



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.70 OF 2017

MICHAEL NDWIGA KATHURE..... APPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The appellant **MICHAEL NDWIGA KATHURE** was charged before the Chief Magistrate's court Kerugoya with the offence of defilement contrary to section 8 (1) as read with **Section 8(3) of the Sexual offences Act**. He denied the charge. He was tried and was eventually found guilty, convicted and sentenced to serve twenty (20) years imprisonment.

2. He was dissatisfied with both the conviction and sentence and filed this appeal. He also filed the present application under **Section 357 of the Criminal Procedure Code** for his release on bail pending appeal.

3. The application is premised on the following grounds;

[a) That the appellant/applicant was convicted on the Principal charge under section 215 of the criminal procedure code on 8th February 2017.

(b) That the appellant/applicant have filed a petition of appeal

(c) That appellant/applicant has a parent who is on medication fully depend on applicant and other dependants who solely depend on him.

(d) That the appellant was convicted on a defective charge and unknown charges under Sections 8(2), 8(3) and 8(1) of the Sexual offences Act No.6

(e) That the appellant's parents are old and cannot managed to take care of the appellant's family.

(f) That the appellant's parents depend on the appellant for their upkeep.

(g) That the appeal has very high chances of success.

(h) That the appellant has family and has fixed abode and it is therefore unlikely he will abscond as the appellant was gainfully employed at Kemunye tea factory.

The application proceeded by way of written submissions. For the applicant it was submitted that the appellant was convicted on a defective charge. That the conviction was based on none existent section of Sexual offences Act. He submits that the applicant should be allowed to enjoy his freedom. He is not a flight risk as he has already served 1 ½ years in prison.

4. The respondent did not file any submissions or grounds of opposition to the application.

5. I have considered the application, bail pending appeal is provided under **Section 35 (1) of the Criminal Procedure Code**. It provides;

“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”

When considering an application for bail pending appeal, the court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

- (1.) Whether the appeal has overwhelming chances of success.**
- (2.) There are exceptional or unusual circumstances to warrant the court's exercise of its discretion.**
- (3.) There is a high probability of the sentence being served before the appeal is heard.**

The leading authority on this subject is *Somo –VS- Republic*. In refusing to grant bail the High Court, held that the most important ground in deciding whether or not to grant bail is whether the appeal has an overwhelming chance of being successful and that there were no exceptional or unusual circumstances to justify the grant of the bail.

In an application of this nature, an applicant is required to satisfy the existent of one or a combination of the conditions mentioned in the above cited authority.

OVERWHELMING CHANCE OF BEING SUCCESSFUL

In order to ascertain whether the appellant's appeal has chances of success, the court needs to go through the evidence adduced before the trial court and the judgment delivered by the learned trial magistrate but without going into any detail in order not to prejudice the court which will eventually hear the appeal.

The appellant has faulted the fact that the charge, sentence and conviction under *Sections 8(1), 8(2) and 8(3) of the Sexual Offences Act* was defective and illegal as he was convicted of unknown charges. That his constitutional rights were not observed and he has been committed illegally. In addition, that the complainant was examined 2 days after the alleged incident and her hymen was long broken as there was no blood.

The copy of the charge sheet is not on record. However as per the judgment, the appellant was charged with main charge of defilement contrary to *Section 8(1) as read with Section 8(3) of the Sexual Offences Act, No. 3 of 2006*. He was found guilty on the charge of defilement contrary to *Section 8(1) as read with Section 8(2) of the Sexual Offences Act, No. 3 of 2006*, was convicted under *Section 215 of the Criminal Procedure Code* and sentenced to serve 20 years in prison.

From the judgment, the appellant was charged under *Section 8(1) as read with Section 8(3) of the Sexual offences Act*. At the last paragraph of the judgment, it is stated that the appellant was found guilty of defilement contrary to *Section 8(1) as read with Section 8(2) of the Sexual Offences* though the charge sheet has not been availed, the judgment is telling that there is a possibility that the charge sheet was defective.

6. It is not clear how the trial Magistrate having stated that the applicant was charged with a main charge of defilement under *Section 8(1) as read with Section 8(3) of the Sexual Offences Act* ended up finding the applicant guilty of defilement contrary to *Section 8(1) as read with Section 8(2) of the Sexual Offences Act*.

7. Counsel for the applicant submits that since the applicant was convicted under a defective charge, he should be admitted to bail which is a prerogative right and though he is convicted he should constitutionally be allowed to enjoy his freedom pending the appeal and also based on his fundamental rights to freedom, he should be given a benefit of doubt and be allowed to be free.

8. The consideration as to whether the appeal has overwhelming chances of success is important as the liberty of an individual should be jealously protected by court such that if there is likelihood of the appeal succeeding the bail pending trial will be granted so that the applicant can enjoy freedom pending appeal. These considerations have been addressed in various decisions.

