REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 46 OF 2019

MARTIN MULI MUTAVA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The appellant herein, **Martin Muli Mutava,** was charg`ed with the offence of defilement contrary to section 8(1)(3) of the ***Sexual Offences Act***, No. 3 of 2006, the particulars being that on diverse dates in the month of June, 2015 at [particulars withheld] Sub Location in Yatta Sub County within Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of **AMM**, a child aged 15 years. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the same act the facts being that on the same dates at the same place he intentionally touched the vagina of **AMM**, a child aged 15 years with his penis.

2. Aggrieved by the said decision, the appellant has now appealed to this Court based on the following grounds:

> **1) THAT the Honorable Magistrate erred both in law and fact by convicting the Appellant in a trial that was not only defective and illegal but also contrary to the Constitution.**
>
> **2) THAT the trial Court blatantly and intentionally violated the Appellant's Constitutional right to fair trial by prematurely determining one of the issues for the determination in the trial before the conclusion of the trial.**
>
> **3) THAT the trial court erred both in law and fact by failing to scrupulously comply with section 200(3) of the Criminal Procedure Code when she took over the trial from her predecessor.**
>
> **4) THAT the trial Magistrate erred in both law by failing to disqualify herself from the trial when requested to do so by the Appellant despite the fact that she had already made it known to one of the Court's staff at Kithimani Law Court that she would convict the Appellant with or without a Lawyer's input in the matter.**

3. The appellant, through his Learned Counsel, **Mr Ngolya**, now seeks by his application filed dated 24th June, 2019, that the appellant be granted bail pending the outcome of this appeal.

4. According to the appellant, he has set out substantial points of law and unless he is granted bail pending the hearing of the appeal, he may end up serving a substantial part of his sentence and render the appeal an academic exercise. It was the appellant's case that he is ready to abide by any condition the court may impose on his bond.

5. In the submissions filed on behalf of the appellant it was stated that the Appellant's trial in the Subordinate Court was conducted in a manner that violated every norm of a fair hearing as envisaged in Article 50 of The Constitution. Not only did the trial Court flagrantly violate the Appellant's constitutional right to a fair hearing but also went further to breach and unjustifiably ignore the provisions of section 200 (3) of the ***Criminal Process Code, Cap 75***, with the result that the Appellant's trial was rendered a mistrial.

6. It was contended that the trial Magistrate was so unfair to the Appellant that even before the pronouncement of her Judgment, she (the trial Magistrate) had already determined some of the issues in the trial as can be seen from the Court proceedings of 22nd January, 2019 wherein the trial Court pronounced itself that this was a case involving a minor. It was submitted that the trial Court's approach went against the tenets of a fair hearing and resulted to a gross miscarriage of justice on the part of the Appellant. In his view, determining the age factor before the conclusion of the matter was illegal, unconstitutional and unfair.

7. It was contended that even before the delivery of the Judgment under attack, the trial Court had already confided in one of the Judiciary's staff at Kithimani Law Court that the Appellant would get a conviction no matter what. When requested to disqualify herself vide the letter dated 13th February, 2019, she declined contending that a formal application ought to have been filed. Sensing that the trial Court was determined to make good its threat to convict him, the Appellant chose not to be heard by the trial Magistrate and consequently, the trial Court closed the Defence case.

8. It was further contended that the Appellant shall argue during the hearing of the Appeal that the trial Magistrate deliberately failed to scrupulously comply with the provisions of section 200(3) of the ***Criminal Procedure Code***. The matter had initially been handled by **Honourable M.A.O Opanga**, **SRM**, but when **Honourable E.W Wambugu** took over on 22nd February, 2017, no attempt was ever made to invoke section 200(3) of the ***Criminal Procedure Code***. Such an omission, it was contended, rendered the Appellant's trial a mistrial.

