



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 141 OF 2018**

**NMK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The appellant (applicant) on 15<sup>th</sup> January, 2019 filed an application under the provisions of Articles 21(1), 49(1)(h), 50(2) of the Constitution of Kenya, Section 357 of the Criminal Procedure Code and all enabling provisions of the law, seeking the following orders:-

i. Spent

ii. That the applicant be admitted to bail/bond pending hearing and determination of this appeal;

iii. That this Honourable court suspends and stays execution of sentence entered on 3<sup>th</sup> December, 2018 in Sexual Offence Criminal Case No. 11 of 2016, against the applicant herein pending the hearing and determination of the applicant's appeal; and

iv. That any other orders as this court may deem fit to grant in the interest of justice.

2. The application is supported by the affidavit of the applicant, NMK, sworn on 14th January, 2019. The application was opposed by the Director of Public Prosecutions.

3. In arguing the application, Mr. Odundo, Learned Counsel for the applicant relied on the case of **Tom Omare Magutu vs Republic**, Mombasa Cr. Appeal No. 89 of 2017, where the court outlined the grounds upon which an applicant can be released on bail/or bond pending appeal. The said grounds are such as, if an appeal has overwhelming chances of success or special circumstances exist in a particular appeal. He submitted that the trial court relied heavily on DNA evidence that was adduced by the Government Analyst. He stated that production of the said evidence was opposed strongly by the appellant because in his view, the results were dubious, as he was not subjected to a DNA test. He argued that although the Government Analyst stated that he took swabs from the applicant herein, as well as from the victim and the child who was born; the Government Analyst said that he had never seen the applicant, other than in court.

4. Counsel for the applicant also submitted that the Government Analyst failed to produce photographs of the applicant which he said he took at the time he collected the DNA specimen from him.

5. Mr. Odundo raised the issue that the Investigating Officer testified that he prepared the exhibit memo form yet it was signed by the Officer Commanding Kiambeni Police Station.

6. The Judgment of Hon. D. Mochache was put to the test for stating that the applicant did not produce a report to counteract the Government Analyst's report and by so doing, she shifted the burden of proof to the applicant.

7. It was submitted that the applicant's bond in the lower court was cancelled arbitrarily without any justification on 28<sup>th</sup> April, 2017 but it was thereafter reinstated on 19<sup>th</sup> May, 2017. It was also submitted that he was not given an opportunity to mitigate thus being denied a fair trial.

8. Mr. Odundo stated that the applicant has worked for [Particulars withheld] for 20 years and is the sole bread winner of his family and that he was not a flight risk. He further indicated that the applicant had overwhelming chances of success in his appeal. He prayed for the applicant to be released on bond/ bail pending appeal.

9. Ms Marindah, Learned Prosecution Counsel, opposed the application for bail/ bond pending appeal and stated that it is not granted as a matter of right. She submitted that the applicant was sentenced to serve 30 years imprisonment and at this point, the presumption of innocence does not apply as the position of the law is that he was properly convicted. She stated that the applicant had not satisfied the court on a substantial point of law that would merit his release on bail/bond pending appeal.

10. She further argued that since proceedings have been typed, no delay would be occasioned to the applicant in having the appeal heard. She added that since the applicant was sentenced to serve 30 years imprisonment, he will not have served the sentence by the time the appeal is heard.

11. Ms Marindah submitted that the fact that the applicant is an employee of [Particulars withheld] and a breadwinner are not exceptional circumstances.

12. Counsel for the respondent further submitted that the DNA report was produced in court as P. exh 7 and the applicant exhaustively cross-examined PW4 on the said report. She pointed out that the report indicated that chances are 99.9% that the applicant was the father of the child born of the defilement.

13. On collection of the DNA sample from the applicant, it was submitted that it was the Investigating officer who escorted him to the Government Chemist and that he was present when the DNA sample was taken from the applicant. She indicated that the procedure therein is for photographs of offenders to be taken at the point of collection of DNA samples.

14. On the issue of fair trial, Ms Marindah stated that the applicant's bail in the lower court was not arbitrarily cancelled and that upon production of a letter from the applicant to the court at the subsequent mention date, his bond was reinstated.

15. On the issue of mitigation, Ms Marindah urged the court to peruse the lower court file, at the time of hearing the appeal, to see if the applicant was given an opportunity to mitigate.

#### ANALYSIS AND DETERMINATION

The issue for determination is if the applicant has met the principles required for grant of the orders for release on bail/bond pending appeal.

