



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO E014 OF 2020

ALLAN CHEBORE CHEMOSIT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1.Pursuant to the provisions of section 356 of the Criminal Procedure Code (Cap 75) Laws of Kenya, the appellant has applied for bail pending the hearing and determination of his appeal.

2.The application is supported by five grounds that are set out in the notice of motion dated 26/4/2021, with the major grounds being the following. The appeal has overwhelming chances of success. The appellant is unwell. There is a likely danger that the appellant will have served a greater part of his sentence before his appeal is heard and determined. The appellant is a young parent with two children who solely depend upon him for their needs.

3.In addition to the aforementioned grounds, the application is supported by the appellant's eleven (11) paragraphs supporting affidavit, whose major averments are as follows. The appellant's appeal has overwhelming chances of success. The appellant is married with two children who solely depend upon him for their basic needs. There is a risk that the appellant will have served a substantial part of his sentence before his appeal is heard and determined. The children are suffering due to his incarceration.

The submissions of the appellant.

4.Based on the decision of the Court of Appeal in *Dominic Karanja v Republic (1986) KLR 612*, Messrs Anassi Momanyi & Co. Advocates, for the appellant submitted that the appellant has to demonstrate the following. First, that the appeal has overwhelming chances of success. Second, the appellant risks serving a sentence of imprisonment which he ought not to have served. Third, no reason exists to deny the appellant's application.

5.Furthermore, counsel for the appellant has submitted that the trial court failed to conduct a proper *voire dire* examination. As a result, that court improperly took the evidence of the minor on oath; since the minor did not understand the meaning of taking evidence on oath. Counsel also submitted that the minor's evidence was not credible as her evidence in court was at variance with her statement to the police.

6. Counsel also submitted that the trial court did not warn itself on the danger of convicting the appellant on the evidence of the minor alone. Counsel has also submitted that the medical evidence is of no value; since the minor testified that she had had sexual intercourse with another man the previous day. And for that reason a DNA test was necessary to ascertain whether the spermatozoa found in the vagina of the minor was that of the appellant.

7.Counsel for the appellant cited four other authorities which I have perused.

The submissions of the Respondent

8.Mr. Mong'are, counsel for the Respondent filed nine grounds of objection in opposition to the application.

9.Counsel cited three authorities which I have perused.

10.Counsel has submitted that the appellant has not demonstrated that his appeal has overwhelming chances of success. The appellant has similarly failed to demonstrate that he will have served a substantial part of his sentence before his appeal is heard.

11.In addition to the foregoing, counsel has submitted that the contention of the appellant that he is the sole bread winner of his family does not constitute exceptional circumstances. Counsel has also submitted that if this were the position any one in gainful employment would

automatically be entitled to bail pending the determination of his appeal. This he argues is not the correct position in law.

12. Furthermore, counsel has submitted that since the record of appeal is ready the appeal may be set down for hearing and determination within the next few months. Counsel has therefore urged the court to dismiss the application.

Issues for determination.

13. I have considered the affidavit of the appellant and his submissions and the authorities cited by his counsel. I have also considered the submissions of counsel for the respondent and the authorities he cited.

14. After doing so, I find that the following are the issues for determination.

- 1) Whether the appellant has demonstrated that his appeal has overwhelming chances of success.
- 2) Whether there are exceptional circumstances in the appeal.

Issue 1

15. I have taken into account the minor's evidence which is said to be at variance with her statement to the police. I have also taken into account that there is on record other evidence. Additionally, I have borne in mind that it is upon the appellant to demonstrate and discharge the burden of proving that his appeal has overwhelming chances of success. The contention that of the minor's evidence is at variance with her evidence in court is not in itself a demonstration that the appeal has overwhelming chances of success.

Issue 2

16. Furthermore, the averment that the appellant is the sole bread winner of his family of two children who may be suffering due to his incarceration does constitute an exceptional circumstance.

17. Since the record of appeal is ready counsel for the appellant may set down the substantive appeal for hearing and determination within the next few months. It therefore follows that the appellant who was sentenced to ten (10) years imprisonment in respect of the offence of defilement will not have served a substantial part of his sentence before the hearing and determination of his appeal.

18. In the premises, I find that the appellant's application fails and is hereby dismissed in its entirety.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT KABARNET THIS 30TH DAY OF SEPTEMBER 2021 THROUGH VIDEO CONFERENCE.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Kemboi and Mr. Sitienei, Court Assistants.

Mr. Momanyi for the Appellant.

Mr. Mong'are for the Respondent.