



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 136 OF 2013

DAVID MUTAI APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The applicant *David Mutai* has moved this court by way of a Notice of Motion dated 5th May, 2016 seeking to be admitted to bail pending the hearing and determination of his intended appeal to the Court of Appeal. The application is supported by a deposition made by the applicant on 5th May, 2016 to which he annexed the notice of appeal and the draft petition of appeal.
2. From the record, the applicant was convicted in Eldoret Criminal case No. 1006 of 2011 on three counts with the offence of defilement contrary to *Section 8(1)* as read with *Section 8(4)* of the Sexual Offences Act No. 3 of 2006. He was sentenced to fifteen years imprisonment in each count which sentence was ordered to run concurrently.
3. The applicant was dissatisfied with his conviction and sentence. He preferred an appeal to the High Court vide a petition of appeal filed on 18th July, 2013. The appeal was heard and dismissed by this court (Hon. J. George Kanyi Kimondo) on 29th October, 2015. The learned judge upheld the applicant's conviction and sentence. Aggrieved by the decision of the first appellate court, the applicant has duly filed a notice of his intention to lodge a second appeal to the Court of Appeal.
4. Pending the determination of his intended second appeal, the applicant prays that he be granted bail mainly on grounds that his intended appeal has overwhelming chances of success and that by the time it is finally heard and determined, he will have served a substantial part of his sentence. He in addition avers that he has an unspecified medical condition which would jeopardize him if he continued to remain in prison.
5. At the hearing of the application, the applicant was represented by learned counsel *Mr. Korir* while learned prosecuting counsel *Ms. Mutheu* appeared for the Republic.
6. *Mr. Korir* argued that the application ought to be allowed as the intended appeal has overwhelming chances of success as in his view, the applicant was convicted on the basis of a defective charge sheet ; that both the trial court and the superior court failed to appreciate that all the elements of the charge of defilement were not proved beyond doubt as the age of the complainant was not strictly proved. Lastly, counsel argued that the applicant was out on bond pending trial and during the hearing of his first appeal and if granted bail now, he is not likely to abscond.

7. *Ms. Mutheu* for the state opposed the application on grounds that the intended appeal did not have any chance of success as the charge sheet was not defective and the complainant's age had been proved. She urged the court to dismiss the application for lack of merit.

8. Under *Section 361 (6)* of the *Criminal Procedure Code*, this court is empowered to use its discretion in determining whether to grant bail to a convicted person pending the hearing of a second appeal. That discretion, being a judicial one must however be exercised judiciously in accordance with the law.

9. The principle considerations that guides the court in the exercise of its discretion in determining applications for bail pending appeal have been restated by the Court of Appeal in several authorities. It will suffice to cite just two of them.

In *Jivraj Shah V Republic (1986) KLR 605*, the Court of Appeal held inter alia that bond pending appeal should be favourably considered where an applicant had established that there were exceptional or unusual circumstances upon which the court could fairly conclude that it was in the interest of justice to grant bail. Secondly, that bail may be granted where it appears prima facie from a totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or a substantial part of it will have been served by the time the appeal is heard.

10. Similarly, in *Dominic Karanja V Republic (1986) KLR 612*, the court held that the most important consideration should be whether an applicant had demonstrated that his appeal had overwhelming chances of success because if that was established, there would be no justification for depriving the applicant his or her liberty. The court further stated that a solemn assertion by the applicant that he will not abscond if released on bond is not a sufficient ground for releasing a convicted person on bail pending appeal.

11. I have considered the application and the rival submissions by both counsel in view of the holdings in the cases cited above. I find that the applicant has not demonstrated that there are unusual or exceptional circumstances upon which I can conclude that it would be in the interest of justice to grant him the orders sought. He did not for instance produce any evidence to substantiate his claim that he suffers from any medical condition that would compromise his health if he remained in prison pending the hearing of his intended appeal.

12. I am alive to the fact that the applicant was convicted and sentenced by the trial court and that his appeal to this court was dismissed in its entirety. The intended appeal is a second appeal to the Court of Appeal which by virtue of *Section 361 (1)* of the *Criminal Procedure Code* will be canvassed on points of law only.

13. Counsel for the applicant urged this court to allow the application on grounds that the intended appeal has overwhelming chances of success. In my considered view, this court having dismissed the appellant's first appeal cannot purport to re-evaluate its own decision in order to make a finding whether or not the intended appeal has high chances of success.

My take is that to do so would be tantamount to the court sitting on appeal on its own decision. The argument that the intended appeal has high chances of success ought to be made before the Court of Appeal which is the court that will hear the applicant's appeal on its merits. In making this finding, I am aware that the applicant has a right to make an application such as the one before this court to the Court of Appeal.

14. For the foregoing reasons and considering that the applicant no longer enjoys the presumption of innocence having been convicted by a competent court and he has not demonstrated that there are unusual or exceptional circumstances that would entitle him to the grant of bail pending appeal, I am satisfied that the application is not merited. It is accordingly dismissed.

15. It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 14th day of September, 2016

In the presence of:

Mr. Korir for the Applicant

Mr. Mulati for the Republic

Ms. Naomi Chonde – Court clerk