16. The principles that this court should consider in the present application were spelt out in the case of **Jivraj Shah vs Republic** [1986] eKLR, where the Court of Appeal stated thus:-

**“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 exist. The decision in Somo vs Republic [1972] EA 476 which was referred to this court with approval in Criminal Application No. NA1 14 of 1986, Daniel Dominic Karanja vs Republic where the main criteria was stated to be 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.”** (emphasis added).

17. The applicant was convicted of the charge of defilement contrary to Section 8(1)(3) of the Sexual Offences Act. He was sentenced to serve 30 years imprisonment.

18. The Victim of defilement, PW1, MS [name withheld] a 14 year old girl testified on how the applicant defiled her on diverse dates during night time and day time, in either her sister's or the appellant's house. She informed her sister who took her to Hospital. PW1 was examined and found to be pregnant. She later gave birth to a baby boy.

19. Her evidence was that the applicant defiled her vaginally and later anally which led her to being unable to sit properly. She also passed bloody stool. The appellant would defile her and then give her money.

20. The offence was reported to Kiembeni Police Station by PW1 and her Uncle, PW3. She reported that it was the applicant who used to defile her. The applicant was summoned to the Police Station.

21. Dr. Julius Maneno, PW5 produced the PRC and P3 forms for PW1. The 2 reports indicated that PW1 was 24 weeks pregnant at the time she was examined. Her hymen was broken with an old scar as per the PRC form. The P3 form indicated that the hymen was torn and healed. The Doctor also produced an age assessment report of PW1 which showed that she was 14 years old.

22. PW4, George Ogunda, a Principal Chemist at the Government Chemist Mombasa collected specimen on 29th March, 2017 from the applicant, PW1 and a child HM [name withheld]. He generated a DNA profile which established that there are 99:9 % chances that the applicant was the biological father of HM. He produced the report as evidence in court.

23. PW6 received a report from PW1 that she had been defiled and was pregnant. He accompanied her to the Hospital where she was examined. She identified the suspect whom PW6 arrested and charged. PW6 escorted him to the Government chemist for forensic analysis. He filled the exhibit memo form which he took to the Government Chemist. He indicated that he was aware of the report from the Government Chemist which indicated that the applicant was the father of the PW1's child.

24. On the issue of the Hon. Magistrate having shifted the burden of proof, I find nothing in the Judgment of the lower court to support that submission. The Hon. Magistrate found the applicant's defence to be "improbable, meaningless and incapable of dislodging the prosecution's evidence." The Hon. Magistrate further found that the prosecution had proved its case beyond reasonable doubt.

25. The Government Analyst, PW5 in his evidence stated that he took specimen from the applicant, PW1 and the child. As to whether the Government Analyst was required to recall the physical appearance of all the men he takes DNA samples from, that should be argued at appeal stage. As to whether or not it was necessary for the Government Analyst to produce the photographs of the applicant, it will be best for the applicant to argue the same at appeal stage.

26. On the issue of the exhibit memo having been signed by the OCS of Kiembeni Police Station instead of the Investigating Officer that is a matter that cannot be verified since the applicant did not attach the documentary exhibits that were produced before the lower court, to the proceedings he availed before this court.

27. I have perused the lower court proceedings and established that the applicant failed to attend court on 27th April, 2017 thus leading to cancellation of his bond. It was reinstated on 19<sup>th</sup> May, 2017 when he attended court

28. The foregoing analysis shows that the grounds the applicant has relied on do not meet the threshold set out in the case of **Jivraj Shah vs Republic** (supra).

29. The case cited by Mr. Odundo of **Tom Omare Magutu vs Republic** (supra) is distinguishable from this one. In the said case, the Judge found that exceptional circumstances existed as the appellant was sentenced to serve 3 and a half years imprisonment and he stood the risk of serving a substantial part of the sentence by the time the appeal was heard.

30. As was submitted by Ms Marindah no special or exceptional circumstances exist in this appeal. The fact that the applicant is a bread winner and the risk of a job loss because of being imprisoned are not exceptional circumstances. The applicant was sent to 30 years in prison. There is no chance at all that he will have served a substantial part of the sentence by the time the appeal is heard and determined.

31. The lower court proceedings have been typed and all that is left to be done is compilation of the record of appeal. The mitigation by the applicant was considered, the Hon. Magistrate did indicate that mitigation factors are noted.

32. The release of a person who has been convicted on bail/bond pending appeal is not a right but an appellate court has to be satisfied that an applicant has met the requisite test before the court can exercise its discretion in his favour. In this instant, he has failed to do so. The application is hereby dismissed.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28<sup>th</sup> day of February, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of**

Mr. Odundo for the appellant

Ms Ogweno, Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant