 612* where it was held that the previous good character of the convict and the hardships that the family is facing are not exceptional circumstances to entitle one to bail. Counsel also relied on *Peter Hinga Ngotho v Rep(2015)eKLR* where the court held that failure to breach bail conditions before conviction are not exceptional circumstances.

I have duly considered the application and the rival submissions. Although the applicant tended to rely on Article 49(I) of the Constitution, that provision applies to an accused person who is yet to be convicted. Once convicted, the applicant has lost the right to the presumption of innocence which is envisaged under Article 49(i)(h).

The lower court proceedings were not availed to me but I have read a copy of the judgement of the trial court. The appellant is serving 15 years imprisonment which is indeed a long period that would tempt one to be a flight risk.

The grant of bail pending appeal is an exercise of the court's discretion and it is upon the applicant to demonstrate to the court that he is entitled to the said exercise. Of course, each case will depend on its own special circumstances.

In regard to existence of exceptional circumstances that would prompt this court to exercise its discretion in the appellant's favour, the applicant did not allude to any.

The applicant was treated as a first offender but that alone and his good character before conviction cannot be a good ground for granting him bail pending appeal.

I have perused the grounds of appeal and also read the judgment of the trial court and I cannot come to the conclusion that the appeal has overwhelming chances of success.

On the last issue, whether the applicant is likely to serve most of the sentence before the appeal is heard, there is no evidence of that. The judgment is already typed. The station has already up scaled court operations since the Covid-19 pandemic. There is no possibility of a delay in the typing of proceedings or having this appeal heard.

In the end, I find no merit in the application. It is hereby dismissed.

Dated and Signed at NYAHURURU this 15th day of October, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms Rugut for state

Ms Wanjiru for applicant

Henry Court Assistant