



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO 22 OF 2019**

**JOSHUA KOECH.....APPELLANT/APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**BAIL PENDING APPEAL RULING**

Before me is the Notice of motion dated the 12<sup>th</sup> February 2020 brought under **Section 257(1) (sic) of the Criminal Procedure Code read with Article 49(2) b, g, h, and q (sic) of the Constitution of Kenya 2010.**

It seeks the order that the appellant applicant be released on bond terms to be determined by the court pending the hearing and determination of his appeal.

The applicant was charged in **Eldoret CMCRC no. 48 of 2016** with *inter-alia*, the offence of **Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act**, where it was alleged that on the 2<sup>nd</sup> day of December 2013 at [Particulars Withheld] Village Kocholwa Location Keiyo District Elgeyo Marakwet County he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of MLR a girl aged 10 years old.

On 1<sup>st</sup> February 2019, the learned trial Magistrate H.O Barasa PM found him guilty as charged, convicted him and on 11<sup>th</sup> February 2019 sentenced him to twenty five (25) years imprisonment.

Aggrieved, he filed his petition of appeal on the 12<sup>th</sup> February 2019, challenging the conviction, on grounds *inter alia* that it was based on incredible, contradictory, scanty evidence full of latches which did not establish the statutory ingredients of defilement, or prove the charge beyond a reasonable doubt; that no investigations were conducted and the trial magistrate exhibited impartiality and that sentence was harsh and up for review.

It is in the backdrop of this conviction and sentence that his application for bail pending appeal is to be considered.

It is supported by the applicant's affidavit sworn on the February 12<sup>th</sup> January 2019. in which he reiterates the grounds for his appeal, and depones that he is a person of good character who will attend the appeal just as he attended the trial while on bond in the subordinate court; that he has a surety, his own father; that he has a young family that needs his attention and care; that if his application is not allowed his appeal will be rendered nugatory; In addition, that the respondent will not be prejudiced.

The firm of Morgan Omusundi and Company Advocates filed written submissions dated the 28<sup>th</sup> July 2020 in support of the application.

Mr. Omusundi argued the application for the appellant applicant while Mr. Kwame appeared for the state.

Mr. Omusundi in his oral submissions reiterated what was in the applicant's affidavit. He added that the applicant was not a flight risk, hat the appeal raised substantive legal and factual matters and had high chances of success, and that the appellant's continued holding in custody would prejudice the appellant's appeal. That administrative challenges had worked against a fast tracking of the appeal.

In response Mr. Kwame stated that he had been preparing for the appeal but noticed that the record was not complete as two P3s produced before the subordinate court were missing from the Record of Appeal. We adjourned the matter to enable both parties to try and trace the same. This did not happen and we proceeded with the application for bail pending appeal.

Mr. Kwame opposed the application.

He submitted that grounds for granting bail pending appeal were set out in **Dominic Karanja v R [1986] eKLR**; that the applicant had not demonstrated how the appeal had overwhelming chances of success, that on the part of the prosecution the appeal had minimal chances of success as the offence, in particular that the ingredient of penetration was proved. That the applicant had also not demonstrated how he would suffer irreparable damage, or how his appeal would be rendered nugatory. That no unusual circumstances had been established, and that considering the sentence the appellant was now serving, he was a flight risk. That the record would show that the appellant was not of good character. That the mere solemn assertion that would attend court was insufficient. For this he relied on the **Dominic Karanja** case.

In his rejoinder Mr. Omusundi submitted that at this juncture the court could not consider the merits of the appeal. That the appellant was of good character and had attended court without fail during the trial.

In the written submission the appellant's counsel cited the correct provision of the Criminal Procedure Code. He relied on **Somo vs Republic (1972) EA** cited with approval in **Anthony Gathogo Kiama & 2 others vs Republic Nyeri Criminal Appeal no. 145, 147 & of 148 of 2008 [2019] eKLR** for the proposition that where the appeal has high chances of success there is no justification to deprive the appellant of his freedom; **Charles Owanga Aluoch vs DPP [2015] eKLR** for the proposition that though bail pending trial is a constitutional right bail after conviction is at the discretion of the court; and **Jivraj Shah vs R [1986] eKLR** on principles for granting bail pending appeal being the existence of exceptional or unusual circumstances, the likely chance that the appellant may serve a substantial part of his sentence before the appeal is heard, the existence of a set of circumstances which disclose substantial merit in the appeal and its likely success.

**Section 357(1) of the Criminal Procedure Code** states:

*“S. 357. Admission to bail or suspension of sentence pending appeal (1) 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.”*

The appellant's counsel clearly intended to rely on the provisions of the Constitution that relate to bail and fair trial as found in on **Article 49(1) (h)** (because 49(2) does not have any sub articles and bear no relation to bail pending appeal),

*“(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”*

and 50(2) (q) (as 49 does not have (q))

*(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.*

As is submitted by applicant's counsel there is a difference between bail pending trial or charge as indicated at **Article 49(1) h)** and bail pending appeal under **Section 357 of the Criminal Procedure Code**. Secondly that it depends on the exercise of the discretion of the court based on certain laid down principles.

The applicant herein has already been found guilty, convicted and is serving a twenty five (25) year term of imprisonment. Though he has the right of appeal, grounded on the possibility of an erroneous conviction, he does not enjoy the presumption of innocence that forms the basis of the Constitutional right to bail pending appeal. This was well captured in the words of by Haris J in **Chimambhai vs Republic (No 2) [1971] E.A.343**;

*“The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one-time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases. ...”*

Has the applicant herein demonstrated the requirements for bail pending appeal? The exceptional and unusual circumstances must be such that the court is moved to exercise its discretion in the interest of justice. These 'unusual an exceptional' circumstance are further expounded in the list set out in **Arvind Patel -vs- Uganda S.C Cr. Appeal No. 1 of 2003** as hereunder;

1. The character of the offender
2. Whether the applicant is or not a first offender;
3. Whether the offence of which the applicant is convicted involved personal violence;
4. The appeal must not be frivolous and has reasonable chance of success;
5. The possibility of substantial delay in the determination of appeal and;
6. Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.

In the applicant's favour is that he is a first offender. However, the record shows that after the commission of the offence the appellant disappeared for three years and it not until 2016 that he was arrested and charged with the offence. Clearly with a 25-year term of

imprisonment on his head, the temptation to flee without trace is higher and the prosecutions fear is not baseless.

Is there a risk of the applicant serving most of the term before the appeal is heard? That is highly unlikely. This appeal was filed in 2019 and would have been heard was not that the record was incomplete. During this service week I noted that except for a few files most matters were for 2019. There is therefore no risk of the appellant serving a substantial part of his sentence before his appeal is heard and determined.

On the face of the appeal is there anything to indicate that the appeal has overwhelming chances of success? I perused the record and the judgment of the learned trial magistrate. It *would appear* that the prosecution did establish the ingredients of the offence. I must hasten to emphasise that I say this without any analysis of the evidence but to answer to the question whether on its face, the appeal reeks of success. As to its merits or otherwise that is for the appeal court.

In its totality I find no unusual or exceptional circumstances to warrant the orders sought.

There is nothing before me to demonstrate that the hearing and determination of the appeal will be delayed. The Record of Appeal is ready. Parties can get a hearing date immediately.

From the foregoing it is clear the application does not meet the threshold for bail pending appeal. It is dismissed with no orders as to costs.

**Dated, delivered and signed virtually this 9<sup>th</sup> Day of November, 2020.**

**Mumbua T Matheka**

**Judge**

**In the presence of:**

CA Koech

Applicant present in Eldoret Prison

N/A for both Counsel who had notice