



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E113 OF 2021

FM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. FM was convicted for the offences of ‘Incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006’ and ‘Deliberate Transmission of HIV contrary to Section 26 (1) (A) of the Sexual Offence Act No. 3 of 2006.’ He was sentenced to life imprisonment for each of the convictions, to be served simultaneously.
2. He intends to appeal his convictions to this Court and has filed a Petition of Appeal dated 1st July 2021. By his application dated 2nd July 2021, supported by his own affidavit and that of Elias Mutuma, Advocate, he seeks to be granted bail pending hearing and determination of the appeal.
3. 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 are well settled. These were set out in the Court of Appeal case of *Jivraj Shah v. R, Criminal Application NAI 18 of 1986 (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.”

4. The Applicant’s case is that he was not accorded a fair trial in that Tigania Criminal Case No. E027 of 2021 was hurriedly conducted and concluded in a record 72 hours; that the appeal has high probability of success; that he faces moments of lucidity and at times loses his memory especially when under pressure no wonder he had no objection or questions for the key witnesses in his trial as he was not enjoying control of his mental faculties at all times; that during trial, he was at all times under the threat of death should he not agree to what was being said in Court; that he was promised that if he didn’t offer his defence in the matter, he would be acquitted; that he is the sole breadwinner of his family; that he is HIV positive and is on constant medication, having to see a specialist twice a month and requires special diet which are not readily available within the prison facilities; and that he has a fixed place of abode and is not a flight risk.
5. The DPP field grounds of opposition dated 19th July 2021 in response to the application. They urge that the application is incompetent, lacks merit and is an abuse of court process; that the appeal is weak and does not have high chances of success; that the applicant was rightfully convicted and does not have a fundamental right to be released on bail or bond; that there are no inconsistencies in the witness statements; that there are no compelling reasons for the Applicant to be granted bail; that there are prison medical facilities for prisoners where the Applicant can be attended to.

Whether the applicant’s appeal has exceptional circumstances

6. This Court has observed the Applicant’s application together with his Petition of Appeal. The totality of the Appellant’s contention that his appeal has high chances of success is pinned on the assertion that he did not have full control of his mental faculties during trial and that he was not accorded a fair trial. He also urges that the trial Court failed to properly apply the test of admission of circumstantial evidence.

7. Without embarrassing the Court on appeal, this Court must express that the expeditious disposal of a criminal trial in Court does not of itself amount to evidence of violation of the right to a fair trial. It must be demonstrated which is properly done at the hearing of the appeal that the expedited trial infringed upon one or the other of the accused's fair trial rights. Indeed, an expedited trial may be the demand of circumstances of the case having regard to the nature of the charge, the vulnerability of witnesses and or the possibility interference with or damage to the evidence as well as special circumstances of the accused. The rationale behind the principle that justice delayed is justice denied is for the dual benefit of both the accused and the complainant. This Court does not see that, of itself, the conclusion of a trial in 3 days over a trial period of 7 days is a ground to urge that the right to fair trial has been violated in the context of a sexual defilement charge. It is however not for this Court to go into the merits of the appeal at this time and this Court will say no more in this issue.

8. The mental state of an accused person during trial, as has been raised by the Applicant is however an issue, which if urged and found to be valid and material enough has the potential of overturning the Court's decision. The ability of an accused person to understand the trial process and thereby make adequate representations during trial is key in every trial process. This goes to the root of the Constitutional right to fair trial, which may not be limited under any circumstances. *See Article 25 (c) of the Constitution of Kenya*. This is indeed an arguable point of law.

9. Arguability of the appeal is however not the only consideration to be made in applications for bail pending appeal. An applicant must also show that there is an unusual circumstance upon which the Court can conclude that it is in the interests of justice to grant bail. This Court is not convinced that the fact of the Applicant being the sole breadwinner and the fact of him having a family and small children to take care of qualifies as unusual or exceptional for that matter. Every adult convict who has a family would suffer similar consequences and the fact that a convict's family is deprived of the usual support they would ordinarily get from the said convict is an expected and natural consequence of any custodial sentence following conviction. This eventuality, cannot be allowed to come in the way of the criminal justice system which has set objectives some of which are expressly directed to the very convict i.e punishment and rehabilitation.

10. The Applicant has also argued that he is HIV positive and requires special diet in addition to regular medical checkups. This is indeed tragic, especially in the ongoing COVID-19 pandemic times. This Court however observes that the Applicant did not annex any documents in support of his averments that he requires regular checkups or special diet. What he annexed and marked as FM1 in his supporting affidavit is a standard patient card facilitated by the Ministry of Health and the National AIDS/STD Control Programme with general guidelines, advising the patients on what to do in light of their condition i.e consulting a doctor anytime they are unwell and the requirement to following instructions when using ARVs. He failed to give particulars of which doctor, if any, that he ordinarily sees twice a month as he claims and neither did he indicate the hospital that he visits to consult this doctor. He also failed to indicate for how long he has been HIV positive for this Court to assess whether he is able to manage the disease. This Court finds that the circumstances of the case do not call for the Applicant's release as the ARVs he relies on can be supplied to him in prison as shall be ordered by the Court.

