IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 8 OF 2014

(Being an application for bond pending appeal)

JOEL LUNGAI …….…….. APPLICANT

VERSUS

REPUBLIC …… RESPONDENT

RULING

This is a Notice of Motion dated 29th January 2014 filed on behalf of the appellant by Geoffrey Okoth & Company advocates under certificate of urgency. The application was filed under **Section 356 (1)** of the **Criminal Procedure Code (Cap 75)** as well as **Article 49 (1)** of the **Constitution of Kenya 2010**.

It is an application for bail pending appeal.

The application has grounds on the face of the Notice of Motion. It was filed with a supporting affidavit sworn on 29th January 2014.

At the hearing of the application, Mr. Getanda, who appeared for the appellant made submissions. Counsel submitted that the petition of appeal filed raised substantial grounds. Counsel submitted that the appellant, who was aged 18, had been sentenced to serve 15 years imprisonment for defilement. That the imprisonment had prejudiced his education, as he was school going. Counsel submitted that bail was a Constitutional right. That the appellant suffered from epilepsy and that he would abide by bail terms imposed by the court.

Ms Omondi for the State opposed the application. Counsel submitted that the appeal had minimal chances of success, and that there was no proof of the appellant's alleged ill health. In addition, there was no documentary evidence to prove that was studying. Counsel emphasized that Constitutional rights were limited. In the present case, the appellant while on bond during trial interfered with the complainant, who was a witness, resulting in cancellation of his bond.

In response, Mr. Getanda submitted that there was no proof that that appellant would interfere with the appeal as the complainant would not be called to testify on appeal. Counsel emphasized that no prejudice would be suffered by the State or complainant if bail was granted.

This is an application for bail pending appeal. The parameters to be considered by the court in such an application were clearly stated by the High Court in the case of ***Somo –vs- Republic [1972] EA 476***. In that case, the court explained that the most important consideration is whether the appeal has

overwhelming chances of success, in that case there is no justification for depriving the applicant of his freedom. The other factor is whether there are exceptional or unusual circumstances.

Though counsel for the appellant has relied on **Article 49 (1) (h)** of the Constitution, in my view that Article is not applicable herein. In my view **Article 49 (1) (h)** of the Constitution of Kenya 2010 relates specifically to the rights to bail or bond of a person who has not yet been convicted. For the record, the Article provides –

> ***"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 so released."***

Though the above be the position, both before and after the promulgation of the Constitution of Kenya 2010, Section 356 (1) of the Criminal Procedure Code (Cap. 75) has conferred power on both the High Court and Subordinate courts to grant bail pending appeal, in deserving cases. It provides as follows –

> ***"356 (1) – The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court."***

The above statutory powers of courts have to be exercised on the basis of the peculiar facts and circumstances of each case.

I have perused the proceedings and petition of appeal. I have considered the submissions both for the appellant and the State.

In my view, the appeal of the appellant has overwhelming chances of success, mainly with regard to the age of the complainant. The offence is alleged to have been committed in August 2013. The evidence from the complainant is that she was born on 6/5/1997. Reliance was merely placed on a health card and baptismal card. The learned magistrate did not evaluate the evidence on establishment of the age of the complainant. This is a borderline case of a complainant who could be 18 years, and positive proof of age was crucial in establishing the offence charged.

I am convinced that the appeal herein has overwhelming chances of success. I will therefore grant bail pending appeal.

In the result I allow the application and order as follows –

1. The appellant will be released on his paying a cash bail of Kshs.100,000/= pending hearing of appeal.
2. He will attend every mention and hearing of the appeal.
3. Mention on 16th June, 2014 to fix a hearing date.

Dated and delivered at Kakamega this 15th day of May, 2014

George Dulu

J U D G E