



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CR. APPEAL NO. 66 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 28 of 2017 of the Senior Principal Magistrate's Court at Baricho.

JOSEPH MUTHII MURIUKIAPPELLANT

V E R S U S

REPUBLICRESPONDENT

RULING

1. The application pending before this court is the one dated 18/12/2018 seeking an order that the applicant Joseph Muthii Muriuki be admitted to reasonable bail/bond terms pending the hearing and determination of the appeal filed herein.
2. The application is brought under **Articles 51, 50(2) of the Constitution and Section 357(1) of the Criminal Procedure Code**. It is premised on the grounds that the accused was convicted for the offence defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act**. And sentenced to imprisonment for Twenty Years without the option of a fine. He was sentenced on 23/11/2018 in criminal case 28/2017 in the Senior Principal Magistrate's Court at Baricho and has been in prison ever since. He has filed an appeal which he contends that has high chances of success. That unless the application is allowed and the applicant admitted to bail he will suffer irreparably as he will have served substantial part of his sentence by the time the appeal is heard and determined this rendering the appeal nugatory.
3. The application is supported by the affidavit of the applicant sworn on 8/12/18 where he has reiterated the above grounds and further depones that he undertakes to abide by the terms of the bail/bond. He further states that the application be granted in the interest of justice.
4. The application was brought under a certificate of urgency. However, the court directed that it be served and be heard in the usual way.
5. The applicant filed a Replying Affidavit (sic) sworn on 28/3/2019. Further to what he had deponed in the Supporting Affidavit, he depones that he was admitted to bond during trial and did not breach the terms. This he depones shows there is no compelling reason why he should not be admitted to bail.
6. The application was opposed by the State and in submissions filed by M/s Muthoni(S.P.C) on behalf of Mr. Geoffrey Obiri they list the following grounds to oppose the application.
 1. **That the applicant has failed to demonstrate that the appeal has overwhelming chances of success. This is so because the prosecution proved the following key ingredients-**
 2. **The applicant was properly identified by the complainant.**
 3. **The age of the complainant was proved to the required standards.**
7. The counsel further submitted that the applicant was properly identified by the complainant as the person who defiled her. The fact of defilement was corroborated by the medical evidence which confirmed that the complainant had laceration on the vaginal opening, the hymen was freshly broken and she had blood stained skirt. The conclusion was that the complainant was defiled. This is based on the evidence of the Clinical Officer (PW-1-).
8. He further submits that the age of the complainant was confirmed with the production of a birth certificate. That the defence of the applicant was dislodged by the evidence of PW-2- who placed him at the scene of crime.

9. For the applicant it is submitted that the relevant law is **Section 357(1) of the Criminal Procedure Code**. That the court has to determine whether the appeal has overwhelming chances of success and whether there are exceptional circumstances warranting the release of the applicant on bail. He relies on the case of **Tom Omare Magutu –v- Republic 2017 eKLR**.

10. He further submits that the appeal has raised grounds which have overwhelming chances of success. He submits that penetration was not proved as seemingly the court was in doubt as to whether penetration occurred as what the court could make was a presumption as it stated:-

“The injuries found by PW-1- on the complainants vagina could only be possible where sexual activity had taken place”.

11. That nothing was detected to connect the applicant to the said injuries. It is further submitted that the applicant was not properly identified, investigations were not done in a prudent manner and the evidence could not support the charge.

12. I have considered the application and the submissions. The issue which arises for determination is whether I should order the release of the applicant on bail pending appeal.

13. Bail pending appeal unlike bail pending trial is not a constitutional right but is discretionary. **Section 357(1) Criminal Procedure Code** makes provision for the release of a convicted person on bail pending appeal. It provides:-

“(1) 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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.”

14. The leading authority is the case of **Somo –v- Republic (1972) E. A 476**. The principles for granting bail pending appeal have been guided by this decision for a period of over Forty years. The principles for granting bail pending appeal based on this authority are that:-

- **The applicant must demonstrate that the appeal has overwhelming chances of success.**
- **The applicant must also demonstrate that there exists unusual or exceptional circumstances to warrant the release of the applicant.**

Substantial part of the sentence will have been served before the appeal is heard and determined.

15. The applicant must therefore demonstrate that he has an appeal which is meritorious and will most probably lead to an acquittal. This is based on the presumption that the applicant has been lawfully convicted and unless it is proved to the contrary. The applicant is therefore supposed to raise substantial grounds of law and evidence in order to discharge that burden. On the issue of exceptional circumstance, the applicant will be required to bring such matters which ought to be weighty to the attention of the court. The court will then consider them and exercise discretion depending on the circumstances of the case. The principles for granting bail pending appeal were also stated in the case of **Jirraj Shah –v- Republic (1986) KLR 605** where it was stated that the applicant must demonstrate the existence of exceptional or unusual circumstances and that the appeal is likely to be successful on account of a substantial point of law and the sentence or substantial part of it will have been served by the time the appeal is heard.

16. From these authorities the three grounds which must be established are, meritorious appeal with overwhelming chances of success, exceptional or unusual circumstances, the likelihood of the sentence being served before the appeal is heard and determined. This must therefore entail consideration of the proceedings of the lower viz-a-viz The grounds of appeal in order to make such considerations. I must state that I have perused the proceedings in the **Senior Principal Magistrate’s Court at Baricho S. O. A Case No. 28/2017**. I have also perused the Six grounds of appeal. In view of the offence charged and based on the evidence tendered before the trial Magistrate, this is not an appeal which can be held to be meritorious or having overwhelming chances of success. I will not delve much on the reasons for this finding rest I prejudice the appeal which is still pending.

17. The appellant was imprisoned for Twenty years. The record of appeal is ready. There is no possibility that the applicant will have served a sentence of Twenty years before the appeal is heard and determined. The wheels of justice do not guide that slow in this court. The applicant was sentenced on 23/11/18. This application was heard and concluded by 20/5/19. It is this ruling which has been pending. There is therefore a possibility that the appeal will be heard and determined within the next one year.

18. On the issue whether there are unusual and exceptional circumstances, the applicant has stated that there are no compelling reasons to deny the applicant bail. As I have stated that there are two regimes for granting bail that is bail pending trial and bail pending appeal. Bail pending trial is a constitutional right which is based on the right of the accused to be presumed innocent until he is found guilty. It is a right to fair trial which is one of the rights that cannot be limited as provided under **Article 25 of the Constitution**. The accused has a right to bail which can only be denied where the prosecution has satisfied the court that there are compelling reasons not to grant him.

19. On the other hand, bail pending appeal is discretionary and based on the principles which I have highlighted above. In bail pending

appeal there is a presumption that the applicant has been properly convicted. The court has to balance the public interest which is that where crime is committed it must be punished with a just punishment provided under the law. The measure for granting bail pending appeal in this regard are exceptional, even extra-ordinary circumstances because the fact of conviction is sufficient reason to deny bail in the public interest. My view is that the fact that he complied with bail in the lower court is not an exceptional circumstance, he was duty bound to do that anyway. The appellant has not demonstrated any exceptional or unusual circumstances to warrant me to exercise discretion in his favour.

In conclusion I find that the applicant has not demonstrated the principles for the grant of bail pending appeal. The application lacks merits and it dismissed.

Dated at Kerugoya this 24th day of April 2020.

L.W. GITARI

JUDGE