9. Taken cumulatively, it was submitted that the Appellant's grievances captured in his Appeal will most likely persuade this court to reach a finding at the conclusion of the Appeal that the Appellant's trial in the subordinate Court was a mistrial. Before that point is reached, it would be in the broad interest of justice and the Constitution to grant the Appellant herein bail pending the hearing and determination of his Appeal. In support of the submissions the appellant relied the decision of this Court in Criminal Appeal No 96 of 2019 – **Michael Mumo Nzioka vs. Republic (Machakos).**

10. It was therefore submitted that the Appellant's appeal has overwhelming chances of success and it would only be fair and just to admit him to bail pending the outcome of his appeal.

11. The application was however opposed by the Respondent by way of a replying affidavit sworn by **Mogoi Lilian**, a Prosecution Counsel in the Office of the Director of Public Prosecutions and counsel handling this Appeal. According to the deponent, the appellant has not demonstrated that his appeal has high chances or any chance at all of succeeding particularly in light of the DNA evidence.

12. According to the Respondent, the solemn assertion by the appellant's advocate that the applicant will abide by any conditions the Court will impose is not sufficient ground for releasing a convicted person on bond pending appeal considering the seriousness of the offence. It was deposed that since the appellant was sentenced to 10 years' imprisonment, he is not likely to serve substantial part of his sentence before the hearing and determination of his Appeal. It was therefore suggested that the appellant ought to set down his appeal for hearing at the earliest and in the event the same is successful, no prejudice will be suffered in view of the lawful sentence imposed by the trial court of 10 years. The court was therefore urged to dismiss the application in its entirety.

13. I have considered the application and the affidavits both in support thereof and in opposition thereto as well as the submissions made.

14. Before dealing with the merit of the application it was disclosed by the applicant that he, by way of a letter requested the learned trial magistrate to recuse herself from hearing the matter based on the allegations that the learned trial magistrate had had already confided in one of the Judiciary's staff at Kithimani Law Court that the Appellant would get a conviction no matter what. How the appellant expected the learned trial magistrate to recuse herself from the matter based on such serious allegations casually made by way of a letter defeats reason. What is even more disturbing is that when correctly advised to make a formal application, the appellant instead of heeding the said advice took offence and decided that he was no longer going to participate in the trial. It is unfortunate that the appellant's advocate did not deem it fit to advice his client appropriately that an application for recusal of a judicial officer is not a matter to be taken in that casual manner. It is a serious application that ought to be made only with a lot of circumspection and soul searching and not to be based on alleged information received from some third party whose identity is not even disclosed.

15. It must be noted that all parties have a right to be heard in an application seeking the recusal of a judicial officer. However, the letter in question does not seem to have been even copied to the prosecution. How a party expects a judicial officer to recuse herself from a matter based on bare allegations not even made on oath purportedly made to an undisclosed person, is flabbergasting. Advocates, as officers of the court, must appreciate that their duty is not only as mouthpieces of their clients but they also owe a duty to the court to ensure that the dignity of the courts are maintained by not easily acceding to unnecessary and frivolous applications for recusal. This was the view of **Shah, JA** in **Malindi Air Service Limited & Another vs. Halima Abdinoor Hassan Civil Application No. Nai. 103 of 1999** where he opined that:

> **"Advocates are honourable people. Learned friends should not take undue advantage of the absence of the opponents. They are officers of the Court. Their duty first lies to the Court and then to their clients."**

16. Similarly, in **Wamwere vs. Attorney General [1991] KLR 107 Mbaluto, Dugdale & Mango, JJ**, held that as officers of the court, advocates are expected to conduct themselves properly and with some degree of decorum in court. Therefore, it is my view that learned counsel ought to guard against the temptation to step into the shoes of their clients and treat their clients' causes as their own. This is however a general observation and is not to be deemed to be a determination of this appeal.

17. I now proceed to determine the merits of the instant application.

18. Article 49(1)(h) of the Constitution provides that:-

> ***An accused person has the right …***
>
> ***(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.***

19. It is however true that a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the ***Criminal Procedure Code*** provides as follows:

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.

