



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 38 OF 2018

JOHN MACHARIAAPPLICANT/APELLANT

VERSUS

REPUBLIC..... RESPONDENT

R U L I N G

1. The application dated 28/09/2018 seeks for orders for release on bail pending hearing and determination of this appeal. It is supported by several grounds contained on the face of the application and in the supporting affidavit of the applicant and may be summarised as follows: -

a) That the appeal has overwhelming chances of success.

b) That the sentence was excessive considering that the applicant was in custody during the trial.

c) That the appellant was a minor when he committed the crime thus rendering the sentence imposed unlawful.

d) That the appeal may take a long time to be heard considering the backlog of cases in Embu High Court.

e) That due to the congestion of the court diary, the applicant may end up serving a substantial part of the sentence.

2. The respondent opposed the application arguing that the appeal has no overwhelming chances of success and that no special or extraordinary circumstances have been shown to exist.

3. It was also deposed that the sentence imposed was lawful and not excessive. The evidence of the prosecution was watertight and the conviction was therefore sound. The respondent urged the court to dismiss the application for lack of merit.

4. Both applicant and the respondent filed written submissions and cited decided cases.

5. The applicant in his submissions imported two grounds from the petition of appeal as new grounds in the application. The respondent did not have a chance. He said the magistrate relied on hearsay evidence and did not comply with Section 169 of the Criminal Procedure Code.

6. I have perused the judgment of the learned trial magistrate and considered the issues raised. Firstly, it appears that there is no indication on the record that it was brought to the attention of the court that the applicant was as minor at the time the offence was committed. To this application, no evidence was annexed to that effect either. In the circumstances, the court should not be blamed on imposing an imprisonment sentence which is authorised by Section 11(1) of the Sexual Offences Act.

7. On hearsay evidence, I gather from the judgment that the victim was aged 4 years and in baby class at the time of hearing. The court interacted with the minor and observed that she possessed limited understanding of her surroundings.

8. The child identified the suspect in court but the court allowed an intermediary to testify on her behalf. The evidence of the intermediary is not hearsay evidence and is admissible under the Act.

9. As for non-compliance with Section 169 of the Criminal Procedure Code, the court will interrogate this ground during the hearing of the appeal and reach a conclusion.

10. The most important aspect of the judgment is that the court convicted on the alternative count and pronounced itself accordingly. The rest is for the appeal court to decide.

11. So far, I would not say that the applicant has established any points of law in his appeal which may enhance the chances of success of his appeal.

12. The respondent cited the case of the **Supreme Court of India Krishnan Vs the People** where it was held that the applicant in seeking bail pending appeal must establish either of the following:

i. That there exist exceptional circumstances in the case.

ii. That the appeal has great prospects of success.

13. Like Krishnan case (supra), Kenyan courts have upheld the same principles in applications of this nature.

14. It is trite law that other grounds will, come secondary to the two established principles.

15. On the congestion of diary, I must admit that backlog in this court has considerably reduced with the extensive programmes of the honourable Chief Justice under Sustaining Judicial Transformation. The position is that appeals will not take too long to be heard.

16. All the applicant requires to do is to follow up the admission of his appeal and fixing of a hearing date.

17. It is important to say that the appellant is now a convict and does not enjoy the presumption of innocence. For this reason, he has a heavier burden to establish his entitlement to bail as opposed to an accused person who has not been convicted.

18. I am of the considered opinion that the applicant has failed to satisfy this court that he deserves release on bail at this stage.

19. I find this application unmerited and decline to grant the orders sought herein.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Maina for Andande for Applicant/Appellant

Applicant/Appellant present