



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 25 OF 2019

JEREMIAH MUTISYA KILONZO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Kilungu SRM'S Court

in Criminal Case No. 50 of 2017 passed on 20.3.2019)

RULING OF THE COURT

1. By an application brought before Makueni court by way of chamber summons dated 9th April, 2019 under Sections 49(1)(h),50(2) of the constitution of Kenya,2010, Section 356 and 357 of the Criminal Procedure Code Cap 75, Laws of Kenya, the Applicant herein seeks the following orders:

a) Spent

b) **THAT** the Applicant/Appellant be admitted to bail or bond pending the hearing and determination of the Appeal herein.

c) **THAT** the Applicant/Appellant has a fundamental right to be released on bail and/or bond pending the hearing and determination of the Appeal herein.

2. The application was supported by the affidavit of **Jeremiah Mutisya Kilonzo sworn** on 9th April, 2019.

3. The Applicant averred that he was charged with the offence of Defilement contrary to Section 8(4) of the Sexual Offences Act and convicted and sentenced to 15 years imprisonment. He averred that he filed an appeal and has a constitutional right to be admitted to bail or bond pending the hearing and determination of the Appeal.

4. The Applicant further alleges that is a civil servant working as a constable forest guard and if he is not released, he will lose his job. The Applicant alleges that he has no intention of absconding from the jurisdiction of the court for he has a wife and children and they reside in Kilungu sub-county. Copies of the petition of appeal and the appointment letter were annexed to the application.

5. Vide a further affidavit filed on 16.4.2019, the applicant deponed that the age of the victim was never proved and that the ingredient of penetration was not sufficiently proved and further that a bribe of Kshs 30,000/- was given to the OCS by the father of the victim so as to frame him. Copies of the proceedings and judgement of the trial court were annexed to the application and marked JMK 1 (a) and (b).

6. In response to the application, the respondent filed grounds of opposition and a replying affidavit sworn by Monica Owenga Mikuru on 11th April, 2019. The respondent finds that the applicant has not demonstrated that his appeal has overwhelming chances of success and that the applicant is serving a sentence for serious offence and thus a grant of bail will jeopardize the objective of conviction and sentence. The deponent vide her replying affidavit avers that rather than releasing the appellant on bail, it is better that the appeal be admitted on priority basis so that legal and factual issues may be determined to their finality. Further that the right to bail is not an absolute right and ought to be considered in light of the circumstances, and that the Appellant losing his job is not reason enough to warrant grant of bail for if the appeal fails he will still serve his sentence. The deponent prayed that the court make an order to have the appeal admitted for hearing within the shortest time possible so that issues for determination are determined once and for all by the court.

7. The application came up for hearing on 12.4.19 when the parties took directions to the effect that the application dated 1.4.2019 be

marked as withdrawn and that the application dated 9.4.19 be canvassed vide written submissions. M/s Mwangangi and Associates filed their submissions on 16th April, 2019 while the state filed their submission on 18th April, 2019.

8. Counsel for the applicant submitted that the Applicant had satisfied exceptional circumstance for grant of Bond/Bail pending appeal stating that the appeal has overwhelming chances of success and cited the case of **JKB v R (2018) eKLR**.

9. Counsel submitted that the appellant may lose his job due to the length of time that the appeal will take and cited the case of **Tom Omare Ogotu v R (2017) eKLR**. Counsel urged the court that the applicant is willing to abide by any conditions imposed by this court and urged this court to grant Bail pending appeal.

10. Mr. Machogu, counsel for the state opposed the application vide written submissions based on the principles governing grant of bail pending appeal as per the case of **Dominic Karanja v R (1986) KLR 612 which are**, a demonstration by the Applicant that the appeal has overwhelming chances of success and proof of exceptional circumstances that apply; previous good character and any hardships if any facing his family; a solemn assertion by the applicant that he would not abscond if released. Counsel submitted that during trial, all the elements of the offence were proved and the applicant has not demonstrated that there are any exceptional circumstances to warrant grant of bail pending appeal and thus the application should be dismissed and the appeal be set down for hearing on priority basis.

11. Having carefully considered the application and the oral submissions of the parties, I find that the only issue for determination is **whether the Applicant should be granted bail pending appeal**.

12. Section 357 (1) of the Criminal Procedure Code provides admission to bail pending appeal and it states that:

“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.”

13. In the case of **Jivraj Shah v Republic [1986] KLR 605** the principles for grant of bail pending appeal were established as:

i).The existence of exceptional or unusual circumstances upon which the Court may consider.

ii). 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 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.

iii). 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 the weight and relevance of the points to be argued.

14. In the case of **Chimambhai versus Republic [1971] E.A. 343**, the court observed that an Appellant under sentence of imprisonment seeking bail lacks some of the elements that may be available to an accused person seeking bail before trial which is the presumption of innocence.

15. In this case, the Applicant argued that the appeal has overwhelming chances of success and according to the grounds of appeal, he has challenged the decision of the trial court in nine grounds of appeal. At this juncture, it is not for the court to delve into the merits of each ground but it should suffice that all the grounds are examined, and a conclusion is made that *prima facie* the prospects of success are dim or high.

16. Having looked at the grounds of appeal, prima facie, the appellant raises issues of uncorroborated evidence, contradictory evidence, insufficient evidence, failure to consider his defence and a defective charge sheet.

17. I have also looked at the proceedings and Judgment in **SRMCC Kilungu No. 50 of 2017** and found that the trial magistrate raised issues for determination as the age of the victim being below 18 years, carnal knowledge, the identification of the appellant and the plausibility of the defence of the appellant. The trial court seems to have satisfied itself of all the issues and hence came up with the findings that the complainant was 16 years, she was defiled and impregnated and that the appellant was responsible and that the defence of the appellant was a mere denial and thus convicted the appellant and sentenced him .

18. On the aspect of exceptional circumstances to warrant the Appellant to be admitted to bail pending appeal, the applicant submitted that he stands to lose his job if he served the sentence due to the long time that he will spend in jail. However the Respondent's counsel argued that this is not reason enough and proposed that the hearing of the appeal be fast-tracked.

19. I find that the Appellant has not proved that the appeal has overwhelming chances of success of his appeal because the decision that the appellant challenges seems to have addressed what amounts to his concerns as indicated in the grounds of appeal. Further, it is not in doubt that the appellant is now a convict and that his constitutional freedoms and rights are already circumscribed by his conviction since he no longer enjoys the presumption of innocence available to persons facing trial at the first instance. The appellant therefore has the onus of demonstrating that his appeal has overwhelming chances of success. He has not convinced this court that at this stage that the Appeal has overwhelming chances of success.

20. On the aspect of exceptional circumstances warranting grant of bail pending appeal, the appellant's concern seems to be the length of

time that hearing of the appeal will take. However the same can be cured by the fast-tracking of the hearing. In fact once the appeal is admitted then the same can easily be determined within a short timeline. Hence this court is not satisfied that there exist exceptional circumstances to warrant grant of bail pending appeal. I am not satisfied that the applicant has met the requirements under **Jivraj Shah v Republic** (supra) and therefore i decline to grant the application dated 9th April, 2019 and accordingly dismiss it and further order that:

a) *The hearing of the appeal be fixed on priority basis.*

b) *The applicant shall continue to serve his sentence pending the outcome of the appeal.*

It is so ordered.

Dated, Signed and Delivered at Machakos this 23rd day of April, 2019.

D.K. KEMEI

JUDGE