



REPUBLIC OF KENYA

AT THE HIGH COURT IN NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 153 of 2019

DENNIS MURUGA.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant herein has moved the court by way of a Notion of Motion dated 17th July, 2019 seeking bail pending the hearing and determination of the appeal. The same is brought under Article 49 (1)(h) of the Constitution and all other enabling provisions of the law.

2. He was charged with defilement contrary to Section 8(1)(4) of the Sexual Offences Act. The particulars were that on 1st October, 2011 at Ongata Rongai Township within Kajiado County he unlawfully and intentionally caused his penis to penetrate the vagina of GW, a child aged 16 years. He was further charged with an alternative count of an indecent act with a child contrary to Section 11 of the Sexual offences Act in that he intentionally and unlawfully committed an indecent act by touching the vagina of the GW a child aged 16 years with his penis. On conclusion of the trial he was convicted of the main offence and sentenced to fifteen (15) years. Aggrieved, he appealed the decision in the appeal that has given rise to the present application.

3. The application is supported by the affidavit of the Applicant sworn on 17th July, 2019. The gist of the affidavit is that it is his constitutional right to be released on bail/bond pursuant to Article 49(1)(h) and 50(2)(a) of the Constitution unless there are compelling reasons not to be released. Further that he must be presumed innocent unless otherwise proved. In this regard, he avers that he is not a flight risk as he a Kenyan citizen. He alludes that he is the sole bread winner of his family and his continued incarceration is causing suffering to the family. Furthermore, no prejudice would be occasioned to any party if bail is granted. In contrast, the grant of bail would in the interest of justice.

4. The following cases were referred to, to buttress the application:

a) R V Rolex Waita Mukunzu [2012] eKLR

b) Shelly Kavila Nzomo v R [2012] eKLR

c) Julius Mutemi Kamotho v R [2012] eKLR

d) R v Lawrence Sebastian Lorunyei & Others (2012) e KLR

5. In his oral submission, learned counsel, Mr. Swaka for the Applicant submitted that the appeal had high chances of success. This was on account that the age of the minor had not been established. It was his submission that the mere description given was insufficient to establish the age of the minor. As well, that the investigating officer admitted to not knowing the age of the minor. He added that the court in delivering its judgment considered extraneous circumstances and cited authorities that were unrelated to the matter. It was his submission that the authorities related to young children whereas this was a minor of advanced age. Further that the age of the minor was not determined.

6. Counsel submitted that the investigations were shoddy. He pointed to the complainant admitting that she was confused at the time due to use of bhang but no medical evidence was adduced to establish the assertion. Further that the assertion that she was hit with a Somali sword was not substantiated. In addition that the assertion that the complainant mentioned to have been in the company of other people was not proved as none of them was called to testify. It was therefore counsel's conclusion that the complainant's testimony was unreliable and untrustworthy.

7. Mr. Swaka further submitted that there were material contradictions between the testimonies of PW2, Mr. Kinuthia, on behalf of Mr.

Charles Mwai, the Clinical Officer who prepared the treatment report and Mr. Zephaniah Kamau the police doctor who examined the minor. PW2 examined GW two (2) days after the ordeal on 4th of October, 2011 while PW3 conducted the examination thirteen days later on the 13th of October, 2011. It was his submission that it was awkward that PW3 found PW1 to have suffered injuries yet PW2 did not find any injuries.

8. Lastly, Mr. Swaka submitted that the Appellant's defence was not considered. It was his submission that despite the Appellant giving a sworn defence and calling two (2) witnesses the same was not considered in the judgment. He submitted that the Applicant was on bail throughout trial. He did not abscond save on account of illness and that he was married with two children. He urged the court to extend leniency to the Applicant.

9. Ms. Chege for the Respondent opposed the Application. It was her submission that the appeal had no overwhelming chances of success. This was because the case was proved beyond a reasonable doubt. In this regard, she stated that the age of the complainant was established by her testimony and the Police Surgeon, Dr. Zephaniah Kamau. She submitted that the court was guided by the authorities to determine that the age of the complainant had been established. On the submission that the investigations were poorly conducted, she submitted that although the initial investigating officer did not testify, the same was occasioned by his demise. Another officer took over the conduct of investigations and testified accordingly.

