



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 5 OF 2020

MARK ONGURU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant has filed an application dated 24th January 2020 seeking to be granted bond pending hearing and determination of the appeal filed herein. The application is premised on grounds on the face of the application and supported by the affidavit of the applicant. The applicant contends that his appeal has overwhelming chances of success. Further that he is apprehensive that unless bail is granted he will have served a significant portion of the sentence by the time the appeal is heard and determined. That this will occasion him great prejudice. That he is not a flight risk as he was on bond during his trial at the lower court. That he is a husband and the sole breadwinner of his 4 children.

2. The prosecution did not oppose the application. However, it is the duty of this court to satisfy itself that the application is merited.

3. The applicant was tried and convicted of the offence of rape contrary to section 3(1) (a) (b) 3 of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 7 years imprisonment. The prosecution evidence was that the applicant and the complainant in the case Pw1 were from the same home area. The complainant was a tailoring student. She was at the material time working at Nanganda market. The appellant was a boda boda operator at the said market. That on the 19/11/2018 the complainant was heading home from the said market when she met the applicant and another person on a motorcycle. The applicant offered to give her a ride home on the motorcycle. She agreed. It is the other person who was riding the motorcycle. She sat between the two of them. Before they left the applicant said that he had forgotten something behind. They turned back and took the direction towards a place called Simakina. On getting to the said place they went to a certain building. The applicant wanted the complainant to enter into the building. She refused. The applicant and his colleague dragged her into a room in the building. The other person left with the motorcycle. The applicant locked the door to the room. He raped the complainant throughout the night. At 4am the other person came with the motorcycle. She and the applicant boarded the motorcycle. They went to Budonga village where they left the other person. The applicant took her to Shianda bus stage and put her into a matatu that was heading to Kakamega town. The matatu dropped her at Kakamega town where she got stranded. She met a friend who called her father Pw2 and informed him that the complainant was stranded in Kakamega town. Her father went and picked her. He took her home. She told him what had happened. They reported at Navakholo police station. The complainant was taken to Navakholo Sub-County hospital where she was examined by a clinical officer Pw3. She was found to be one month pregnant. Pc Nguja Pw4 investigated the case. He arrested the applicant and charged him with the offence.

4. The applicant in his defence stated that he was at his home on the material night. His evidence was supported by his wife Dw2 and a friend Dw3.

5. This court has powers under section 357 of the Criminal Procedure Code to grant a convict bond pending appeal. The principles applicable in an application for bond pending appeal are that the applicant has to demonstrate to the court that:-

- 1) There exists exceptional circumstances to warrant grant of bail/bond.
- 2) The appeal has overwhelming chances of success.

6. In **Somo Vs Republic (1972) EA 476** the Court of Appeal held that the most important ground is that the appeal has an overwhelming chance of being successful, in which case there is no justification for depriving the applicant of his freedom.

7. These principles were re-stated by the same court in **Jivraj Shah Vs Republic (1980) eKLR** where the court stated that:-

“(a) The principal consideration in an application for bail 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.

(b) If it appears prima facie from the totality of the circumstance 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.

(c) 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.”

Also see Mundia Vs Republic (1986) KLR 623 and Ademba -Vs- Republic (1983) KLR, 442.

8. In addition to the above principles it was held in the case of **Mutua -Vs- Republic [1988] KLR, 497** that:-

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the Applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

9. I have considered the application. The advocate for the applicant did not make any submissions in respect to the application. I cannot say with certainty that the appeal has overwhelming chances of success. There are no exceptional circumstances shown to warrant the applicant being granted bail.

The application is thereby declined.

Signed:

JESSE N. NJAGI

JUDGE

Delivered, dated and signed at Kakamega this 30th day of April, 2020.

By:

W. M. MUSYOKA

JUDGE

In the presence of:

No appearance for Applicant

Mr. Mutua for Respondent

Applicant – via zoom; present

Court Assistant - Eric

14 days right of appeal.