REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HIGH COURT REVISION CASE NO.E041 OF 2021

(FROM ORIGINAL WUNDANYI S.O CASE NO.17 OF 2020)

PMM.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Being an appeal against the ruling of Wundanyi Resident Magistrate Court Hon. E.M.Nyakundi in sexual offence case No.17 of 2020 delivered on 27th January 2021)

RULING

1. The applicant herein was charged with the offence of ***Incest contrary to Section 20(1) of the Sexual Offences Act, No.3 of 2006***. He was further faced with an alternative count of ***Committing an Indecent Act with a Child contrary to Section 2(1) as read with Section 11(1) of the Sexual Offences Act No.3 of 2006***.The applicant pleaded not guilty and trial commenced. After hearing the prosecution witnesses, the learned magistrate on 27th January 2021 held that a prima facie case had been established and subsequently put the applicant/accused on his defence.

2. The applicant feeling aggrieved filed the subject Notice of Motion application dated 22nd February,2021 seeking the following orders;

a) Spent

b) That the honourable court be pleased to grant leave to the applicant to file the draft memorandum of appeal out of time.

c) Spent

d) Spent

e) That the criminal proceedings at Resident Magistrate Court Wundanyi, Sexual Offence 17 of 2020, be and are hereby stayed pending the lodging, hearing and determination of the intended appeal.

f) That the court be pleased to issue such other orders that it may deem fit to prevent the ends of justice from being defeated.

g) That the costs of and or incidental to this application to abide the outcome of the appeal.

3. The application is premised on the grounds therein and supporting affidavit of the applicant sworn on 22nd February, 2021. It was averred that his failure to file his appeal on time was due to lack of funds to engage an advocate. He stated that he has an arguable appeal with high chances of success. That should he be put on his defence before this appeal is heard, the same will affect the substratum of the appeal hence render the same nugatory. He contended that he will suffer a Miscarriage of justice if the application is disallowed.

4. The applicant attached a draft MOA dated 22nd February 2021contending that the trial court; erred by putting him on his defence contrary to available evidence; disregarded his submissions and inconsistencies in evidence. When the application came for hearing, parties agreed to stay the lower court proceedings pending the hearing and determination of the same. They also agreed to dispose the application by way of written submissions.

5. The applicant through his advocates Omurwa and company advocates filed written submissions dated 29th June,2021 and submitted on four issues;

whether the applicant/accused has an arguable appeal

6. Learned counsel submitted that the draft memorandum of appeal has raised an arguable appeal worthy considering hence the need to grant leave sought. Mr. Omurwa contended that an arguable appeal is one that would raise a single bonafide point worth of consideration by the bench that will hear the appeal and it need not to be one that must necessarily succeed. To buttress that proposition, counsel relied on the following case law;

Dennis Mogambi Mong'are v Attorney General & 3 Others cited with approval in the case of **Ian Gakoi Maina & 3 Others v Republic & Another [2020] eKLR** in which the court rendered itself thus:

"an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."

7. Further reliance was placed in the case of **Berkley North Market & Others v Attorney General & Others Civil Application No.Nai 74 of 2005** cited with approval in the case of **Ian Gakoi Maina &3 Others v Republic &Another (Supra)** in which the court rendered itself on the factors to be considered in an application for stay of criminal proceeding thus:

"at this stage, on an application to stay criminal proceedings, it is not for the court to make a determination: we only need to be satisfied that a sole bonafide contention is not unarguable or frivolous".

8. The applicant further submitted that the intended draft Memorandum of Appeal further raises factual and legal issues in respect of inconsistencies in the testimonies of the prosecution witnesses and the medical reports, which have a bearing on whether the applicant /accused has case to answer. That the trial magistrate erred on both points of law and fact and manifestly misinterpreted Section 210 of the Criminal Procedure Code, on the evidential threshold required, to put the applicant/accused to his defense, which legal points have been raised in the intended draft appeal.

whether the appeal shall be rendered nugatory if the orders sought herein are granted(sic)

9. The applicant submitted that the annexed memorandum of appeal is arguable, with very high prospects of success as demonstrated and that unless the orders sought herein are granted, the applicant will suffer great prejudice. That unless the orders sought are granted, pending appeal, the applicant/accused will be put to his defense, thus completely destroying the substratum of the appeal. To address that proposition, learned counsel again relied on the **Ian Gakoi Maina &3 Others V Republic &Another (Supra)**

whether the applicant should be granted leave to appeal out of time

10. The applicant submitted that the prayer seeking leave to file the intended draft appeal out of time has not been contested and urged the court to grant the same in the interest of justice.

Whether the intended appeal is bonafide

11. The applicant submitted that the legal and factual issues are meritorious as demonstrated in the draft Memorandum of appeal and unless the orders sought herein are granted, the applicant will be highly prejudiced.

12. In response, the respondent filed a replying affidavit sworn on 14th June 2021 by Kibet Chirchir prosecution counsel appearing for the state. It was averred that the applicant will not suffer any prejudice by being put on his defence and the purported appeal is premature hence intended to further delay the case.

