



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO 59 OF 2015

ALBERT KIMATHI MUGO.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By his notice of motion dated 9th October 2015, which is supported by an affidavit dated 8th October 2015, the appellant has applied for bail pending the hearing and determination of his appeal. Additionally, he has also supported his application by grounds which are set out on the face of the notice of motion. Those grounds are as follows. Firstly, he has stated that his appeal has overwhelming chances of success. Secondly, that there is a likelihood of the appellant serving a substantial part of his sentence before the appeal is heard and determined. And thirdly, that it is in the interest of justice that this application be allowed to avoid hardship.

2. It is important to point out that the appellant was convicted of a charge of defilement and was sentenced to twenty years imprisonment in count I and the trial court properly did not make a finding in respect of the alternate charge in count II which charged him with committing an indecent act in respect of the same complainant. The trial court made these orders of imprisonment and sentence on 25th June 2015.

3. The state opposed his application.

4. In supporting affidavit, the appellant has deponed that he has filed an appeal in the High Court being Criminal appeal No 59 of 2015, which is yet to be heard. He has also deponed that he is aggrieved by both the conviction and sentence entered against him in regard to which he has filed an appeal based on his grounds as set out in his petition of appeal. According to him, his appeal has overwhelming chances of success and has further deponed that he will have served a substantial part of the sentence before the appeal is heard and finally determined in view of the workload at Embu High Court registry. Furthermore, he has deponed that no prejudice will be occasioned to the respondent, if he is admitted to bail pending his appeal. And finally, he has deponed that he is a person of good conduct and does not pose any danger to the society if released on bail.

5. Mr Andande for the appellant submitted that the appellant has an arguable appeal with overwhelming chances of success in regard to which he referred the court to his petition of appeal. According to counsel, the trial court relied on an unsatisfactory medical report to convict the appellant of the offence of defilement. Furthermore, he also submitted that the presence of pregnancy in itself was not proof of defilement. There had to be corroboration of the complainant's evidence in order to sustain a conviction in respect of the charge of defilement. He also submitted that there was no DNA test carried out to

determine that the pregnancy was that of the appellant.

6. In his further submission, Mr Andande submitted that the trial court did not give good reasons for dismissing the defence evidence which he asserted was contrary to section 169 of the Criminal Procedure Code (Cap 75) Laws of Kenya. In other words, the court did not give reasons for dismissing the defence case. And finally, he submitted that the appellant will have served as substantial part of his sentence, before the appeal is heard and determined, because of the heavy backlog of cases in the High Court registry in Embu.

7. Ms Mbae has opposed his application. She has submitted that the grant of bail pending appeal is not an absolute right.

8. Furthermore, she referred the court to the case of *Munjia Michubu v. R* being *High Court at Meru, Criminal Appeal No. 100 of 2013*. According to that case, there must exist exceptional or unusual circumstances to warrant the release of an applicant on bail pending appeal. Again in that case the court stated that the fact that the applicant was suffering from TB and other related illness did not constitute exceptional circumstances to warrant his release on bail pending appeal.

9. Furthermore, she also submitted that the appellant has not demonstrated that there are overwhelming chances of success in his appeal. According to her the prosecution had proved the case beyond reasonable doubt and that the appeal of the appellant cannot succeed. She therefore urged the court to dismiss the appellant's appeal.

10. I have considered the affidavit evidence of the appellant. I accept the principles of law in the case of *Munjia Muchubu v. R, supra*, as good law. The appellant's submission that he is a person of good conduct and does not pose any danger to the society, if released on bail pending appeal does not constitute exceptional circumstances to warrant the release of the appellant on bail pending appeal. I find the case of *Jivraj Shah v. R (1986) KLR 605* to be good law in requiring that an applicant for bail pending appeal must demonstrate that there is in existence exceptional or unusual circumstances before being granted bail. I also accept the principles set out in that case that an applicant may be granted bail if he can successfully show that he will have served a substantial part of his sentence by the time an appeal is heard and determined.

11. A charge of defilement may be proved if the evidence of the complainant is found to be credible by the trial court. It was not mandatory to carry out a DNA test in order to prove defilement. In this regard I do not accept the submissions of Mr. Andande that a DNA test had to be carried out and that the medical evidence was unsatisfactory.

12. In the light of the applicable law and the affidavit evidence of the appellant I find that the appellant has not demonstrated that his appeal has overwhelming chances of success. He has also failed to demonstrate that there are exceptional circumstances in his appeal.

13. The upshot of the foregoing is that the appellant's application is hereby dismissed its entirety.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **13th** day of **JULY, 2016**

In the presence of Mr Momanyi holding brief for Andande and Ms Mbae for the State

Court clerk Njue

J.M BWONWONGA

JUDGE

13.07.16