



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL APPEAL NO. E008 OF 2020

KENNETH MUTEGI KILONZO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Hon. S.M. NYAGA (SRM) delivered in the Senior Resident Magistrate's Court at Marimati SOA Case No. 17 of 2018 on the 4th August, 2020).

RULING

Introduction

1. The Appellant/Applicant was charged in the *Senior Principal Magistrate's Court at Marimati Criminal S.O.A. Case No. 17 of 2018* with the offence of defilement contrary to **Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**.
2. **The particulars of the offence were that in the month of November 2017 at Marimati Location in Tharaka South Sub-County within Tharaka Nithi County, the Applicant intentionally caused his penis to penetrate the vagina of JK a child aged 14 years. He also faced an alternative charge of committing indecent act with a child contrary to Section 11(1) of the same Act. The appellant pleaded not guilty to the charges.**
3. **The trial court convicted him of the main offence and** sentenced him to serve 20 years imprisonment. Being dissatisfied with the conviction and sentence, he filed a Petition of Appeal. On 02/10/2020, the Applicant filed this application seeking his release on bail pending appeal.

Applicant's Case

4. At the hearing of this application, the Applicant submitted that his appeal has overwhelming chances of success. He stated that the complainant was of the age of majority at the material time and as such, he was allegedly wrongly convicted under **Section 8(1)(3) of the Sexual Offences Act**.
5. The Applicant further stated that the trial magistrate wrongly convicted him on the strength of a D.N.A. test. He relied on the case of *Peter Muasa Vala v. Republic [2015] ekLR* and submitted that proof of defilement should be by evidence and not D.N.A. test.
6. The Applicant asserted that he was granted bail during the trial and abided by the set bond terms and that he is ready to provide security and avail himself in court whenever required.
7. The Applicant finally stated that he would suffer prejudice for serving an unlawful conviction and sentence and that it is therefore in the interest of justice that this application be allowed.

Respondent's Case

8. The Respondent opposed the application vide the Replying Affidavit sworn on 28/10/2020 by Eric Momanyi a Prosecution Counsel in the Office of the Director of Public Prosecutions and counsel handling this Appeal. The Respondent depones that the application lacks merit and should be dismissed on the following grounds:
 - a. THAT the Appeal by the Appellant is not arguable and does not have any chances of success.
 - b. THAT the Applicant has not demonstrated any grave error by the trial court that would make the Applicants appeal arguable or

have any chances of success.

c. THAT the Applicant has not demonstrated the existence of any special/exceptional circumstance that would warrant grant of bond/bail pending appeal.

d. THAT the Applicant has not demonstrated what prejudice will be suffered if he is not released on bail pending appeal.

e. THAT the fact that the Applicant had been granted bail in the lower court is not a ground for consideration on granting bond pending intended appeal.

f. THAT the fact the Applicant has been convicted and found guilty of the offence he was charged with, is a compelling reason to deny him Bond/Bail pending appeal as he has a motivation to abscond if released.

g. THAT the grant of Bond/Bail pending appeal is discretionary and the Applicant has not met nor demonstrated the minimum requirements for the exercise of the court's discretion in his favour.

Issue for Determination

9. The issue which arises for determination is whether the application meets the threshold for the grant of bail pending appeal.

Analysis and Determination

10. Applications for bail pending appeal is provided under Section 357(1) of the Criminal Procedure Code (CAP 75 of the Laws of Kenya) which provides as follows:

“After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”

11. The applicant has complied with the provisions of section 357(1) of the Criminal Procedure Code and has filed an appeal.

12. The principles for granting bond pending an appeal were reiterated in the case of Jivraj Shah v Republic [1986] KLR 605 which laid down the principles as follows;

(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.

(2) If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

(3) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.”

This position has been restated by the Court of Appeal in the case of Mutua -v- Republic (1988) KLR 497 as follows:-

“ It must be remembered that an applicant for bail has been convicted by a property constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.”

It follows that the principles for granting bail pending appeal is different from the ones for bail pending trial. The latter is a constitutional right granted on the principle that a person charged with a criminal offence enjoys the right to be presumed innocent until proved guilty. He is granted bail to ensure that he does not suffer before he is found guilty or declared innocent. In the former, the applicant seeks the exercise of court's discretion. It is trite that when considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judiciously taking into consideration three laid down factors. These are:-

(i) Whether the appeal has overwhelming chances of success as stated in the leading authority, that is Somo -v- Republic (1972) E.A .

(ii) There are exceptional or unusual circumstances to warrant the exercise of court's discretion, see Raghibir Singh Lamba -v- Republic (1958) E.A 37, Jivraj Shah -v- Republic (Supra) and Somo- v- Republic (Supra)

(iii) That the applicant is likely to serve the entire sentence or substantial part thereof before the appeal is heard and determined.

