



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 99 OF 2018

JOSEPH GONA FONDO.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application before me is dated 15th October, 2018. It has been brought under the provisions of Section 357 of the Criminal Procedure Code, Cap 75 Laws of Kenya, Articles 22, 48, 50, 51 and 159 of the Constitution of Kenya, 2010, the inherent powers of the court and any other enabling provisions of the law.

2. The applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) That this Honourable Court be pleased to grant bond/bail terms to the appellant/applicant herein pending the hearing and determination of the appeal;

(v) That in the alternative, this Honourable court be pleased to suspend the execution of the sentence of the appellant/applicant and release him on such terms and conditions as it deems fit pending the hearing and determination of the appeal; and

(vi) That the costs of this application be provided for.

3. The application is anchored on the grounds on the face of it and the supporting affidavit sworn by the applicant, Joseph Gona Fondo, on 15th October, 2018. The Prosecution Counsel, Ms Marindah filed a replying affidavit on 30th October, 2018 to oppose the application.

4. Messrs. Magolo and Adhoch Advocates represented the applicant. Mr. Magolo indicated that the applicant was granted bail during the trial in the lower court. He submitted that the appeal herein has overwhelming chances of success. He indicated that the applicant was sentenced to life imprisonment for the offence of defilement but in his view, any error in the Prosecution's case however minor, prejudiced the applicant. He took the position that evidence that cannot support the conviction and the trial before the lower court cannot be regarded as lawful.

5. Counsel for the applicant took issue with the action taken by the Hon. Magistrate of permitting the complainant's father to address the court when he asked her to order for exhibits in the defilement case which had been tested by the Government analyst to be examined by another expert with a view of getting a 2nd opinion of the same. Mr. Magolo opined that allowing the complainant's father to address the lower court amounted to interference of court proceedings.

6. Counsel for the applicant submitted that the Hon. Magistrate on 1st December, 2017 made 7 orders with regard to having the said exhibits examined by KEMRI. He stated that the orders for collection of evidence were made in the absence of all the parties involved and by so doing, she turned herself into an investigative agency and the court conducted itself in a manner not envisaged by the Criminal Procedure Code. He further submitted that as a result of the foregoing, the applicant could be serving a sentence from a conviction that was null and void.

7. Mr. Magolo contended that the conviction cannot stand because there was no evidence to support the charge. He submitted that the victim

(child) was too young to testify and as such the court relied on circumstantial evidence as none of the witnesses who testified were present when the offence of defilement was committed.

8. Counsel for the applicant suggested that the watchman who was said to have been present when the offence occurred could have committed the offence and not the applicant as alleged.

9. Reference was made to a report produced by an Officer from KEMRI which did not connect the appellant to the child and in Mr. Magolo's view, the applicant could not have committed the offence.

10. Counsel for the applicant also referred to page 26 of the Judgment where the Hon. Magistrate included recommendations made to the Government at the time of delivering the Judgment. It was argued that by so doing, the Hon. Magistrate was expressing her doubts as to the conviction of the applicant on the evidence adduced.

11. Ms. Marindah, Learned Counsel for the respondent relied on the depositions made in her affidavit sworn on 26th October, 2018 and suggested that the appeal should be heard instead of the present application as the Record of Appeal had been compiled. She submitted that the respondent was sentenced to life imprisonment and he would not have served the sentence as at the time of hearing the appeal.

12. With regard to the orders that were alleged to have been made by the Hon. Magistrate in the absence of the parties, Ms Marindah counteracted the submission on the same by saying that the lower court proceedings show that Mr. Oduor Advocate, who was representing the applicant, was present in court.

13. On the issue of the father of the child being allowed to address the Hon. court, Ms Marindah submitted that was done as the victim was 2 ½ years old thus she was a vulnerable witness.

14. Counsel for the respondent submitted that the Prosecution relied on circumstantial evidence which is of no less probative value than direct evidence. She submitted that the circumstantial evidence was corroborated by witnesses which confirmed that the applicant was the only person who could have defiled the minor on that day. She posited that there was spermatozoa in the child's diaper and that it matched the specimen from the applicant, although it was small in quantity. She stated that the sample from the applicant was almost a complete match.

15. Mr. Magolo referred to the lower court proceedings and reiterated that there were orders given after the court gave a mention date and that happened in the absence of the parties.

16. On the Government Analyst's report, he said that the sample taken from the applicant was not 100% match to the sample collected from the diaper. He prayed for the application to be allowed.