11. This Court is cognizant of the seriousness of the offence that the Applicant was convicted for. In addition to incest, he was convicted for deliberate transmission of HIV. It does not translate to justice, which must not only be done but also be seen to be done, for the Applicant to seek to benefit from the very thing which is at the centre of his charge and conviction i.e his HIV status.

12. Furthermore, considering that the Applicant has been sentenced to life imprisonment, this Court does not find that a substantial part of the sentence may have been covered by the time the appeal is heard and determined.

13. This Court further finds that releasing the Applicant, in the circumstances of the case would not be in the best interests of the complainant in the trial Court, PM who happens to be the Applicant's biological daughter. The Applicant has not indicated where he intends to go and stay should he be granted bail. He has however asserted that he wants to continue to provide for his children one of whom is PM, the complainant. One who wants to provide would most definitely want access to the said children he is providing for. In the circumstances of the charge herein the possibility of the appellant living together with the complainant may open the child to risk of harm, if the charge be true.

14. A record of the trial Court's Judgement shows that the child was so traumatized at the thought of going back home and she preferred to stay at the police station. In the exact words of the trial Court, the following was indicated: -

"She was staying with him in the same house after her mother left. He had control over her as a father. He also had the chance and opportunity to defile and he did so.

The circumstances of how this matter came to be known by the police also points to the guilt of the father.

The investigating officer PW2 and the Chief of the area, PW4 confirmed that minor had been arrested and held at Muthara Police Station over an unrelated matter.

When she was told to go home however she refused and started to cry. She then informed the investigating officer that her father had defiled her twice.

The evidence by the investigating officer to this effect who interviewed both the minor and the father was credible.

It paints the picture of a girl who is so traumatized and scared to go back home. She is so traumatized since her father had defiled her twice.

She would rather stay in the police station than go through that ordeal again.

The foregoing evidence points to the credibility of the girl's evidence. She could not have been lying since she exhibited trauma when she learned that she would go back home to be reunited with her father."

15. The above finding clearly demonstrates the ugly situation that may become of the Applicant's release. It is this Court's view that the justice of the case demands that the Applicant remains in custody while the appeal is ongoing. The Court will however order for an expedited hearing of the appeal.

Conclusion

16. Although the Applicant's appeal raises certain substantial points of law to be urged on appeal, as to the mental state of the Applicant during trial and the admissibility of the circumstantial evidence, this Court does not find that the Applicant has demonstrated such an overwhelming chance of success of his appeal as would support an automatic grant of bail. Furthermore, the Applicant relies on among others, his HIV status which is an issue at the very centre of his conviction. Despite claiming that his HIV status demands for his special treatment and special diet, he failed to substantiate his allegation that he is required to go for medical checkups twice a month and as such, has not demonstrated that his ailment cannot be handled by the prison facilities. See *Jivraj Shah v. R, Criminal Application NAI 18 of 1986 (1986) KLR 605*. Although HIV is a serious disease requiring specialized treatment, and this is made worse in light of the prevailing COVID-19 times, it has not been demonstrated that the prison authority facilities with the possibility of referrals to the relevant referral hospital in the area are unable to cope with the demands for such treatment and management as may be required.

17. Further in view of his life imprisonment sentence, it cannot be asserted that the Applicant will have served a substantial portion of his sentence by the time the appeal is heard and determined, which is one of the key considerations in such applications for bail pending appeal. The Court will, however, order hearing on priority basis in view of the Applicant's health condition.

18. Ultimately, this Court finds that the exceptional circumstances of the case require a denial of bail as by granting bail, the Court may, if the defilement charge for which he has been convicted be true, be providing means and opportunity for the Applicant to perpetuate the offence in defiling his own child, who was the complainant. In his application, the Applicant has not demonstrated that he will separate himself from the minor but instead indicates that he wants to provide for her. This Court finds that in the interests of protecting the minor, the application for bail pending appeal must be denied. Finally, the fact that the Appellant has a known place of abode are not relevant in determining the application for bail at this stage as upon conviction, the Applicant already lost his presumption of innocence.

Orders

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

i) The Applicant's application for bail pending appeal dated 2nd July 2021 is hereby dismissed.

ii) The Prison Officer in charge of the prison where the Applicant is held in custody is hereby ordered to facilitate the Applicant's medical checkups and supply of ARVs and other relevant medication as may be prescribed for him by the doctors so as to manage his health conditions.

iii) Hearing dates for the appeal to be given on priority basis.

Order accordingly.

DATED AND DELIVERED ON THIS 12TH DAY OF AUGUST, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mutuma Gichuru & Associates Advocates for the Appellant.

Ms B. Nandwa, Prosecution Counsel for the Respondent.