20. It was therefore held in **Masrani vs. R [1060] EA 321** that:

> **"Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction."**

21. I therefore agree with the position in **Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR** where it was held that:

> **"The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R [1966] KLR 605*, the principle considerations for granting bail pending appeal were stated as follows:**
>
> > **(1) Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.**
> >
> > **(2) It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.**
>
> **Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued."**

22. This position was restated in **Mutua vs. R [1988] KLR 497**, the Court of Appeal stated:

> **"It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal."**

23. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending 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:

a) Whether the appeal has overwhelming chances of success. See **Ademba vs. Republic [1983] KLR 442**, **Somo vs. R [1972] EA 476**, **Mutua vs. R [1988] KLR 497**;

b) There are exceptional or unusual circumstances to warrant the Court's exercise of its discretion. See **Raghbir Singh Lamba vs. R [1958] EA 37**; **Jivraj Shah vs. R [1986] eKLR**; **Somo vs. R (supra)**; **Mutua vs. R (supra)**;

c) There is a high probability of the sentence being served before the appeal is heard. See **Chimabhai vs. R [1971] EA 343**.

24. What constitute exceptional circumstances were dealt with in **R vs. Kanji [1946] 22 KLR**, where **De Lestang, Ag.J** (as he then was) held that:

> **"The appellant's appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admit to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail."**

25. According to **Trevelyan, J** in **Somo vs. R [1972] EA 476:**

> **"…the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance."**

26. Good character alone, however, it was held in the same case:

> **"can never be enough. There is nothing exceptional or unusual in having such a character."**

27. The rationale for considering the chances of success of the appeal was given in **Somo vs. R** (supra) at page 480 as follows:

> **"There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word "overwhelming" deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed."**

28. In this case, it is true that the case was initially before one magistrate but was taken over by another magistrate. Section 200(2) and (3) of the ***Criminal Procedure Code*** provides as follows:

> ***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right***
>
> ***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.***

29. Dealing with the aforesaid provision, the Court of Appeal in **Richard Charo Mole vs. Republic [2010] eKLR** expressed itself as hereunder:

> **"We need only refer to Ndegwa v Republic [1985] KLR 534 where this Court held as follows:**
>
> > **'1. The provisions of section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.**
> >
> > **2. The provisions of section 200 should not be invoked where the part heard trial is a short one and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of times was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.**
> >
> > **3. No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.**
> >
> > **4. The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.**
> >
> > **5. A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses.'**
>
> **The trial in this case was not a short one as the first trial magistrate had heard ten prosecution witnesses whose credibility and personal demeanour she had observed. *Section 200 (3)* (supra) requires in mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. The duty is reposed on the court and there is no requirement that an application be made by the accused person. The failure to comply with that requirement would in an appropriate case render the trial a nullity. In the case before us, we agree with both Mr. Kenyariri and Mr. Kaigai that the omission to comply with the section was grossly prejudicial to the appellant and the trial was thus vitiated."**

30. In **Joseph Ndungu Kagiri vs. Republic [2016] eKLR**, **Mativo, J** cited the decision in **Moses Mwangi Karanja vs. Republic High Court Criminal Case No. 151 of 2010** where it was expressed that:

> **"The record before us, the relevant part of which we have reproduced above clearly shows that the Judge did not comply as was required of him with the provisions of Section 200 (3) of the Criminal Procedure Code which as per Section 201 (2) was to apply mutatis mutandis in this case. He did not explain to the appellant his right to demand the recall and re-hearing of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an advocate and so there was no need for that. Our short answer to that is that, it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The written law makes that duty mandatory. The mention in the judgment that section 200 was complied with is hollow without any evidence on record"- See also Paul Kithinji vs Republic."**

31. Similarly, in **Paul Kithinji vs. Republic [2009] eKLR** the same Court held that:

"The failure by the succeeding Judge to comply with it rendered all the proceedings before him a nullity."

32. Based on the foregoing the appellant's appeal can be said to have overwhelming chances of success.

33. In the premises, the appellant I hereby grant the applicant bond of Kshs 200,000.00 with surety of similar amount. The surety shall be approved by the Deputy Registrar of this Court. He shall, however be expected to attend court at least once every month.

34. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 29th day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngolya for the applicant

Ms Mogoi for the respondent

CA Geoffrey