ANALYSIS AND DETERMINATION

The issue for determination is if the applicant has satisfied the prerequisites of being released on bail pending appeal.

17. The threshold for releasing an applicant on bail pending appeal were set out in the case of **Dominic Karanja vs Republic** [1986] KLR 612, where the Court of Appeal held as follows:-

“The most important issue here is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The relevant minor considerations would be whether there are exceptional or unusual circumstances. The previous good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors:

See Somo vs Republic [1927] EA 476. A solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with support of sureties, for releasing a convicted person on bail pending appeal.” (emphasis added).

18. This court will apply the *ratio decidendi* in the above authority, to the facts of the case herein. The evidence on record as adduced by the victim's mother, PW1 indicates that the applicant was in close physical contact with her child who was 2½ years old on the day of the incident. It was her evidence that when she opened the child's diaper, she saw mucous like stuff come out between the child's legs. She noticed that the diaper was torn. She made a report to Nyali Police Station and then went to Coast Province General Hospital (CPGH) where the child was examined and specimen taken from her vagina. A Post Rape Care (PRC) form was filled. Specimen were also taken from the appellant. The diaper was retained by the Doctor. The P3 form was later filled. She indicated that the specimen collected were taken to the Government Chemist 5 days after the incident. She stated that the applicant was taken to the Government chemist one and a half years later for buccal examination.

19. The Hon. Magistrate made an order for a second DNA examination to be done at KEMRI for both the applicant and the victim. PW1 testified that the diaper she was shown at KEMRI was not the one her child was wearing when the offence occurred and that explained why the results were negative.

20. PW2, a Government Analyst testified of how he analyzed a buccal swab from the applicant, a diaper and a high vaginal swab from the victim. He stated that the diaper and high vaginal swab tested positive for human semen but the diaper did not generate a DNA profile. He concluded there was no match in the profile that he generated.

21. PW3 conducted a second DNA test at KEMRI and found no traces of DNA in the diaper and the high vaginal swab. She stated that if the sample for another person was there, she could have established by profiling the DNA of another person.
22. PW4 was in PW1's house on 17th July, 2015 with PW1. She recounted that PW1's child went out to play with other children. When PW1 went for the child later, she removed the child's diaper and drew to PW4's attention some fluids that were visible on the child's private parts. PW4 screamed and said the child had been defiled.
23. PW4 testified that PW1 asked if there was a man in the house the child had gone to and one Vannesa told her that uncle Joseph was there. PW4 said she wiped the child's private parts and saw some bruises. It turned out that Joseph was the appellant herein.
24. PW5 received a report of defilement from PW1. They took the child to CPGH. The Doctor stated the child had been defiled. The PRC was filled and the P3 form was filled later.
25. The Doctor, PW6, testified that in filling the P3 form, results were derived from the PRC form. She testified that the victim when examined had muccol vaginal discharge. She had multiple vaginal abrasions which were reddish, the hymen was irregular and bleeding. A test done revealed pus cells which was evidence of genital infection.
26. In his defence, the applicant confirmed that the victim was in the house with other children. He denied having committed the offence.
27. The Hon. Magistrate after hearing the evidence found the applicant guilty of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual offences Act. He was sentenced to life imprisonment.
28. Having gone through the lower court proceedings and having analyzed the evidence therein, I find that the applicant was convicted on circumstantial evidence for he had the opportunity to commit the offence of defilement. The Government Analyst's report was indicative of human semen in the high vaginal swab taken from the victim in CPGH on the day the offence was committed. The high vaginal swab generated a partial male mixed DNA profile.
29. Injuries were noted on the victim's genitalia. With regard to the submissions made on the 2nd DNA test by KEMRI, the said test was done 1 ½ after the defilement. On cross-examination PW3, stated that the person who gets the samples first gets better results because they are fresh. On being referred to the results from KEMRI, he stated that the sample could have degenerated over a period of time due to storage facilities. He further stated that in practice they collect more than one swab but what he received was a residue.
30. For the reasons highlighted in the foregoing paragraphs, the application for bail pending appeal is hereby dismissed.
31. The issue raised by Mr. Magolo about 3rd parties being allowed to address the court will be dealt with at the time of writing the Judgment.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of January, 2019.

NJOKI MWANGI

JUDGE

In the presence of

Mr. Magolo for the appellant/applicant

Ms Marindah for the DPP

Mr. Oliver Musundi – Court Assistant