



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MACHAKOS**  
**CRIMINAL APPEAL NO. 111 OF 2013**

**MUSEMBI KYENGO alias KYALO KYENGO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant was charged in the Chief Magistrate's Court at Machakos Criminal Case No.975 of 2012 with the offence of defilement 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 life imprisonment on 4<sup>th</sup> February 2013.

The Applicant subsequently filed an appeal against the judgment of the trial Court by way of a Petition of Appeal filed in Court on 18<sup>th</sup> February 2013. He also filed an application by way of a Notice of Motion dated 31<sup>st</sup> March 2016, which was supported by an affidavit the Applicant swore on the same date. The Applicant is seeking orders that he be granted bond/bail pending the hearing and determination of this appeal.

The main grounds for his application are that he has a permanent place of abode and is not a flight risk, he is of high moral standing and a law abiding citizen with no criminal records. The Applicant also deponed that he is ready and willing to abide with the terms set by the Court, that there are no compelling reasons not to admit him to bond/bail, and that his appeal has a high probability of success. Lastly, he averred that he is the sole breadwinner for his wife and children, and that he is apprehensive that he may serve a substantial part of his sentence before his appeal is heard

The Applicant's learned counsel, Nduva Kitonga & Company Advocates, filed written submissions dated 3<sup>rd</sup> June 2016, wherein they reiterated the arguments made in the foregoing, and relied on Article 49 (1) (h) of the Constitution and the decision in **R vs Musili Dewrock Kithome (2012) e KLR** to argue that there are no compelling reasons not to release the Applicant on bail.

The Prosecution opposed the application in a replying affidavit sworn on 12<sup>th</sup> May 2016 by Tabitha Saoli, 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 Article 49 of the Constitution no longer applies to the Applicant since he was tried and convicted in a Court with competent jurisdiction. 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 the replying affidavit.

I have considered the pleadings and submissions by the parties. The learned counsel for the Applicant relied on Article 49(1)(h) to argue that there are no compelling reasons not to release the Applicant on bond/bail. Article 49(1)(h) of the Constitution in this regard states as follows:

**“49. (1) An arrested person has the right—**

**...(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”**

The said provisions therefore apply only to arrested persons pending their charge and trial, since they have a constitutional right to be considered innocent until proved guilty, and not to a person who has been tried, found guilty and convicted of an offence. Likewise, the Applicant in **R vs Musili Dewrock Kithome (2012) e KLR** had applied for bond/bail pending a murder trial and that is why Article 49(1)(h) was applicable in that case.

The provision of law that applies to bond/bail pending appeal is section 357 of the Criminal Procedure Code which provides as follows:

**(1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:**

**Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.**

**(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.**

In **Mutua vs R, [1988] KLR 497** the Court of Appeal stated thus as regards the exercise of the Court's discretion in an application for bond/bail pending appeal:

**“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, the Applicant has not argued any ground that will give his appeal an overwhelming chance of success, and the Applicant having been sentenced to life imprisonment, is unlikely to serve a substantial part of his sentence before his appeal is heard. I am therefore satisfied that this is not a proper case in which to exercise this court's discretion in favour of the Applicant. I accordingly find that the Applicant's application for bail/bond pending appeal has no merit and it is accordingly denied.

There shall be no order as to costs.

It is so ordered.

**DATED AT MACHAKOS THIS 18<sup>TH</sup> DAY OF JULY 2016.**

**P. NYAMWEYA**

**JUDGE**