



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E028 OF 2020

JKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Principles

1. The principles to be considered in an application for bail pending appeal pursuant to the provisions of Section 356 and 357 of the Criminal Procedure Code were set out in ***Jivraj Shah v. R*** (1986) KLR 605 which considered earlier decisions of the Court and expounded on the factor of overwhelming chances of success and held as follows: -

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If 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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in Somo v Republic (1972) EA 476 which was referred to by this court with approval in Criminal Application 5 No. NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self defeating to attempt to define phrases or to establish formulae.”

2. The Appellant was convicted of the offence of Child Prostitution contrary to Section 15 (d) of the Sexual Offences Act No. 3 of 2006 and was sentenced to five (5) years imprisonment on 26/11/2020.

3. The Appellant’s application is supported by the affidavit of B. G. Kariuki, Advocate and it is averred that the appeal has high chances of success. Through her said Advocate, she argues that the charge sheet was defective as she should have been charged with the offence of ‘benefitting from child prostitution’ as provided in the Act. She argues that there was no complainant as PW1 AK never complained of the alleged sexual assault allegedly perpetrated on 31st October 2018 and that she, PW1 gave two contradictory statements; That there was no report tendered in the lower Court from Ripples International as to the character of PW1; That the alleged defiler, Cyrus Ndatho (*Although from Judgement of Nkubu Criminal Case No. 43 of 2018, it should be Silas Ndatho*) was arrested, charged and prosecuted but was not found liable and was released; That the said Cyrus Ndatho ought to have been called as witness, being the alleged defiler; That since Cyrus Ndatho was not found liable for defilement, there was therefore no act of having sex with a minor and thus the omission negates the finding of the trial Court that the Appellant having influence over PW1, a child, to procure child for sexual intercourse; That the investigating officers were lethargic, lazy and highly compromised and were biased and failed to produce all the expected witnesses to decipher the criminal web and that their professionalism ought to have been put into question even as PW1 testified to having been beaten in the police cells to record a statement; That alongside subjecting the Accused person’s cell phone for forensic, the investigating officers ought to have done the same for the Complainant and alleged defiler; That the evidence of PW3 P.C Cylene Mueni is hearsay evidence which is not admissible in a court of law; That the investigating officer (PW5) submitted to Court that he did not connect any form of communication nor monetary transactions between the Accused person and the said defiler, Cyrus Ndatho; That there was no evidence linking the Appellant and the 1st Accused as accomplices; That the trial Court ought to have considered the evidence of the Complainant’s aunt who testified that the Complainant was truant and of questionable character; That the proceedings in the criminal case charging Cyrus of defilement ought to have been produced in Court, which would have confirmed the Complainant’s averment that she had never seen Cyrus, the alleged defiler; That there were inconsistencies in the time and dates by the prosecution witnesses; That the Appellant suffers from tuberculosis and asthmatic attacks and her incarceration is a threat to her health and hazardous to other inmates; That the COVID 19 pandemic is unforgiving especially to old people with underlying conditions; That the Appellant’s daughter suffers from HIV and the said daughter is likely to lose the counselling service of her mother which may precipitate her loss of life; That in the trial Court, the Appellant was on a bond of Ksh 300,000/= with one surety of similar amount and she never absconded.

4. In addition, a second affidavit was sworn by JK who is a daughter to the Appellant. She avers that her mother, the Appellant suffers from chest problems that make it difficult for her to breathe at times and that she is 52 years old, a widow and the sole bread winner of their family. She avers that she has a 17 year old sister in Form two who attends a day school and that her said sister depends on the Appellant for her education and medical check up. She avers that she is married and lives in Wajir County, operating a small vegetable kiosk in Griftu market and does not have the financial muscle to look after her young sister, that the place where she lives is remote and her sister would not be able to access a medical facility for her specialized medical checkups. She therefore prays that her mother, the Appellant be released on bail and/or bond terms to enable her take care of her younger sister.

5. The Prosecution opposed the application and made oral submissions before the court urging that the charge was not defective and in any event had not been raised at the trial; that the applicant was properly convicted on the evidence adduced before the court; that there was no evidence that the alleged defiler of the child had been acquitted of the charges and the issue of the applicant's illness could not warrant the grant of bail as the Prison health facility could deal with the applicant's illness.

6. The applicant's counsel supplied the court with a copy of the judgment in Nkubu PMCCR. Case NO. 43 of 2018 indicating that the offence of defilement with respect to the child the subject of these proceedings had been dismissed and the accused in the case was acquitted.

