



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 2 OF 2015

SKM.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Sentence and Conviction of Resident Magistrate Embu in Criminal Case No. 1146 of 2014 on 8th January, 2015)

R U L I N G

The applicant was convicted of the offences of incest contrary to Section 20(1) of the Sexual Offences Act. He was sentenced to serve 40 years imprisonment. In his application dated 13th January 2015, he seeks for orders for release on bail pending appeal and for suspension of the sentence until the appeal is determined.

Mr. Mungai for the applicant argued the application. It is based on the following grounds:-

1. *That the appeal has overwhelming chances of success.*
2. *That the applicant is a law abiding citizen and that he dutifully attended court when he was on bond pending his trial.*
3. *That the offence he is convicted of is a bailable one.*
4. *That based on the act of lodging the appeal the applicant maintains his innocence.*
5. *That bail is a constitutional right unless there are compelling reasons.*

It is argued that the proceedings have delayed before the trial court which is likely to cause delay in hearing of the appeal. Mr. Mungai submitted that the judgment has wrong reasoning in that the trial magistrate admitted that the victim was not a biological child of the applicant. The court in that regard ought to have warned itself that there was a possibility of framing up the applicant.

There was evidence of occasional quarrels between the applicant and PW1 the mother of the complainant. This court reached a conclusion that such altercations were normal. The counsel argued that there was no evidence to connect the applicant with the penetration the doctor had noted in the P3 form.

Further that the defence of the applicant was not considered. The applicant is a father of one (1) month old baby who required his care. This points to special circumstances in this appeal which justify the applicant's release on bail.

The application was opposed by the respondent. Ms. Matere for the State submitted that the threshold for the application has not been met. The Sexual Offences Act does not require that blood relation exists in

an offence of incest between the complainant and the accused. The trial court dealt with all the issues raised in the defence of the applicant and in cross-examination in relation to the prosecution's evidence. It was the submission of the State that the appeal has no chances of success and that a one month old baby does not amount to special circumstances. Being a convict, the applicant is likely to free if released on bond.

I have considered the arguments of the applicant and those of the respondent. It is argued that bail pending appeal is a constitutional right. Article 49(1)(h) provides for bail for an arrested person and for a person facing trial. The bail though a constitution right is discretionary in that it can be denied where the State demonstrates compelling reasons not to release. Bail pending appeal is not a constitution right but may be granted where the applicant has satisfied the court that his appeal has high chances of success or where it has been shown that exceptional circumstances exist.

The supporting affidavit contains the grounds relied which are also inscribed on the face of the application. The issue of the applicant having one month old baby is not among the grounds. It was a statement by the applicant's defence counsel may be based on instructions which reached him late after the application was filed. The applicant did not tell the court who stays with the one month old baby. Neither did he tell the court where the mother of the baby is. The applicant was convicted on 8/1/2015. The application was heard on 5/2/2015.

The child must be in custody of the mother. This issue was not raised during mitigation. However, I do not find this an exceptional circumstance which can justify releasing the applicant on bail.

On the delay of proceedings, I wish to state that this not likely to take more than one month from the date of the request. The judgment annexed to this application has already been typed. The criminal appeal's diary of this court is not congested and would afford a nearer date for this appeal.

On the appeal having chances of success, a few issues were raised. Firstly, it was said that the court failed to consider that the complainant was not the biological daughter of the applicant and that there were frequent quarrels between the applicant and his wife which were likely to have influenced a frame-up of the charges against the applicant.

It is clear from the judgment that the magistrate dealt with this issue extensively and reached a conclusion that there was no fabrication by either PW2 or the complainant. This is a case where independent witnesses were called to testify of the report they had received from PW2 before the matter was reported to the police.

On the medical evidence, the doctor found that there was penetration. The evidence of PW1 was that the applicant took her from her bed to the sitting room where he defiled her on a sofa set. This evidence was corroborated by that of PW2 connects the appellant with the offence. The medical evidence was only a corroboration of the evidence of PW1. The argument of the applicant that the medical evidence has no nexus with the allegations against him is not correct.

The applicant relied on the case of **ENOCK H. OKOYANA MARAMBI VS REPUBLIC [2014] eKLR** where the learned judge cited the case of **ADEMBA VS REPUBLIC [1983] KLR 442** where the following principles were set out.

1. *That bail pending appeal may only be granted if there are exceptional or unusual circumstances.*
2. *That the likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.*

The principles have been cited in many application for bail pending appeal and are indeed very well established. However the applicant has a duty to satisfy the court on the requirements of the said principles. It is also important to note that once an accused person has been convicted by a competent court, he loses the presumption of innocence. Lodging an appeal cannot restore the presumption.

It is only a successful appeal that quashes the conviction that can restore the innocence of the appellant. This is why the applicant is duty bound to satisfy the court in an application for bail pending appeal that his appeal has high chances of success. In the application before me, the applicant has failed to satisfy this court on any of the two principles.

I find no merit in this application and dismiss it accordingly.

DELIVERED, SIGNED AND DATED AT EMBU THIS 5TH DAY OF MARCH, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Muraguri for Mungai for Applicant

Ms. Matere for Respondent

Applicant present in person

F. MUCHEMI

JUDGE