



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 67 OF 2013**

**(CONSOLIDATED WITH HCRA NO. 68 OF 2013)**

BOB MUTUGI.....1ST APPELLANT

JACKSON MUCHANGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(Being an Appeal from the Sentence and Conviction of M. WACHIRA Chief Magistrate Embu in Criminal Case No. 967 of 2009 on 17th October 2013)***

**R U L I N G**

This is the application for bail pending appeal dated 6/2/2014. The main grounds are as follows:-

1. ***The Appellant/Applicant has filed an appeal against the conviction and sentence of the Chief Magistrate M. Wachira in the Chief Magistrate's Court Criminal case No. 967 of 2009 at Embu.***
2. ***The appeal has merit and has overwhelming chances of success.***
3. ***If successful, the appeal shall be rendered nugatory as the applicant shall have served his sentence substantially.***
4. ***Appellant/Applicant is entitled to right to bail as enshrined under Article 49(h) of the Constitution.***
5. ***The trial Magistrate erred in law and in fact in convicting the Applicant in a charge where the essential ingredients of the offence had not been proved beyond reasonable doubt.***
6. ***The trial magistrate erred in law and in fact in the manner she treated the evidence tendered by the Prosecution which was insufficient and thus arriving at a wrong finding.***
7. ***The defence tendered by the Applicant was weighty and credible.***
8. ***Due to the heavy work load of this Court, there will be a delay before the Appeal is heard by which time the Appellant/applicant will have served a substantial part of the sentence.***
9. ***The Appellant/Applicant had been admitted on bond before and never absconded and being a Kenyan Citizen is unlikely to abscond if admitted to bail pending appeal.***

In her submissions Ms. Fatuma told the Court that the 1st appellant was jailed for 2 years while the 2nd appellant was jailed to life imprisonment by the Chief Magistrate in Criminal Case No. 967/2009 on 17/10/2009. She further submitted that the appeal had high chances of success as there was a serious issue with identification. Was the complainant able to identify her assailants? And if so were they the ones before Court? To her the answer is "NO". The 1st appellant was identified by PW1's father who was not called as a witness. The 2nd appellant was arrested at the police station yet his description had

never been given. It was further her submission that PW1 and the appellants knew each other as neighbours.

Mr. Wanyonyi learned State Counsel did not oppose the application for bond on the following grounds.

- i. ***From a perusal of the record the appeal has chances of success.***
- ii. ***Identification is an issue in this matter as the 6 assailants were masked.***
- iii. ***PW1's mother's evidence is full of contradictions as she denies knowing the appellants yet they are neighbours.***
- iv. ***There was no basis laid for the production of the P3.***
- v. ***It was alleged that the complainant was defiled by 6 people.***

The Court of Appeal in the cases of

- I. ***DOMINIC KARANJA VS REPUBLIC [1986] KLR 612***
- II. ***JIVRAJ SHAH VS REPUBLIC [1986] KLR 605***

laid some guidelines on what the Court should consider when faced with an application for bond/bail pending appeal. In these two cases it came out clearly that the considerations are as follows:-

1. ***If prima facie from the totality of the circumstances 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.***
2. ***Existence of exceptional or unusual circumstances upon which the Court can fairly conclude that it is in the interests of justice to grant bail.***
3. ***If the appeal has overwhelming chances of success there would be no justification for depriving the applicant his liberty.***

Each of the appellants was separately charged with an offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. In both counts the victim was a minor called Cynthia Gatugi aged 7 years.

In this case the Prosecution called a total of five (5) witnesses. The incident occurred when 4 minor children were walking home from school. The complainant was aged 7 years then. As the children walked, some two boys or young men took the complainant into a maize plantation leaving the other children. In the maize plantation were four (4) others. The complainant was then defiled by one of them while another one whipped her. She had not known them prior to this but she was able to identify them later. There is an issue of the boys having put on masks. The evidence of PW1 and PW2 on this appears not to be consistent.

The rest of the evidence will be evaluated during the hearing of the appeal itself. One thing that is clear is that the 1st appellant was sentenced to 2 years and may serve a substantial part of his sentence before the appeal is heard. Considering that the appellants appear to have an arguable appeal, I do find this to be proper case for the Court to exercise its discretion in the applicants' favour and admit both of them to bail pending appeal. Each of the appellant/Applicant will be released upon executing a bond of Shs.50,000/= with a surety in similar sum.

Once sureties are approved mention dates should be set by the Deputy Registrar until the appeal is heard.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 2ND DAY OF MAY 2014.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Ms. Mbae for State**

**Appellants/Applicants**

**Mutereo/Kirong CC**