13. The respondent filed it's written submissions dated 14th June,2021 thus contending that; the applicant has not demonstrated how he is going to be prejudiced if he tenders his evidence in his defence; there is no proof that he is being asked to fill gaps in the prosecution's case during his defence; that the annexed memorandum of appeal dated 22nd February, 2021 does not demonstrate an arguable appeal at this stage; the applicant has jumped the gun by prematurely seeking to file the same and that the trial magistrate analysed evidence to support the reasons for putting the applicant in his defence**;**

14. The respondent contended that being put on his defence does not mean that the appellant has been found guilty. To support that position, counsel relied on the holding in the case of **Ramanlal Trambaklal Bhatt v Republic (1957)E.A 332 at Page 334-335** where it was stated that;

"remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie is made out if, at the close of the prosecution the case is merely one;

"Which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution. Nor can we agree that the questions whether there is a case to answer depends only on whether there is:- some evidence ,irrespective of its credibility or weight ,sufficient to put the accused on his defence."

A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence.it is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, whether if believed it is weighty enough to prove the conclusively, but final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a "prima facie case" but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

15. The respondent further submitted that the application has not been brought in good faith, but meant to delay the trial of the subject case hence urged the court to dismiss the application and do direct the hearing to proceed to its logical conclusion.

16. Having considered the application and rival submissions by both parties, issues that emerge for determination are;

a) Whether the court can stay criminal proceedings at the interlocutory stage

b) Whether the court should grant leave for the applicant to file an appeal out of time

c) Whether the court can set aside the impugned ruling

17. On whether the court can stay criminal proceedings at the interlocutory stage, the court must be convinced that the applicant will suffer grave injustice if the trial court proceeds to take his defence at this stage. Iam a live to the fact that a ruling delivered under Section 210 of the CPC is not a final order but an indication that there is a possibility on the face of it that an offence may have been committed.

18. It is very rare in practice for an accused person to challenge a ruling on a case to answer given that there is a window open to challenge it in defence. An interlocutory appeal of this nature must therefore be founded on firm legal and factual foundation before it can be allowed. In the case of **Joseph Nduvi Mbuvi v Republic [2019] eKLR** the court had this to say;

''It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. Dealing with the right to appeal in interlocutory ruling in a criminal matter, the Court of Appeal in Thomas Patrick Gilbert Cholmondeley vs. Republic[2008] eKLR, held that:

"We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under *section 84 (7)* of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."

19. In this case, the applicant has not advanced any good reason as to why the criminal proceedings should be stayed. He has also not demonstrated how he is going to be prejudiced if he tenders his evidence in defence. From the above case law, it is clear that a ruling of a case to answer does not mean the court will convict the accused and it will cause no harm to the accused if the matter is heard to conclusion.

20. On whether the court should allow the applicant to file an appeal at the interlocutory stage, the court in the case of **John Njenga Kamau v Republic [2014] eKLR** held as follows**;**

"It is clear from the foregoing provisions of the Criminal Procedure Code that only a party who is convicted can file an appeal to this court. The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court's considered view is that the reason why such appeals are not allowed is deliberate and is not a *lacunae* in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case. This position is supported by the finding made by the Court of Appeal in Thomas Patrick Gilbert Cholmondeley –vs-Republic [2008] eKLR. At page 19 of its judgment, the court had this to say:

"In ordinary criminal trials, there is generally no interlocutory appeals allowed for Section 379(1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand, the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person;... the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental rights, falls by the way side and causes no harm to such an accused person."

21. The applicant submitted that he has an arguable appeal that is likely to succeed and if the orders sought are denied the appeal will be rendered nugatory.

22. The respondent on the other hand submitted that the appeal is not arguable at this stage and that the applicant has jumped the gun by prematurely seeking to file the same.

23. While addressing a similar scenario, the Kenyan supreme court in the case of **Joseph Lendrix Waswa v Republic Sup.court petition no.23 of 2019(2020)eKLR gave clear guidelines as to under what circumstances an interlocutory appeal can be allowed as follows;**

> **"94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and a wait the final determination by the trial court. A person seeking to appeal against an interlocutory decision must file their intended notice of appeal within 14 days of the trial court's judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly be allowed. These include;**
>
> > **a) Where the decision concerns the admissibility of evidence which if ruled inadmissible will eliminate or substantially weaken the prosecution case.**
> >
> > **b) When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal.**
> >
> > **c) Where the decision entails the recusal of the trial court to hear the cause"**

24. Similar position was held in **Waititu v republic (petition 2 of 2020)(2021)KESC11(KLR)(Anti-Corruption and Economic Crimes) (22 October 20210 (Judgment).**

25. Guided by the above quoted case law, Iam satisfied that the grounds cited for appeal in the draft memorandum of appeal should be preserved for the main appeal should the applicant be convicted. It will be premature to claim that there is an arguable appeal at this stage. The applicant will not suffer any prejudice by tendering his defence and then await the final verdict which might as well include an acquittal.

26. The claim that the appeal is likely to be rendered nugatory is a fallacy as the window is not closed. Courts should sparingly entertain interlocutory appeals unless there are exceptional circumstances to warrant the same pursuant to the supreme court holding in Joseph Waswa case above quoted. A criminal trial is quite an elaborate process with clear rules of the game properly designed to take care of all parties hence the applicant should not fear as he has an opportunity in his defence to challenge the prosecution case.

27. In my view, the application herein is not merited and there is no need to stay proceedings before the lower. Having held as above, leave to appeal out of time is not necessary hence the same is spent. Accordingly, the application is hereby dismissed and the interim orders staying the lower court proceedings lifted. The trial court to proceed with the hearing of the defence case expeditiously.

Dated, signed and delivered in Voi on this 26th day of January 2022

J.N.ONYIEGO

JUDGE