



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 25 OF 2018**

**MOSES NJAGI RUKEMI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This is a ruling for the application for bail pending appeal dated 18<sup>th</sup> July 2019. The applicant was charged with the offence of defilement contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006 and sentenced to twenty (20) years imprisonment.
2. It is the appellant's case that his appeal has a high probability of success, that he is not a flight risk as demonstrated by his good conduct during trial, that the hearing of his appeal is likely to delay and further that bail/bond pending appeal will reduce the population at the Embu prison.
3. In rejoinder, the respondent, through its counsel, Ms. Mati, opposed the application on the grounds
4. that the appellant was rightfully convicted and that the appellant had failed to demonstrate that his appeal has a high chances of success. It was further deponed that the appellant had not provided any justifiable reason or special circumstance to warrant his release on bail pending appeal. It was further deponed that granting the appellant bail would diminish the retributive purpose for which the sentence was meted out.
5. In submissions in support of their case opposing the grant of bail to the appellant, it was submitted that this court ought to appreciate retribution as one of the objectives which the trial court applied in sentencing the appellant.

**B. Analysis and Determination**

6. Having carefully considered the application and the oral submissions of the parties I find that the only issue for determination is **whether the Appellant should be granted bail pending appeal.**
7. **Section 357 (1) of the Criminal Procedure Code** provides admission to bail pending appeal, it states that:  
  
*“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.”*
8. Once a trial court has made a determination and found an accused guilty of the offence, he is no longer considered innocent for his guilt has already been established. In this regard, if such a convict dissatisfied with the outcome, his recourse is to appeal against the decision.
9. Consequently, the conditions applicable for bail pending trial and bail pending appeal are not the same as those applicable in an application for bail pending trial. An accused can no longer be presumed as innocent and bail is no longer an automatic right. Such an applicant must demonstrate that his appeal has overwhelming chances of success to be entitled to bail pending appeal. Of course, there may be other considerations such as poor health of an applicant or that the sentence is too short that by the time the appeal is concluded, the term may have been served.
10. In the case of **Jivraj Shah v Republic [1986] KLR 605**, the Court of Appeal held: -

*“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interests of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on an account of some substantial point of law to be urged, and the sentence or substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist.”*

11. In **Dominic Karanja v. Republic [1986] KLR 612** the Court of Appeal also held: -

*“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors: see Somo v. Republic [1972] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.”*

12. Article 49 (1) (h) provides that **“an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”** The Bail and Bond Policy Guidelines provide at that with respect bail pending appeal, the burden of proof is on the convicted person to demonstrate that there is an **“overwhelming probability”** that his or her appeal will succeed.

13. In this case the applicant argued that the appeal has overwhelming chances of success. The applicant’s advocate filed a supplementary petition of appeal dated 19<sup>th</sup> June 2019 which he raises twelve (12) grounds for appeal. It is trite law that it is not for the court to delve into the merits of each ground but it should suffice that all the grounds are examined, and a conclusion is made that *prima facie* the prospects of success are dim or high. I have carefully examined the grounds of appeal raised by the applicant. I have also carefully perused the proceedings and Judgment in **PMCC Siakago Criminal Case No. 972 of 2015**.

14. Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant, and the public interest on the other. ***It is the duty of the court to ensure that crime where it is proved, is appropriately punished for the protection and security of society at large. On the other hand, it is the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed under the constitution.*** This position was expressed by the court of appeal in **Gerald Macharia Githuku v Republic [2007] eKLR**.

15. In my view, the applicant has not demonstrated that his appeal has high chances of success although the grounds of appeal cannot be dismissed as frivolous. It is the appellant’s case that his appeal is likely to take a long time before it is determined. Although this ground has not been challenged, the applicant has not explained how such delay may be occasioned. It is not sufficient to just state so without substantiating his concern.

16. I find that the appellant has not demonstrated the existence of any exceptional circumstances to warrant him to be admitted to bail pending appeal. There is little possibility that by the time the appeal is heard and determined, the applicant may have served a substantial portion of his twenty-year sentence given the policies put in place regarding expeditious disposal of cases in the Chief Justice Blue Print of Sustaining Judicial Transformation.

17. I find no merit in this application and it is hereby dismissed.

18. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Appellant present**