



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OKWENGU & KANTAL, J.J.A)

CRIMINAL APPLICATION NO. 2 OF 2020

BETWEEN

PHILIP MAINGI MUEKE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Application for bail pending appeal from a Judgment of the High Court at Nairobi (L. Kimaru, J.) dated 8th October, 2015

in

H.C.C.R.A. No. 58 of 2012)

RULING OF THE COURT

[1] On 8th October 2015, the High Court (**Kimaru, J**), delivered a judgment in which it dismissed an appeal that had been filed by **Philip Maingi Mueke (applicant)** against his conviction and sentence. The applicant had been sentenced to life imprisonment by the Chief Magistrate’s Court at Nairobi for the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act.

[2] The applicant has filed a second appeal before this Court against the judgment of the High Court, and is now before us with an application for bail pending the hearing of his appeal.

[3] The application has been brought under Rule 5(2)(a) of the Court of Appeal Rules that gives the Court discretion to grant bail pending the hearing of an appeal. It is trite that for such an application to succeed, the applicant must demonstrate to the Court that he has an appeal that has overwhelming chances of success, or that there are exceptional or unusual circumstances that would justify his release. (**Dominic Karanja v. Republic [1986] KLR 612**).

[4] In **Jivraj Shah v. Republic [1986] KLR 605**, this Court held that the principal consideration in an application for bail pending appeal, is the existence of exceptional or unusual circumstances upon which the Court can fairly conclude that it is in the interest of justice to grant bail. The Court explained that the existence of overwhelming chances of success does not differ from a set of circumstances which discloses substantial merit in the appeal, and that the proper approach would be the consideration of the particular circumstances and the weight and relevance of the points to be argued.

[5] As was stated in **Somo vs Republic [1972] EA 476**:

“Where he (applicant) is undergoing a custodial sentence he must demonstrate, if he wishes to anticipate the result of his appeal and secure his release forthwith, that there are exceptional or unusual circumstances in the case. That is why when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed.”

[6] The applicant contended that he has an appeal which has overwhelming chances of success. In what is entitled; ‘**substituted petition of appeal**’, the appellant has listed 7 grounds from which we can deduce the following as points of law: failure to comply with section 19 of the Oaths and Statutory Declarations Act during trial; failure to consider the appellant’s defence; wrongly convicting the appellant on improper evidence of identification; failure to consider material contradictions and inconsistencies in the evidence; and failure to note that the appellant’s right to a fair trial was violated.

[7] The above grounds no doubt raise issues of law that the applicant will have opportunity to ventilate during the hearing of his appeal. Of concern to us is the fact that the applicant has not demonstrated to us that his appeal has such overwhelming chances of success as would justify his release on bail. The two lower courts made findings of fact upon which both courts drew conclusions of law regarding the applicant's identification, and the conclusion that he committed the offence charged. The Court will have to address these issues at the appropriate time. For the moment, there are no exceptional circumstances upon which *prima facie*, the Court can conclude that the appeal has overwhelming chances of success.

[8] We find that the applicant has not met the threshold for admission to bail pending appeal under Rule 5(2)(a) of the Court rules. His application for bail pending appeal is therefore rejected.

Dated and delivered at Nairobi this 5th day of February, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR