



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**

**Miscellaneous Application 132 of 2012**

**DAVID MASESE MOGAKA .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Criminal case No. 3122 of 2007 of the Chief Magistrate's court at Makadara.)*

**R U L I N G**

1. The applicant, **David Masese Mogaka** approached the court by way of Notice of Motion dated 14<sup>th</sup> March 2012, seeking to be admitted to bail pending the determination of his second appeal.
2. From the record the applicant was convicted by the magistrate's court and sentenced to 15 years imprisonment in **Chief Magistrate Criminal Case No. 3122 of 2007 at Makadara.**
3. The conviction was upheld by the High Court in **High Court Criminal Appeal No. 68 of 2009.** The applicant forwarded an appeal to the Court of Appeal. That second appeal has not been admitted to the Court of Appeal so as to have a number in the Court of Appeal.
4. The grounds of the second appeal are that during trial the prosecution did not prove penetration, and that this was overlooked by the superior court.
5. Mr. Khamati, learned counsel for the applicant urged that if an appeal has a good chance of success an appellant ought to be granted bail. In the trial court he was granted bail of Kshs.50000/= plus a surety of like amount. Being unable to meet the said bond terms he remained in remand throughout the trial.
6. The learned counsel urged that since the appeal has not been admitted in the Court of Appeal the appeals record is still before this court, and that this purely administrative issue should not confine the appellant.
7. Learned counsel invoked the provisions of **Article 51** of the **Constitution, 2010** under which he is entitled to freedom on such grounds as this court deems fit.
8. Miss Mwanza, learned state counsel opposed the application on behalf of the respondent for reasons that the High Court had already evaluated the evidence and upheld the findings of the trial court. The high court having found that there was overwhelming evidence against the appellant, and the

chances of his appeal succeeding are therefore minimal if any.

9. The learned stated counsel urged that, in any case, the appeal has not been admitted, and there is therefore no appeal in the Court of Appeal.

10. Further that the confinement of the appellant is legal and by order of court, and at this point he cannot be said to have a right to be released on bail.

11. Lastly the learned state counsel pointed out that this court no longer has jurisdiction to hear this application having rendered its verdict. This court cannot state that his appeal has chances of success when it has already ruled otherwise.

12. The principle consideration in an application for bail pending appeal was stated in the case of **Jivraj Shah vs. Republic [1986] LLR 605**, wherein the Court of Appeal stated, inter alia, that bail pending appeal would be considered where there were existing exceptional or unusual circumstances upon which the Court of Appeal could fairly conclude that it was in the interest of justice to grant bail. Secondly, it may granted where 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 of granting bail will exist.

13. I have considered the submissions of both counsels in view of the holding in the case above and I find as follows:

I find no existence of exceptional or unusual circumstances upon which I may conclude that it is in the interest of justice to grant the orders sought, and it would be absurd for me to make a finding that the 2<sup>nd</sup> appeal has overwhelming chances of successes in light of the verdict of the High Court dismissing the 1<sup>st</sup> appeal.

I am also of the view that the High Court was rendered functus officio once it delivered its verdict in the 1<sup>st</sup> appeal, and the appellant moved to the Court of Appeal.

For the foregoing reason I dismiss the appeal.

**SIGNED DATED and DELIVERED** in open court this **1<sup>st</sup>** of **October 2012**.

**L. A. ACHODE**  
**JUDGE**