



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.33 OF 2013

BETWEEN

DANIEL ORAINI OBWONI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the CM's Court at Kisii in Criminal

case No.1395 of 2011 – by Hon. L. Kaityany (Ag. SRM) delivered on 10th April 2013)

RULING

1. The appellant/applicant was the accused in Kisii CMCR Case No.1395 of 2011 in which he was tried and convicted of the offence of indecent assault contrary to **section 11(1)** of the **Sexual Offences Act No.3** of 2006. Upon conviction on 10th April 2013, he was sentenced to serve 12 years' imprisonment.
2. The appellant has already filed his petition of appeal challenging both conviction and sentence. The appeal is yet to be heard.
3. In the meantime, and by an application filed in court on 23rd April 2013, filed by the appellant in person, the appellant seeks to be released on bond pending the hearing and determination of his appeal.
4. The application is premised on grounds that the pending appeal has overwhelming chances of success; that the appellant is capable of raising any surety that the court may deem fit to order; that the appellant's health is deteriorating as he suffers from asthma.
5. The application is also supported by the appellant's affidavit filed on 23rd April 2013.
6. When the application came up for hearing on 3rd December 2013, Mr. Kaburi who appears for the appellant submitted that the appellant is a student at [particulars withheld] and deserves to be released on bond pending hearing and determination of his appeal. Mr. Kaburi also submitted that during the trial, the appellant was granted bond of Kshs.500,000/= plus one surety. Counsel also submitted that because the appeal is unlikely to be heard soon due to backlog, it is in the interest of justice that the application be allowed.
7. In response to the application, Mr. Majale, Prosecution Counsel opposed the application on grounds that the appellant is a flight risk because of the fact that he is now a convict. Counsel also submitted that the appellant's appeal has no overwhelming chances of success.
8. In reply, Mr. Kaburi submitted that whether or not the appeal has high chances of success is not a factor to be taken into account in determining this application. Further, counsel submitted that

the right to bond is enshrined in the Constitution and ought to be granted.

9. After hearing both sides in this matter, the issue that arises for determination is whether the applicant has met the threshold established by the law for the granting of bond.
10. First, there is no doubt that the right to bond for any arrested person is enshrined in the Constitution of Kenya 2010 under **Article 49 (1) (h)** thereof although such a right is not cast in stone, for where there are compelling reasons to refuse the application, the court will not exercise its discretion in favour of the applicant.
11. The court is also under a duty to establish that the applicant shall

appear in court as and whenever required until the appeal is heard and determined. In the case of **Republic –vs- Muneer Haron Ismail & 4 others, High Court Criminal Revision NO.51 of 2009** at Nairobi, Warsame J as he then was stated that:-

“In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused person to answer the charges brought against him. The court has to take into consideration various factors and circumstances and one paramount consideration is whether the release of the individual will endanger public security, safety and the overall interest of the wider public.”

12. Apart from considering whether the person seeking to be released on bond shall show up to answer the case facing him, the court also has a duty to consider whether, if the applicant is released on bond, he would:-
 - a. *Endanger the safety of the public, or any person, or will commit a certain specified offence;*
 - b. *attempt to evade trial;*
 - c. *attempt to influence or intimidate witnesses or to conceal or destroy evidence;*
 - d. *undermine or jeopardize the objectives or the proper functioning of the criminal justice system; or*
 - e. *where in exceptional circumstances, there is the likelihood that the release of the accused would disturb the public order or undermine public peace or security. (See **Nairobi HCCRC Rev. No.372 of 2012 – Republic –vs- Ahmad Abolafathi Mohammad & another**).*
13. In the instant case, the applicant herein is undoubtedly a convict, serving a 12 year sentence. The applicant says he is a student at Gusii Institute of Technology. He has annexed a letter of admission showing that he was admitted to the said institute on 17th March 2013 for a course in Electrical Installation. He has also exhibited a Student’s Information Data Form from which it is established that the applicant herein was born in 1985 and that he suffers from asthma. There is also exhibited some treatment notes from the Kisii GK Prison Dispensary dated 15th April 2013. The appellant was treated for cough, DTB and chest pain.
14. I note from the record that before sentencing the appellant, the trial court observed that the offence of which the appellant had been convicted was a serious offence which warranted a stiff penalty. The trial court also noted that upon conviction, the law provided for a minimum sentence from which the court could not depart.
15. After carefully considering the submissions and the law, and considering the fact that the applicant is a convict and that the offence of which he was convicted is serious with a minimum sentence provided, it appears to me that unless adequate bond terms are given, the applicant could become a flight risk.
16. In the circumstances, the applicant’s prayer for bond is allowed on the following terms:-

1. *The applicant may be released on his own bond of Kshs.1,000,000/= (Kshs. One Million only) plus 2 sureties of a like amount.*
2. *The sureties shall be approved by the Deputy Registrar of this Honourable Court.*
3. *The appellant shall appear for mention of his case once every 30 days*

until the appeal is heard and determined or until further orders of this court, the first such mention shall be on 17th January 2014.

4. *If there is any default without justifiable cause, the bond shall stand cancelled and sureties called to account.*
5. *Orders accordingly.*

Dated and delivered at Kisii this 19th day of December, 2013

R.N. SITATI

JUDGE.

In the presence of:

Mr. Kaburi for Appellant/Applicant

Mr. Shabola for Respondent

Mr. Bibu - Court Clerk



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