13. Clearly, the conditions applicable for grant of bail pending trial and grant of bail pending appeal are different as the accused is no longer presumed innocent after trial and conviction. Granting bail pending appeal is no longer an automatic right but a judicial discretion and the applicant must demonstrate that:

- a. The appeal has overwhelming chances of success;
- b. There are exceptional or unusual circumstances warranting exercise of judicial discretion to grant bail pending appeal;
- c. There is a high probability of the sentence being served before the appeal is heard.

I shall now consider whether the present application has met the required threshold under these heads.

i. Whether the appeal has overwhelming chances of success

14. On whether the appeal has high chances of success, the Applicant submitted that his conviction was wrong as the complainant, according to him, is of the age of majority. The Applicant submitted that the prosecution's evidence was full of contradictions with regards to the actual age of the complainant. He brought up PW4's testimony stating that on cross-examination, she stated that the age of the complainant was not verified in the hospital where she was examined. The Applicant further stated that the complainant's birth certificate was secured when the alleged offence was reported.

15. Further, it is the Applicant's case that his conviction on defilement was based on the strength of D.N.A. test results and therefore not good in law as the same should have been based on the evidence. On the issues raised, I opine that the applicant will be given a chance to present his arguments during the hearing of the appeal.

16. I have had an opportunity to peruse the proceedings and judgment of the trial court that were availed to this court. Without delving into the merits and demerits of the appeal, I am of the respectful view that trial magistrate considered the law and evidence adduced by the prosecution in reaching his judgment.

In *Somo – v- Republic*, the court considered the rationale for considering whether the appeal has overwhelming chances of success. The court stated that this is based on the presumption that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate if he wishes; to secure his liberty there are exceptional and unusual circumstances. These the applicant has not demonstrated.

ii. Whether there are exceptional circumstances to warrant exercise of Court's discretion to grant bail pending appeal

17. The second limb for grant of bail pending appeal is whether there are any exceptional circumstances to warrant the appellant to be admitted to bail pending appeal. In *Dominic Karanja v Republic (1986) KLR 612*, the Court of Appeal stated in alia:

(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;

(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;"

18. It was the Respondent's submission that the fact of conviction is a clear and compelling reason to deny the Applicant bail pending appeal as he may abscond. It is my view that 20 years in jail is indeed a very severe punishment that would ordinarily tempt any convict to abscond if released on bail. That notwithstanding, I rely on the Court of Appeal in *Dominic Karanja v. Republic (supra)* which stated that:

"A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;"

19. The Applicant submitted that he was previously released on bond during the trial and that he abided to the set bond terms. The Respondent submitted that the fact that Applicant was released on bond terms in the lower court does not form a valid ground to support his present application for bail pending appeal as the circumstances have changed. I agree with the Respondent. Although the Applicant did not abscond during trial, chances are higher now since he has been convicted.

20. That notwithstanding, in *Peter Hinga Ngatho versus Republic [2015] eKLR* it was held that the fact that the Applicant did not breach the bail conditions in the court below, is not an exceptional circumstance which can warrant a decision to admit an applicant to bail pending appeal. It is therefore my view that the Applicant has not demonstrated any exceptional circumstance in this application to justify his application for release on bail pending appeal.

iii. Whether there is a high probability of the sentence being served before the appeal is heard

21. In the case of *Chimambhai v. Republic [1971] E.A. 343*, J. Harris made another observation in such an application when he said:

“The case of an appellant under sentence of imprisonment seeking bond lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases...”

22. In ***Chimambhai v. Republic*** (*supra*), Harris, J. granted the application because, an anticipated delay in the hearing of an appeal together with other factors can constitute a good ground for the granting of the application. The Applicant argues that he is bound to suffer prejudice for serving an unlawful conviction and sentence. The appellant was sentenced to 20 years’ imprisonment on 29/09/2020, less than a year ago. The burden of proof was on the Applicant to demonstrate that he is likely to serve a substantial part of the sentence before the appeal is heard. I hold the view that it is not likely that the Applicant will serve a substantial period before the appeal is heard and determined.

Conclusion

23. Taking all the circumstances above in their totality, it is my considered view that the application dated 02/10/2020 has not satisfied the basic requirements for the grant of bail pending appeal. I find that the application lacks merits and is dismissed.

Dated, signed and delivered at Chuka this 25th day of February 2021.

L. W. GITARI

JUDGE

25/2/2021

The ruling has been read out in open court.

L.W. GITARI

JUDGE