10. On proof of identification of the Appellant, she submitted that he was well known to the complainant.

11. Counsel denied that the Appellant's defence was not considered. Furthermore, the evidence of his witnesses, namely, DW2 and DW3 could not give exculpatory evidence in favor of the Applicant. She urged the court to dismiss the application.

Determination

12. This is an application for bail pending appeal. Unlike an application for bail pending trial, an application of this nature is not an automatic right. The grant of bail is therefore not governed by Article 49(1)(h) of the Constitution under which the instant application is brought under and supported with, in the Supporting Affidavit. It is trite that once an accused has been convicted by a court of competent jurisdiction that conviction stands unless it is upset by a court of higher jurisdiction. Therefore, an Applicant for bail pending appeal is deemed guilty and circumstances warranting his release have been settled by case law.

13. An Applicant must demonstrate that the appeal has high chances of success or that there exists unusual or exceptional circumstances to warrant the grant of bail or that he is likely to serve a substantial part of his sentence or the entire sentence before the appeal is heard and determined. (see **Jivraj Shah v Republic [1986] eKLR**).

14. In an attempt to demonstrate that the appeal has high chances of success, the Applicant submitted the elements of age of the minor and penetration were not established. He also raised issues with the credibility of the testimony of the complainant and the failure to consider his defence.

15. On the issue of age, no documentation was adduced to establish the same. It is however trite that age can be proved by other means other than documents. In this case, PW1, who then was in Form III was mature enough to know her age. I have no doubt that age was properly established.

16. On penetration, the Applicant pointed to the inconsistency with the two medical reports. It suffices to mention that the report of PW3 related to the examination done only a day after the incident and was therefore bound to give rise to positive results. The examination by the police doctor, PW2, was done on 13/10/2011 close to two weeks after the incident. The latter explains why no fresh injuries were found. Nevertheless, the doctor confirmed the presence of old hymen tears which was proof of penetration.

17. As regards the credibility of the complainant's evidence, I am unable to deduce that any glaring inconsistency materially affected the strength of the prosecution case.

18. Lastly, the Applicant submitted that the defence was not considered. This is not supported by the record of proceedings. In the judgement, the court recounted the defence in pages 11-13. I find that there was a lengthy consideration of the defence. Whether this defence should have led to an acquittal is a matter for the court on hearing the substantive appeal to determine.

19. *Prima facie*, the Applicant has failed to establish that the appeal has high chances of success.

20. On existence of unusual or exceptional circumstances, the Applicant cites his age, that he is a family man, ill health and that he never absconded during trial despite the fact that he was on bond. The Court of Appeal in the case of **Ademba v Republic (1983) KLR** held that:

"1. Bail pending appeal may only be granted if there are exceptional or unusual circumstances;

2. The likelihood of success in the appeal is a factor to be taken into consideration in granting bail pending appeal. Even though the appellant showed serious family and personal difficulties in view of the unlikelihood of success in this appeal, the application could not succeed,"

21. Further, in **Dominic Karanja v Republic (1986) KLR,612**, it was held, *inter alia*, that ***" the previous good character of the applicant and the hardships, if any, facing his family were not exceptional and unusual factors."***

22. The Applicant herein is not faced with any extreme issue of the circumstances that he is faced with to warrant his release on bail at this stage. Any illness that he is suffering from can well be catered for in prison and where possible a referral to a bigger hospital be made. I add that the court that will hear the main appeal will further and in detail critically reevaluate the evidence and determine whether or not the conviction was safe.

23. As at now, I am of the view that the application is unmerited. The same is accordingly dismissed.

24. Finally, I have looked at the case law cited by the learned counsel for the Applicant. The cases are not relevant to this application as they relate to applications for bail pending trial. I need not further comment on them.

Dated and Delivered at Nairobi This 29th day October, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. *Mr. Swaka for the Appellant/Applicant.*
2. *Miss Kimaru for the Respondent.*