



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 51 OF 2018

ANTHONY GATHUKU KIONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An application for bail pending appeal from the decision of V. Ochanda,

Resident Magistrate, in S.O. No. 13 of 2014 at Murang'a dated 23rd August 2018]

RULING

1. The appellant was adjudged guilty of *attempted defilement* contrary to section 9 (1) as read with section 9 (2) of the **Sexual Offences Act**. He was sentenced to *eleven years imprisonment*.
2. The particulars were that on 5th June 2014 within Murang'a County, he attempted to cause his penis to penetrate the vagina of MMN *[particulars withheld]* a child aged *five years*.
3. The appellant lodged a *petition of appeal* on 13th November 2018.
4. Pending the hearing and determination of the appeal, the appellant has presented a *notice of motion* dated 11th September 2018 pleading for bail. It is supported by a deposition of his counsel, *Mr. William Ongoro*.
5. The appellant contends that the appeal has overwhelming chances of success. The appellant's learned counsel submitted that the evidence of the minor was not corroborated; that the medical evidence did not support the charge as there were no visible injuries or spermatozoa; that the learned trial magistrate relied on hearsay and extraneous matters; and, that the defence proffered by the appellant was disregarded.
6. In a synopsis, the appellant's case is that there are *exceptional* circumstances that warrant grant of bail.
7. The application is *contested* by the Republic. Learned prosecution counsel submitted that all the elements of the charge were proved beyond reasonable doubt.
8. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj Shah v Republic* [1986] KLR 605-

“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 will exist. The decision is Somo v Republic [1972] EA 476 which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the 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.”
9. I resist the temptation to comment about the merits of the appeal. It will be the duty of the first appellate court to *re-evaluate* the evidence; and, determine whether it was *reliable*.
10. But I can safely state the following. Section 124 of the **Evidence Act** has a *proviso* relating to corroboration in sexual offences. I agree that the medical examination report (P3) states that there was no vaginal laceration; that the hymen was intact; and, that there was no blood or spermatozoa. But I am reminded that the appellant was charged for *attempted defilement*.
11. I agree that the points raised in the petition of appeal are *arguable*. Like I have stated, it will be the true province of the appellate court

to re-evaluate all the evidence. But I am not persuaded that there are *exceptional grounds* or that a *substantial point of law or evidence* has been urged to sway the court to grant bail pending appeal.

12. The appellant was sentenced to *eleven years* imprisonment. It will again be for the appellate court to determine whether the sentence was lawful considering all the circumstances of this case; and, the fact that the appellant was a *first offender*.

13. On the face of it, the sentence handed down is not *illegal*. I *cannot* also say that a *substantial part* of the sentence *will* be served *before* the appeal is heard and determined.

14. It is true that the appellant was admitted to bail during his trial. But the *presumption* of innocence no longer holds *pure*. The appellant has been *convicted*. The considerations for grant of bail at this stage are thus markedly different.

15. In the end, there are no *exceptional* circumstances to warrant grant of bail pending appeal. It follows that the notice of motion dated 11th September 2018 is devoid of merit. It is hereby *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 27th day of March 2019.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. Ongoro for the appellant instructed by Rachier & Amollo Advocates.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.