



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.361 OF 2018**

**KAACA MASARA MAIGETI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Kaaka Masara Maigeti was convicted of the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. He was sentenced to serve twenty-five (25) years imprisonment. His appeal to this court (Ngenye J) was dismissed. The Applicant was aggrieved by the decision. He has filed notice of his intention to appeal against the decision to the Court of Appeal. Pending the hearing of the intended appeal, the Applicant has applied to this court to be released on bail pending appeal.

Ms. Adembo for the Applicant submitted that under **Section 361(b)** of the **Criminal Procedure Code** and the **Appellate Jurisdiction Act**, this court has jurisdiction to consider and determine the application. She submitted that the Applicant was the sole breadwinner of his family. He lost his wife and was therefore the only one who is taking care of his two children who are of school going age. She urged the court to consider that the Applicant's appeal has a high chance of success because of the manner in which the prosecution's evidence was received by the court and the improper evaluation of the medical evidence that was presented to the court. Learned counsel submitted that the Applicant was not a flight risk because he was previously employed as an administration police officer. He had previously been released on bail while awaiting trial before the trial magistrate's court. Learned counsel cited several authorities in support of her submission. She specifically pointed out that the State had conceded to the appeal before the High Court. The court was however of a different opinion. Ms. Akunja for the State left the issue to the discretion of the court. She however refused to fault the court for disagreeing with the concession of the appeal by the prosecution.

This court has carefully considered the rival submission made before this court. It has also considered the authorities cited in support of the application. The Applicant appreciates that the principles guiding this court in determining whether or not to grant bail pending appeal are well settled. The Court of Appeal in **Jivraj Shah –vs- Republic [1986] KLR 605** at page 606:

**“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 this court can fairly conclude that it is in the interest 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 account of some substantial point in law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in **Somo –vs- Republic [1972] E A 476** which was referred to by this court with approval in **Criminal Application No.NAI 14 of 1986, Daniel Dominic Karanja –vs- Republic** where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41<sup>st</sup> Edition page 783, paragraph 7 – 86.”**

In the present application, it is the Applicant's case that his appeal has high chances of success noting that there are weighty legal issues that the Applicant will argue during the hearing of the appeal. It is not for this court to consider the merits or otherwise of the Applicant's intended appeal to the Court of Appeal. Unlike the situation where this court is considering an application for bail pending appeal from a decision of a magistrate's court, this court cannot delve into the merits of the intended appeal to the Court of Appeal. It has no jurisdiction to consider such. That notwithstanding, this court cannot ignore an obvious point of law which may have been overlooked when determining the case that is the subject of the appeal. In the present application, the Applicant has undoubted right of appeal which he is at liberty to exercise as guaranteed by the **Constitution**. However, this court is not persuaded that there is a point of law in the intended appeal that is so grave that this court has no option but to take notice and reach a finding that the Applicant's appeal has high chances of success.

As regard the Applicant's personal circumstances, this court is not persuaded that the circumstances put forward by the Applicant are of such kind that will be considered to constitute exceptional circumstances that would warrant or persuade this court to exercise its discretion in the Applicant's favour. The length of the custodial sentence that was imposed on the Applicant and the nature of the offence that the Applicant was convicted militate against this court granting his application for bail pending appeal. There is a likelihood that the Applicant will abscond from the jurisdiction of the court if he is released on bail pending appeal.

For the above reasons, this court holds that the Applicant's application lacks merit and is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2018**

**L. KIMARU**

**JUDGE**