



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO 99 OF 2018

NURICK OMBUI NYASIMIAPPLICANT

Versus

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J.K Mutua Resident Magistrate at Ogembo Law Courts, Criminal Case No. 69 of 2017)

RULING

1. The applicant was convicted of the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act 3 of 2006. He was sentenced to 20 years imprisonment on the 22nd of October 2018.

2. The applicant seeks to be released on bond pending the hearing and determination of his appeal. His grounds as per his application are that offence he is charged with is bailable under the constitution. That he has a right to be released on bond or bail, on reasonable conditions pending the appeal unless there are compelling reasons to the contrary. That the right to bail is constitutional right and that there is no sufficient compelling reasons for denying the accused person bail/bond. That the continued stay of the applicant in custody is repugnant to justice and or morality since he is domiciled in Kenya and there is no possible reason for him to jump bail. That the applicant is a Kenyan citizen who hails from Kisii County and undertakes to appear in court when he shall be required to do so. That he will abide by the terms and conditions imposed by the court if released on bond. In his supporting affidavit he avers that his continued stay in custody has adversely affected his health as he is sickly and venerable to remand sanitation. That he has a clean history of character and his security is guaranteed and that there is no potential insecurity against him or any other party. He reiterates his grounds in his affidavit.

3. The state opposed the application. Mr. Otieno submitted that applicant is now a convict and no longer benefits from the normal presumption of innocence until proved guilty. That the reasons given must be exceptional and the fact that he was on bond is not exceptional circumstance. That he has a sentence hanging over his head.

4. There are conditions which must be met by an applicant before bail pending an appeal can be granted. **In JIVRAJ SHAH -VS- REPUBLIC [1986] KLR 605** the Court of Appeal held, inter alia:

i. 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 interests of justice to grant bail.

ii. 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.

5. Bail pending appeal under our system is not a Constitutional right. The Constitutional right to bail only applies to cases of bail pending trial. Bail pending appeal is a statutory right under section 357 of the Criminal Procedure Code (Cap. 75). The presumption of innocence does not apply in matters of bail pending appeal. In an application for bail pending appeal the principle consideration is whether the appeal has a likelihood of success (see **Ademba vs. Republic 1983 KLR page 442 and Somo vs. Republic 1972 EA 476**). The court will also consider whether there exist exceptional circumstances that would justify the applicant being granted bail pending his appeal. The other grounds upon which bail may be granted is where there is an anticipated delay in the hearing of appeal.

6. The applicant has the burden to establish that the appeal has high chances of success and whether there are exceptional circumstances that warrant him being granted bail pending appeal. The court's discretion must be exercised judicially when considering the application. The applicant states that he is sickly person however the nature of his sickness was not disclosed. That he is employed as a civil servant working with Kisii county and that during the trial he did not jump bail. In my view these are not exceptional or unusual circumstances to warrant him being granted bail. There are medical facilities in prison and he can be attended. I have perused the petition of appeal and the proceedings and note that the appeal could be arguable. I know as a fact the court diary is open and the appeal is likely to be heard as soon as

possible in less than 2 months.

7. Having considered the application I decline to grant the Applicant bail pending his appeal he should stay in custody until his appeal is heard. The Applicant's application is dismissed.

Dated signed and delivered at Kisii this 6th day of December 2018

R.E. OUGO

JUDGE

In the presence of;

Appellant In person

Mr/Ms For the Appellant

Mr. Otieno Senior State Counsel

Rael Court clerk