



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL NO. 21 OF 2015**

**ENOCK ALUKWE INGOSI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant was charged in the Principal Magistrate's Court at Mavoko Sexual Offences Case No. 11 of 2014 with the offence of defilement of a girl contrary to section 8(1) and (2) of the Sexual Offences Act. He was convicted of the offence by the trial court, and sentenced to (twenty) 20 years imprisonment in default on 17<sup>th</sup> December 2014.

The Applicant subsequently filed an appeal against the judgment of the trial Court by way of a memorandum of appeal filed in Court on 1<sup>st</sup> July 2015. He also filed an application by way of a Notice of Motion dated 18<sup>th</sup> April 2016 which was supported by an affidavit sworn on 1<sup>st</sup> April 2016 by his Advocate Kiprop Rutto on the same date, seeking orders that he be admitted to bail pending the hearing and determination of this appeal. The main grounds for his application were that the Applicant has developed health problems namely Asthma and hypertension and needs urgent medical attention, and that his health may deteriorate due to his advanced age as he is 80 years old. The deponent attached a copy of a letter dated 26<sup>th</sup> February 2016 from the in charge of Kamiti Prison confirming that the Applicant suffers from asthma and hypertension and is under medical treatment at the Kamiti Prison Hospital and Kenyatta National Hospital. He also attached copies of the Applicant's treatment cards and notes from Kenyatta National Hospital.

The Applicant's learned counsel, Marrirmoi, Chemurgor & Company Advocates, filed written submissions dated 14<sup>th</sup> June 2016, wherein they urged the Court to use its discretion granted by section 357 of the Criminal Procedure Code to admit the Applicant to bond/bail pending appeal taking into account the special circumstances of this case regarding the Applicant's health situation.

It was also argued that the Applicant's appeal has a high and overwhelming chance of success, and it was submitted in this respect that the dates of the offence indicated in the charge sheet were not established, and that the evidence by the complainant that the Applicant committed the offence was not corroborated as a result of the failure to call a key witness and contradictory medical evidence.

The Prosecution opposed the application in a replying affidavit sworn on 4<sup>th</sup> May 2016 by Cliff Machogu, a prosecution counsel in the Office of the Director of Public Prosecutions. The prosecution averred that the Applicant has not demonstrated that his appeal has high chances of success, and that under section 29(1) and (2) of the Prisons Act, there is a medical officer in each prison who is responsible for treatment of prisoners when the need arises. Further, that the Applicant's assertion that he will not

abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.

The learned prosecution counsel did not file submissions and relied on their replying affidavit.

I have considered the pleadings and submissions by the parties. I note that unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proved guilty, an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In **Mutua vs R, [1988] KLR 497** the Court of Appeal stated thus:

**“ It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”**

A different test from that applied in bail pending trial is therefore applied in bail pending 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:

- a) Whether the appeal has overwhelming chances of success. See **Ademba vs Republic (1983) KLR 442, Somo vs R [1972] E.A 476, Mutua vs R [1988] KLR 497** in this regard;
- b) There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. In this regard see **Ragbir Singh Lamba vs R [1958] E.A 337; Somo vs R (supra.); Mutua vs R (supra.)**
- c) There is a high probability of the sentence being served before the appeal is heard as held in **Chimabhai vs R, [1971] E.A 343.**

In the instant application, I have perused the record of the trial Court, and noted a variance between the charge sheet in terms of the date of commission of the offence, age of the victim and the section of law the Appellant was charged under, vis-à-vis the evidence called on these particulars and the section of law the Appellant was convicted under.

I am therefore satisfied that this is a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly allow the application in the Notice of Motion dated 18<sup>th</sup> April 2016 on the following terms:-

1. That pending the hearing and determination of the appeal herein, the Applicant be released on his own bond of Kshs.300,000/= (Kenya Shillings Three Hundred Thousand) with one (1) surety of a like amount;
2. The surety shall be approved by the Deputy Registrar of the Machakos High Court;
3. The Applicant will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until his appeal is heard and determined.
4. The Applicant shall be required to attend court for the hearing of the appeal without fail.
5. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and sureties called to account.

There shall be no order as to costs.

It is so ordered.

**DATED AT MACHAKOS THIS 13<sup>TH</sup> DAY OF JULY 2016.**

**P. NYAMWEYA**

**JUDGE**