



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.153 OF 2015**

**DAVID KITHINJI.....APPLLCANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Original Conviction and Sentence in the Chief Magistrate's Court at Makadara in Criminal Case No.2489 of 2012 delivered by Hon. Linda C. Koskei, RM on 28<sup>th</sup> August 2015)*

**RULING**

The Applicant herein was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006. It was alleged that on 5<sup>th</sup> May 2012 at Githurai 45 in Kasarani within Nairobi County committed an act by inserting a male genital organ (penis) into genital organ of a female (vagina) of O N a child aged 14 years which caused penetration. He was tried and convicted accordingly and was sentenced to 20 years imprisonment. He preferred the appeal against both the conviction and sentence. In the meantime, he has filed the instant application by Notice of Motion dated 9<sup>th</sup> March, 2016 under Section 357(1) of the Criminal Procedure Code. The main prayer sought is that he be granted bond pending the hearing and disposal of the appeal. The application is premised on the grounds that the appeal has a high chance of success and that by the time the appeal is heard and disposed off he will have served a substantial part of the sentence. The application is further supported by the Applicant's affidavit sworn on 9<sup>th</sup> March, 2016 which reiterates the grounds on which the application is premised.

The application was canvassed before me on 27<sup>th</sup> July, 2016. Learned Counsel Mr. Maina Kamau represented the Applicant while learned State Counsel M/s Akuja represented the Respondent. Mr. Kamau submitted that the appeal had overwhelming chances of succeeding in that there were material contradictions in the evidence of the prosecution witnesses. He took issue particularly with the evidence of PW1 who was the complainant who testified that she was defiled in their house by the Appellant on a sofa set. In contrast, PW2 who was PW1's mother together with PW4, the Investigating Officer testified that the house had no sofa set but chairs. He also faulted the inconsistency of the medical evidence. He submitted that PW3 Dr. Kamau of Police Surgery discounted PW1's assertion that she bled after the defilement. Further, that Dr. Kamau was categorical that it was not the first time that PW1 had had a sexual intercourse. It was further the submission of Mr. Kamau that if the application herein is not granted, the Applicant was likely to serve a substantial part of the sentence by the time the appeal is heard and determination.

On behalf of the Respondent, M/s Akuja submitted that the appeal had no chance of succeeding. Her case was that the evidence of the prosecution witnesses was corroborating and consistent. In any case, under Section 124 of the Evidence Act, the court was entitled to convict on the evidence of the victim alone notwithstanding the absence of corroboration. She was also of the view that the Applicant having been sentenced to 20 years imprisonment was so lengthy a jail term that the appeal would be heard before a substantial part of it was served. She urged that the application be dismissed.

The principles to be considered in an application for bail pending appeal were settled in the case of **Jivraj Shah vs Republic [1986] eKLR** in which the Court of Appeal held that:

***“1. The principle 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.***

***2. If it appears prima facie from the 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 substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.***

***3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”***

On the success of the appeal, I have had the advantage of looking at the prosecution’s evidence as well as the defence case. The prosecution called a total of 6 witnesses. It is factual that there was a contradiction on the actual place that the defilement took place. PW1 testified that she was defiled on a sofa set while PW2 and PW4 testified that there was no sofa set in the house. However, that is a minor contradiction which may not necessary negate the fact of whether PW1 was defiled. In regard to the medical evidence, I find the same was consistent with PW1’s evidence. Both doctors who examined PW1, that is, Dr. Kamau –(PW3) and Dr. Kamande (PW6) of Nairobi Women’s Hospital were unanimous that PW1 was defiled. The issue of whether or not PW1 bled after the defilement can be resolved in detail in the judgment. The defence of the Applicant in my view did not dislodge prosecution’s case. On the whole, I do not think that the appeal has a high chance of succeeding.

On whether the Applicant shall have served a substantive part of the sentence before the appeal is heard and determined is obviously not factual. He was sentenced to 20 years imprisonment and the current rate of disposal of appeal is between one and two years. He is ably represented by a counsel who was able to process the proceedings for the purpose of this application. The proceedings being ready, counsel should serve the record of appeal as soon as is practically possible and list the appeal for admission and hearing which is possible within the current calendar year.

In the end, I find the application unmeritorious and the same is hereby dismissed. It is so ordered.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF SEPTEMBER 2016**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Maina Kamau for the Applicant*

2. *M/s Nyauncho for the Respondent*