



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 162 OF 2018

PETER KIMANI NJOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Peter Kimani Njoki was convicted of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. He was sentenced to serve twenty (20) years imprisonment. Aggrieved by his conviction and sentence, he has filed an appeal to this court. Pending the hearing of the appeal, the Applicant has applied to be released on bail pending appeal. The grounds in support of his application are that when the offence was allegedly committed, the Applicant was nineteen (19) years old while the victim was sixteen (16) years old. The Applicant contends that the charges against him were trumped up and were an afterthought driven by malice by the complainant's mother. He contends that his appeal had high chances of success and he should therefore be released on reasonable bail terms. He gave the undertaking that he would not abscond and would abide by the terms imposed by the court to secure his release. The application is supported by the annexed affidavit of the Applicant.

During the hearing of the application, this court heard oral rival submission made by Ms. Odembo for the Applicant and Ms. Kimaru for the State. Ms. Odembo submitted that the Applicant was nineteen (19) years old at the time the incident is alleged to have occurred. The Applicant and the complainant had cohabited together as husband and wife. She complained that the Applicant was not given a fair hearing. The ingredients of the charge of **defilement** were not proved to the required standard of proof. The conviction was erroneous and the punishment was excessive. He urged the court to take into account that the Applicant and the complainant were lovers at the time it is alleged the offence was committed. They had been lovers for a considerable period of time before the Applicant was arrested. He pleaded with the court to consider the circumstance of the Applicant who had just completed his secondary school education at the time that he was arrested and charged. She was of the view that the medical report that was produced in court exonerated the Applicant from the offence that he was charged with. She therefore urged the court to find that the Applicant had an appeal which had high chances of success. She relied on several decisions of the Court of Appeal and the High Court in support of her submission that the Applicant should be released on bail pending trial.

Ms. Kimaru for the State opposed the application. She submitted that the Applicant was properly convicted of the offence that he was charged with. The prosecution adduced overwhelming evidence which persuaded the trial court as to the Applicant's guilt. The Applicant's intended appeal had no chances of success. She reiterated that there existed no exceptional circumstances that would persuade this court to release the Applicant on bail pending appeal. The authorities cited by the Applicant were not of any assistance to him because it was clear from the evidence adduced by the complainant that she was a school going child at the time the Applicant sexually assaulted her. She urged the court to disallow the application.

This court has carefully considered the rival submission made by the parties to this application. This court agrees with the counsel for the Applicant that the principles to be considered by this court in determining whether or not to grant an appellant bail pending the hearing of his appeal are settled. In **Lawrence Kirinya Kiragu –vs- Republic [2015] eKLR**, Nyamweya J held thus:

“I note that unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proven guilty, an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In Mutua vs R, [1988] KLR 497 the Court of Appeal stated thus:

“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. It is not wise or to set the applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

A different test from that applied in bail pending trial is therefore 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] E.A. 476, Mutua vs R [1988] KLR 497 in this regard;***
- b. There are exceptional or unusual circumstances to warrant the court's exercise of its discretion. In this regard see Raghibir Singh Lamba vs R [1958] E.A. 337; Somo vs R (supra.); Mutua vs R (supra.)***
- c. There is a high probability of the sentence being served before the appeal is heard as held in Chimabhai vs R, [1971] E.A. 343.***

Applying the above principles, and having read the proceedings of the trial court, this court formed the view that the claim by the Applicant to the effect that his appeal has overwhelming chances of success is not supported by evidence. Without prejudicing the Applicant's appeal, this court noted that the prosecution was able to establish the age of the complainant, it was also able to establish that the Applicant had sexual intercourse with the complainant when the complainant was a school going child. It cannot therefore be said that the Applicant was not aware of the age of the complainant when he knew that the complainant was a pupil in a primary school. Further, after the birth of the child, DNA analysis resulting from the sexual assault established to the required standard of proof beyond any reasonable doubt that the Applicant was the father of the child.

In the circumstances of this case, it cannot therefore be said that the Applicant's appeal will have an overwhelming chance of success when he challenges his conviction on appeal. On sentence however, taking into consideration the recent Court of Appeal decisions extending the application of the *ratio decidendi* of the Supreme Court's decision in **Francis Karioko Muruatetu vs Republic [2017] eKLR** to sexual offences, there is a likelihood that the Applicant's sentence may be revised downwards. However, taking into consideration the period of one (1) that the Applicant has served time in prison, this court is of the opinion that the Applicant has not established the existence of any exceptional or unusual circumstances that will persuade this court to exercise its discretion in his favour.

The upshot of the above reasons is that the Applicant's application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2019

L. KIMARU

JUDGE