Whether the applicant's appeal has exceptional circumstances

7. The totality of the Appellant's contention that her appeal has high chances of success may be summarized in the following points: -

- i) Alleged defectiveness of the charge sheet.***
- ii) Alleged failure to link the evidence adduced by the Prosecution to the charges.***
- iii) Alleged inconsistencies and shortfalls on the evidence adduced by the prosecution.***

8. The court abhors the presentation of evidence by affidavit sworn by counsel for the parties. See ***THAMBURA LEONARD MUCUI v. R Meru*** HCCR.A NO. E25 of 2020. In this case, however, it is noted that the advocate who has sworn an affidavit herein is merely reiterating and submitting on the evidence that was adduced before the trial and not leading fresh evidence. Evidence of the applicant's ill-health and her circumstances at home are given by her daughter, K.

9. The present Appellant, however, urges a matter of law that the charge sheet as drafted is defective for the reason that she was charged with the offence of '***Child Prostitution***' which is not known in law. The correct offence she argues is '***Benefiting from Child Prostitution.***' Section 15 of the Sexual Offences Act provides as follows: -

15. Child prostitution

Any person who—

- a) knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show;***
- b) acts as a prisoner of a child for the purposes of sexual intercourse or for any form of sexual abuse or indecent exhibition or show;***
- c) induces a person to be a client of a child for sexual intercourse or for any form of sexual abuse or indecent exhibition or show, by means of print or other media, oral advertisements or other similar means;***
- d) takes advantage of his influence over, or his relationship to a child, to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;***
- e) threatens or uses violence towards a child to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;***
- f) intentionally or knowingly owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of any offence under this Act with a child by any person;***
- g) gives monetary consideration, goods, other benefits or any other form of inducement to a child or his parents with intent to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show, commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years.***

10. From the reading of the Act, the offence that accrues from the commission of any of the acts specified in Section 15 including subparagraph 15 (d) which is the subject of the matter herein as that of '***Benefiting from child prostitution.***' The offence as drafted in the charge sheet by which the Appellant was charged indicated '***Child Prostitution.***'

11. The general principle governing the drafting of charge sheets is that an Accused person should be charged with an offence which is known in law. This is the hallmark of the criminal law principal '***Nullum crimen sine lege***' which provides that no person should be punished for a criminal offence except such offence that has been criminalized by law before the act in question was done. In essence there is

no crime without a law. The question that follows is whether the omission to include the term ‘benefitting’ so as to make the offence in the charge sheet correspond to what is provided in the Act renders the charge sheet defective.

12. The Prosecution has argued that the charge sheet is not defective and that in any event, this issue ought to have been raised at the trial Court.

13. It would appear that, properly framed, the offence should be charged as “benefitting from child prostitution” in accordance with the name given to the offence in the provision and not as *child prostitution* given by the subtitle to section 15 of the Sexual Offences Act. The particulars of the charge are required to indicate the way that the offence was committed with the reference to the particular subparagraph of section 15 that is applicable. Without prejudging the outcome of the Appeal, this Court is of the view that the essence of drafting charge sheets as per the required standards by law is to ensure that an Accused person can sufficiently understand the charge(s) and adequately prepare his defence. Section 134 of the Criminal Procedure Code provides significantly as follows:

“134. Offence to be specified in charge or information with necessary particulars

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

14. The offence charged was child prostitution contrary to section 15(d) of the Sexual Offences Act. The particulars of the charge in this case as set out in the judgment of the trial court were given as follows:

“On the 31st day of October 2018 at Nkubu township in Imenti South Sub-county within Meru County being the aunt and family friend respectively to AK a child aged 15 years, the accused persons took advantage of their influence to procure her for sexual intercourse.”

There would appear to be an arguable case whether the charge as framed communicated to the accused the nature of the charge facing her to enable her fully respond to it in her defence. That is matter for the hearing of the appeal.

15. If a defect is established in the charge, it cannot be said that the defect has not caused prejudice as the applicant stands to serve an imprisonment term of five years which she may not have to if the charge sheet was at the determination of the appeal found to be defective and a retrial ordered. Section 382 of the Criminal Procedure Code provides as follows: -

382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

16. The above sets out the criteria of determining whether a finding or sentence imposed when there was an error, an irregularity and as in the instant case, an omission to include the word ‘benefitting’ to complete the offence of ‘benefitting from child prostitution’ in the charge sheet is worth disturbance on appeal. The test is on whether the said error and/or irregularity and/or omission occasioned the Appellant a failure of justice.

17. This Court finds that the question whether or not the charge sheet as drafted was defective and whether the error and/or omission and/or irregularity in the charge sheet occasioned a failure of justice to warrant disturbance of the finding of the trial Court is a substantial question of law which has the potential of overturning the outcome of the trial Court.