The Supreme Court of Uganda in the case of *Arvind Patel Vs. Uganda* cited with approval the above decision by Harris J and set out the consideration which should generally apply in applications for bail pending hearing of an appeal as follows;

- i) The charge of the applicant***
- ii) Whether he/she is a first offender***
- iii) Whether the offence of which the applicant was convicted involved personal violence***
- iv) The appeal is not frivolous and has reasonable possibility of success.***
- v) The possibility of substantial delay in the determination of the appeal.***
- vi) Whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any).***

Justice Oder in the above cited case had the following to say;

“In my view it is not necessary that all these conditions should be present in every case” (emphasis added)

The court of appeal of Uganda in the case of *Igamu Joanita Vs. Uganda* cited with approval the above case and numerous other authorities and reiterated the above conditions and added that the said conditions are guidelines and are not exhaustive or mandatory and that they need not all be present. A combination of two or more of the said conditions will suffice. The court further added that the main purpose of granting bail especially bail pending appeal is that while the applicant is set free pending trial or appeal, the court must be satisfied that the applicant shall in compliance with the bail conditions be available to attend to attend trial or appeal. The court must therefore be satisfied that the applicant will not abscond.

The Supreme Court of India in *Gulabrao Baburao Deokar Vs. State of Maharashtra and Others* cited its previous decision in *Masroor Vs. State of Uttar Pradesh and Anor* where it stated as follows:

“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the court. Nevertheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned”

9. In an application for bail pending appeal, the applicant bears the burden of proof that there are overwhelming chances of appeal succeeding. The court exercises discretion when granting bail, and has to balance the rights of the applicant and the public interest. That is the court has a duty to ensure that crime where it is proved is appropriately punished. This is based on the presumption the person was properly convicted unless the contrary is proved.

10. The court on the other side has a duty to uphold the rights of applicants who have been convicted. The applicant has a right to pursue the appeal. Bail pending appeal ensures that the applicant continues to enjoy his rights. Where the court finds that the applicant has established the factors for his release on bail pending trial, the principle consideration is whether the applicant will turn up for trial.

11. It is submitted that the applicant having served part of the sentence, he will be careful to ensure that he turns up for his appeal. *Article 50 (2) (b) of the Constitution* provides that;

“Every accused person has a right to a fair trial which includes the right to be informed of the charge with sufficient details to answer”

12. This presumption that the accused person is charged on a proper charge disclosing the offence and sets out the allegation against an arrested person. This entails disclosing the specific offence and the particulars giving sufficient information to demonstrate the nature of offence. It requires that the correct section of the law under which the accused is charged be disclosed. This is provided under *Section 137 (a) (ii) of the Criminal Procedure Code* which provides:

“(a) The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;”

13. In this case though the applicant has not availed the charge sheet, it has been demonstrated that the charge sheet was defective and it is not clear under which provision the applicant was charged as there was the section on the charge is different from the provisions under which he was convicted. The court will have to consider whether there was miscarriage of justice which is the main consideration under *Section 382 of the Criminal Procedure Code*. This is an important point of law which the appeal court will determine, that is whether or not it prejudiced the rights of applicant guaranteed under the Law and more so whether right to a fair trial were infringed.

14. At this stage the court is not supposed to determine the merits of the appeal. All I need to do is look at the grounds of appeal and while bearing in mind that if I dealt deeper into the grounds and give a view, it may pre-empt the appeal which is still pending. All I can state is that the appeal raises serious issues of law and of facts which are not frivolous. The grounds are likely to be successfully argued. Though the appellant was sentenced to serve ten years imprisonment, he has already served one and half years. He is likely to have served a substantial part of the sentence before the appeal is heard and finally concluded. This would lead to a severe punishment in the event that the appeal succeeds.

15. The court considers whether the appeal has chances of success and whether the appellant will have served a substantial part of the sentence. The appeal is arguable has raised substantial grounds on the charge, the evidence and whether the defence of the applicant was satisfactorily considered viz viz the trite law that an accused person is presumed innocent until proved guilty, that burden of proof in criminal cases never shifts and that the accused bears no burden to prove his innocence.

16. In my view, the appellant has not shown exceptional or unusual circumstances. However, in the case of *Somo Vs. Republic* the three conditions need not be established, if the applicant satisfy one or two the conditions and in the absence of any compelling reason to deny the applicant bail, the court will exercise discretion to release him on bail. The applicant has established that the grounds for appeal may be successfully argued. The appeal raises substantial grounds of law and facts. The appeal is arguable.

17. There are no serious grounds to deprive the appellant his liberty pending the determination of the appeal. The next consideration is the conditions of bail to be imposed. The court when determining this has to ensure that the terms are not so strict and beyond the reach of the applicant neither should they be so lenient as to tempt the applicant not to attend court where the security would not be a big loss. Where the court decides to release the applicant, terms should not be such that he will not be able to comply and will not enjoy the freedom. The terms should be balanced to reflect the seriousness of the charge and to ensure that the appellant turns up for the hearing of the appeal to its conclusion.

18. Having considered is a Kenyan citizen and there was no material placed before me to show that he may not turn up for trial, I order that he be released on bail pending appeal on the following terms;

(1). He will sign a bond of Kshs. 500,000/= plus two sureties of like amount.

(2). The sureties shall be approved by the Deputy Registrar of this court.

(3). The applicant to appear before the Deputy Registrar for mention once a month during the pendency of this appeal until the appeal is heard and finalized.

(4). The applicant to appear in this court for the hearing of this appeal.

Dated at Kerugoya this 24th day of May 2019.

L. W. GITARI

JUDGE