



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 102 OF 2018

MOSES MUSASA EDAVILE..... APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant/applicant has filed an application dated 26th July, 2018 seeking that he be admitted to bail pending the hearing and determination of his appeal filed herein. The grounds in support of the application are that the applicant has preferred an appeal against the conviction and sentence meted out by the lower court. That the applicant is aged, sickly and suffers from diabetes and acute coronary syndrome. Further that the appeal has high chances of success.

2. The application was supported by the affidavit of the applicant in which he states that he was on bond during his trial at the lower court and never skipped to appear in court. That his health is deteriorating and he needs to seek advanced medication. That it is in the interest of justice and the prevailing circumstances that the orders sought be granted.

3. The State did not oppose the application.

4. The applicant was convicted of the offence of defilement contrary to Section 8 (a) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to a life in prison. The particulars of the offence were that on diverse dates between 3rd October, 2016 and 6th October, 2016 at [particulars withheld] Sub-location within Vihiga County he intentionally and unlawfully caused his penis to penetrate the genital organ namely vagina of S. I. a child aged 11 years.

5. The case against the applicant was that he and the complainant were neighbours. That on the 3rd, 4th and 6th October, 2016 the applicant lured the complainant into his house and defiled her. That after each act he would give her some money. That the complainant reported the incidents to her mother who did not take action. That when he did it on her on the third day she went to school and reported to her teacher. Her teacher summoned her mother to school. Her mother took her to a local dispensary but she was not presented before a medical personnel. They went back home. She reported to her father PW3. Her father asked a neighbour PW2 to accompany them to hospital. They went to Mbale Referral Hospital. She was examined by a doctor PW6 who found her with a laceration on the vaginal opening with missing hymen. The doctor made a conclusion that there was penetration. He completed a P3 form. The appellant was arrested. PC Ouma PW5 of Mudete Police Station investigated the case and charged the applicant with the offence. During the hearing the P3 form, the treatment notes and the complainant's birth certificate were produced as exhibits.

6. The court has powers under section 357 of the Criminal Procedure Code to grant a convict bond pending appeal. The principles applicable in an application for bond pending appeal are that the applicant has to demonstrate to the court that:

(1) There exist exceptional circumstances to warrant grant of bail/bond.

(2) The appeal has overwhelming chances of success.

7. In **Somo Vs Republic (1972) EA 476** the Court of Appeal 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.

8. These principles were re-stated by the same court 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 .

9. 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.”

10. The applicant is seeking to be granted bail on the grounds that he is sickly and requires medical attention, that he is not a flight risk and that the appeal has high chances of success.

11. I have considered the application for bond pending appeal. There were no medical documents filed to prove that the applicant suffers from the ailments complained of. There is then no basis to grant bond on that ground.

12. The most important consideration when determining whether to grant a convict bond pending appeal is whether the appeal has high chances of success. In this case I am not convinced that this is so.

13. The upshot is that there are no exceptional circumstances to warrant the applicant being granted bail pending appeal. The application is unmerited and is accordingly declined.

Delivered, dated and signed in open court at Kakamega this 9th day of May, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Malala holding brief for Mukabi for appellant/applicant

Mr. Ng’etich for State

Appellant/applicant – present

Court Assistant - George