



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 22 OF 2017

DICKSON MUCHIRA NDAMBIRI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court ((A. N. Makau) at Gichugu, Sexual Offence No. 2 of 2014 delivered on 23rd March, 2017)

RULING

1. The appellant was convicted with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** and sentenced to 20 years imprisonment. He proceeded to file an appeal on 31st March, 2017 and an application for bail pending appeal on 9th May, 2017.
2. The application is based on the following grounds:
 - (a) *That on 23rd March, 2017 the applicant was sentenced to serve 20 years prison.*
 - (b) *That on 31st March, 2017 the applicant filed an appeal against the said judgment.*
 - (c) *That the applicant has a constitutional right to bond pending appeal.*
 - (d) *That the applicant has an arguable appeal with high likelihood of success.*
 - (e) *That no prejudice will be occasioned if the applicant is released on bond.*
 - (f) *That it is in the interest of justice that this application is allowed.*
3. The respondent opposed the application and filed a replying affidavit sworn by E. P. O. Omayo.
4. **Section 357(1) Criminal Procedure Code** provides:

“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”.

When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

1. Whether the appeal has overwhelming chances of success.
2. There are exceptional or unusual circumstances to warrant the court's exercise of its discretion.
3. There is a high probability of the sentence being served before the appeal is heard.

5. The leading authority on this subject is Somo -VS- Republic where the High Court held that the most important ground in deciding whether or not to grant bail is whether the appeal has an overwhelming chance of being successful and that there were no exceptional or unusual circumstances to justify the grant of the bail. In an application of this nature, an applicant is required to satisfy the existence of one or a combination of the conditions mentioned in the above cited authority. These are:

1. Overwhelming chance of being successful

In order to ascertain whether the appellant's appeal has chances of success, one needs to go through the evidence adduced before the trial court and the judgment delivered by the learned trial magistrate but without going into any detail in order not to prejudice the court which will eventually hear the appeal. It is sufficient for the Court to make a finding on the face of the proceedings and judgment. The applicant has faulted the fact that the prosecution's case was inconsistent, that vital witnesses were not called to testify and his defence was not considered. The complainant and her mother together with a neighbour testified but no medical evidence or police evidence was tendered in court to confirm the alleged defilement. The appellant's defence was that the complainant's mother had been chased away from the plot by his father and her father had left her at his home therefore the matter is false allegations. Having gone through the evidence adduced and the judgment delivered, I am of the view that the appellant's appeal has high chances of success since no medical evidence was tendered in support of the alleged defilement.

2. Exceptional or unusual circumstances

The appellant claims that he suffers from a medical condition and is on lifetime medication therefore requiring constant medical check-up and special diet. That if he is not released on bond he is likely to succumb to the ailment. As per the medical card, the appellant is taking ARVs since 22nd March, -*2007. This is not a life threatening ailment if one is on treatment and prisoners are usually allowed to go for medical check-ups while still in prison.

6. The appellant was sentenced to 20 years imprisonment on 23rd March, 2017, he will not have served a substantial part of his sentence before his appeal is heard and determined since the record of appeal is ready. In the premises therefore due to the lack of medical evidence to prove the defilement, I am persuaded that the appellant has put forward a case to warrant his release on bail pending appeal as the appeal has overwhelming chances of being successful. I order that the appellant shall be released on a bond of Ksh.500,000/= plus two like sureties pending the hearing and determination of this appeal.

Dated and delivered at Kerugoya this 1st day of March, 2018.

L. W. GITARI

JUDGE

Read out in open Court, Appellant present, MS Makworo for Appellant, Mr. Ombiri for the State, Court assistant Naomi Murage this 1st day of March, 2018.

L. W. GITARI

JUDGE

01.03.2018