

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 87 OF 2017

VINCENT MAYENGA MASARE APPELLANT/APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The applicant/ appellant hereinafter referred to as the applicant through a Notice of Motion dated the 14th March 2018 seeks to be released on bail pending the hearing and determination of his appeal under affordable terms and conditions that the court may deem fit. The applicant was convicted and sentenced to life sentence on the 20th day of November 2017 by Ogembo Resident Magistrate for the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. He has filed his appeal against conviction and sentence.

2. The applicant in his supporting affidavit dated the 14th March 2018 avers that he did not commit the offence as alleged in Ogembo Criminal Case No. 666 of 2011. His appeal has overwhelming chances of success and he seeks to be released on bail to enable him prosecute his appeal. He is a farmer and is 31 years old with a wife and children. He is also the sole bread winner of his family. He is willing to abide by any terms and conditions whatsoever and that he was on bond at the SRM's court and faithfully attended court. He commits to attending court for the hearing of the appeal to the end. He is law abiding citizen with no criminal record except the charges herein which are false. That the complainant in the lower court is his step brother and the charges which were preferred were done because of their difference. At the hearing of the application Miss Mogusu submitted further in addition to relying on the applicant's affidavit that the trial court failed to determine the age of the victim nor did the court see the child. That the court relied more on the evidence of the medical doctor where the Doctor talked of blood oozing from the victims private parts yet the blood sample was not associated in any way with the appellant. That the applicant is a person of good character. That the mother of the minor did not witness the incident nor did the child tell her she was defiled. The applicant relied on the case Peter Hinga Ngatho vs. Republic HCCA 2 of 2015 where Justice Mativo enumerated the principles to be considered before granting bail pending appeal. He also relied on the case of Jeremiah Wachira Muchiri vs. Republic where Justice Mativo admitted the appellant to bail pending appeal.

3. The application was opposed. It was submitted by Mr. Otieno for the State that the applicant is now a convict and is serving a 20 year jail term. That there must be exceptional grounds to warrant the applicant's release on bond pending appeal. That the applicant has not demonstrated that his appeal will be delayed to warrant his release on bail. That the appeal will be heard as soon as it is set down for hearing. The fact he was on bond during the trial is not an exceptional reason. The temptation to abscond is high as we are now dealing with a convict as a life sentence hangs on his head.

4. The applicant has the burden of persuading the court that the intended appeal has overwhelming chances of success and that his circumstances fall with the principles (see **Domnic Karanja Vs. R KLR (1986) Pg 62**). I have considered the proceedings and judgment; I find the appeal is arguable, though not one with overwhelming chances of success in addition the applicant has not established any exceptional circumstances to warrant the grant of bail pending appeal. In my view the appeal can be heard expeditiously if the proceedings are ready. The application is dismissed.

Dated signed and delivered this 20th day of September 2018.

R. E. OUGO

JUDGE

In the presence of;

Applicant/ Appellant in person

Mr. Otieno for the State

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Court Clerk