18. It is further contended that the evidence adduced failed to link the Appellant to the charges. In so claiming, the Appellant urges that PW1, AK who is the ‘child’ in the matter never complained of the alleged sexual assault which was perpetrated on 31st October and that the alleged defiler, one Cyrus Ndatho was not found criminally liable and was released. She argues that since Cyrus Ndatho was not found criminally liable of defilement, then there was no act of having sex with a minor and thus this omission negates any finding of the Appellant having influence to procure child for sexual intercourse. She argues that the proceedings in which the alleged defiler was charged ought to have been produced in the trial Court.

19. The other averments may be categorized as inconsistencies and shortcomings of the evidence adduced. To begin with, having perused the Judgment of the trial Court, this Court observes that at some point during the trial PW1, ‘the child’ was taken to Ripples International for guidance and counselling. Indeed, her oral evidence before she was taken to Ripples International contradicted her evidence after she came back to testify following the counselling. In addition, the trial court (Hon. Irura, PM) itself framed the issues for determination in reference to the offence as follows:

“The element of the offence under section 15(d) are that:

a) The complainant was then a child for purposes of the Sexual Offences Act.

b) *That the accuseds knowingly took advantage of the relationship they had with the complainant **for purposes of causing the complainant to be sexually abused.***

20. In acquitting the accused person in Criminal Case No. 43 of 2018, the trial court differently constituted (Hon. Ayuka, SRM) found as follows:

*“In the circumstances of this case, I find that the prosecution build its case on suspicions. **The accused was implicated by the complainant’s aunt – Gladys Murega, who also made a report at the police station.** That she had suspected that the accused and the complainant had travelled to Mombasa. I find that suspicions alone, however strong they may be, can never be of probative of an offence.”*

21. The fact of causing the child to be sexually defiled is central to the charge of child prostitution and there is a question whether the offence of benefitting from child prostitution is committed where the alleged sexual intercourse is not proved. There would appear to be something of an inherent contradiction in the two prosecutions that the appellant and her co-accused would report the matter of her (child’s) disappearance to the police while all they wanted was to benefit from proceeds of prostitution of the child. While it is not for this Court, at this stage, to determine the validity of the arguments raised by the Appellant, it would appear that weighty questions of fact as well as law emerge and would potentially determine the result of the appeal.

22. As regards the health of the Appellant, it is alleged that she suffers from chronic illness being tuberculosis and asthmatic attacks. A report by Dr. Paul Wambugu of Githongo Sub-county Hospital was annexed to the affidavit of JK to confirm this allegation. In the current COVID 19 pandemic times, and noting that the Accused is 52 years old, thus making her more susceptible to contract the said virus, this Court is inclined to allow the application for bail. It is a different situation today as existed in the case of ***Dominic Karanja v. R*** (1986) KLR 612 cited in ***Jivraj Shah*** case above. It is not merely a consideration of whether the prison authorities can treat the ailment of the applicant but also whether the ailments of TB and asthma as underlying conditions predisposes her to infection by the COVID-19 virus in prison conditions.

23. As concerns the allegation that the Appellant has a daughter who is HIV positive and who is at a risk of losing out on her counselling services, this Court finds that this is not a reason good enough to grant bail as the said daughter could benefit from the services of another counsellor. Had this been the only ground, this Court would not have allowed the application. There are, however, other grounds that warrant the grant of bail as aforesaid.

Conclusion

24. The court finds that the Appeal raises certain substantial points of law to be urged on appeal, as to the defectiveness of the charge sheet and the ramifications of the same on the justice of the case, in terms of section 382 of the Criminal Procedure Code; the linkage of the evidence adduced to the offence; and the inconsistencies and shortcomings of the evidence adduced. The composite effect of the points of law, in the words of the court in ***Jivraj Shah***, is to make it appear to this court that ***“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”***. The Court also considers that against the sentence of five years, with remission an actual custody of three years and four months, ***“the sentence or a substantial part of it, will have been served by the time the appeal is heard”*** by this court. The health of the Appellant in the present circumstances affords reason to grant of bail pending appeal. The fact that the Appellant had complied with the terms of bail granted to him in the trial Court and the fact that he has a known place of abode are not very relevant in determining the application for bail at this stage.

Orders

25. Accordingly, for the reasons set out above, the Court makes the following orders:

i) The Appellant’s application for bail pending appeal dated 7th December 2020 is hereby allowed in terms of prayer number 2 of the application.

ii) The Appellant is admitted to bail pending appeal on terms that she executes a bond of Ksh.500,000/= with one (1) Surety for a similar amount.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF FEBRUARY 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S B. G. Kariuki & Company Advocates, Advocates for the Appellant.

Ms. Nandwa, Prosecution Counsel for the Respondent.