



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO E001 OF 2020

ELKANA MATETE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In his Notice of Motion application dated 4th February 2021, the Appellant sought orders that he be granted bail pending the hearing and determination of this appeal on such terms as the court shall deem fit, appropriate and expedient in the circumstances. His application was supported by an affidavit that was sworn by his advocate, George Ngala Awino, on even date.

2. The Appellant stated that he was charged with and convicted of the offence of defilement contrary to Section 8(1) as read with section 8(4) of the Sexual Offences Act and sentenced to fifteen (15) years imprisonment in **Nyando S O A NO 13B of 2019**.

3. Being dissatisfied with the said decision, he lodged the Appeal herein. He relied on ten (10) grounds of appeal. He averred that his Appeal had overwhelming chances of success. He was apprehensive that it would take a long time for his said Appeal to be heard thus serving a substantial part of his sentence which would render his Appeal nugatory in the event that the same succeeded. He added that he was the sole breadwinner of his family which would suffer if he was not released on bail pending appeal.

4. He was categorical that he was not a flight risk as he had been on bond in the Trial Court without fail. He asserted that he was willing to abide by the terms and conditions that this court would impose on him.

5. He relied on the case of **Pauline Ruguru Kithumbu vs Republic [2019] eKLR** where Muchemi J granted the appellant's application for bail pending appeal as she was a mother of children of tender years which she found amounted to exceptional circumstances.

6. In opposition to the said application, the State filed Grounds of Opposition dated 17th March 2021 on 18th March 2021. It asserted that the Appellant had already been convicted and therefore had no absolute right to bond as provided under Article 49 of the Constitution. It added that the Appellant was properly convicted and hence his appeal did not stand a high chance of success.

7. It pointed out that the punitive purpose of the sentence meted upon the Appellant would be defeated if he was released on bail pending appeal. It asserted that there were no exceptional circumstances herein for the granting of such orders and the fact that the Appellant was a sole bread winner did not in itself amount to an exceptional circumstance. In support of this point, it relied on the case of **Jivraj Shah vs Republic [1986] KLR 605** where a similar conclusion was arrived at.

8. It further argued that his assertion that he would not abscond if released, was not sufficient ground for him being released on bond pending trial. In this respect, it relied on the case of **Dominic Karanja vs Republic [1986] KLR 612** where it was held that even where there were sureties, that was not sufficient ground to release a convict on bail pending appeal.

9. Section 357 (1) of the Criminal Procedure Code Cap 75 (Laws of Kenya) 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.”

10. The State did not attach copies of the cases it relied upon. Be that as it may, this court considered the principles of granting bond pending appeal that were laid down in the case of **Jivraj Shah vs Republic [1986]** (Supra). These were that bond pending appeal will be granted

where:-

1. Existence of exceptional or unusual circumstances upon which the Court can fairly conclude that it is in the interest of justice to grant bail.

2. 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 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.

11. Having said so, grant of bail pending appeal is at the discretion of the court. As was stated in the case of **Dominic Karanja vs Republic**, availability of sureties, ill health, suffering of a convict's family were not grounds for the granting of bail pending appeal. However, the anticipated delays in hearing an appeal, the length of the sentence, whether or not the applicant had pleaded guilty and/or admitted the offence and option of a non-custodial sentence are factors that an appellate court ought to take into account when considering an application for bail pending appeal.

12. The Appellant did not furnish this court with the proceedings of the lower court. However, it was clear that he had been convicted of the offence of defilement and sentenced to fifteen (15) years imprisonment. The offence had no option of a fine which would prejudice him if his Appeal was found to have been successful as he would have served a prison term despite having had an option of a fine.

13. At this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that was under the purview of the appellate court. It should only be concerned with the question of whether or not the appeal would be rendered nugatory if bail pending appeal is not granted. That notwithstanding, this court noted that while sentencing the Appellant herein, the Trial Court observed that the Probation Report had indicated that the Appellant admitted to having committed the offence. He did not allude to the consideration of the said Probation Report by the Trial Court as a ground of appeal.

14. Without pre-empting the merits or otherwise of the Appeal, the onus was on the Appellant to demonstrate that he had an appeal with overwhelming chance of success. He also failed to demonstrate that exceptional circumstances existed to warrant him being granted bail pending appeal. This court also took judicial notice that there are no delays in hearing of appeals presently sufficient to cause the Appellant to serve a substantial part of his fifteen (15) years sentence before his Appeal could be heard and determined. The onus was on him to expedite the typing of the proceedings for the preparation and lodging of the Record of Appeal.

15. It was therefore the considered view of this court that this was not a suitable case for the granting of bail pending appeal.

DISPOSITION

16. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion dated 4th February 2021 and filed on 8th February 2021 was not merited and the same be and is hereby dismissed.

17. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JULY 2021.

J. KAMAU

JUDGE