



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPLICATION NO. 131 OF 2019**

**PAUL MINITO AMINGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By way of Chamber Summons dated 19<sup>th</sup> June, 2019, the Applicant prays that he be released on bail pending the hearing and determination of the appeal. The Application is premised on the grounds that the appeal has high chances of success, that the Appellant is married and has children in school and was the bread winner of the family and that being a first offender he was very remorse. The application is supported by an affidavit sworn by Richard N. M. Ongegu, council for the Applicant on 19<sup>th</sup> June, 2019. It basically supports the Grounds on which the application is premised.

2. The Applicant was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. It was alleged on 7<sup>th</sup> May, 2012 at in Industrial Area within Nairobi Area Province intentionally and unlawfully caused his penis to penetrate the vagina of LM a child of 13 years. He was in the alternative charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual offences Act No. 3 of 2006 In that he intentionally and unlawfully touched the private parts of LM namely vagina.

3. The trial court found him guilty of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offence act and convicted him accordingly. He was sentenced to serve 20 years imprisonment. Aggrieved by both conviction and sentence, he preferred the appeal giving rise to the instant application. He sets out the grounds of appeal in the Petition of Appeal dated and filed on 19<sup>th</sup> June, 2019.

4. The application was canvassed by way of oral submissions. The application was represented by learned counsel Mr. Bosire whilst the Respondent was represented by learned state counsel Ms. Kimaru. In submitting that the appeal had high chances of success, Mr. Bosire pointed to contradictions in the evidence of the complainant who testified as PW1. He stated that PW1 testified that she went to deliver goods to the Applicant who in turn gave him Kshs. 150/= in exchange at which point she was defiled. In cross examination, she stated that someone identified to her the Appellant's house. According to Mr. Bosire, the 3<sup>rd</sup> party who identified the house to PW1 was not called as a prosecution witness. He submitted that this left a glaring gap in the prosecution case as the 3<sup>rd</sup> party is the only person who would have placed the Applicant at the scene. It was his further submission that the father to PW1 who testified as PW2 indicated that he was alerted by someone at a chemist that PW1 was pregnant. However, this person was never called to testify. Furthermore, no evidence of penetration was established in that Dr. Kamru of Police surgery upon examining PW1 found nothing abnormal with her genitalia. In addition, according to PW4, a clinical officer, PW1 declined to have her genitalia examined. It was the submission of Mr. Bosire that even though a child was born, it was not established that the person responsible was the Appellant as no DNA analysis was conducted.

5. Mr. Bosire submitted that the investigations were shoddy as the investigating officer did not testify. Furthermore, the scene of the incident was not visited yet it was said to have been a house occupied by more than two persons. It was his view therefore that the conviction was not safe.

6. Ms. Kimaru on the other hand opposed the application citing that the prosecution proved their case beyond all reasonable doubts. It was her submission that the identity of the Applicant was not in issue as she was a friend to PW1's uncle. Furthermore, he gave PW1 money to go to a chemist to confirm whether she had become pregnant after the incidence. As regards the age of the complainant, she submitted that her Birth Certificate was adduced which established the correct age. On the issue of penetration, counsel submitted that PW3 the government doctor confirmed that there were old tears of PW1's genitalia. She submitted that although PW1 declined to be examined by PW4, PW4 confirmed that she was pregnant which was proof of penetration. She urged the court to disregard the issue of money because it was not an element requiring prove in case of defilement. She urged the court to dismiss the application. In rejoinder, Mr. Bosire was of the

view that the money issue could not be overlooked because PW5, the mother to PW1 gave contradicting figures of the amount she gave to PW1 to take to the Appellant. He also submitted that it was not denied that the Applicant knew the uncle to PW1. However, he did not know the house in which the Applicant lived. The said house according to Mr. Bosire was occupied by 3 men. It was therefore paramount that the Appellant was strictly identified as the person culpable and more so responsible for PW1's pregnancy. He submitted that the Applicant was definitely framed and his conviction was not safe. He urged the court to allow the appeal.

### **Determination**

7. This is an application of bail pending appeal for which the threshold is set by the case law. An Applicant must demonstrate that the appeal has high chances of success or that there exists an unusual or exceptional circumstance to allow a warrant the grant of bail pending appeal or that he is likely to serve a substantial part of the sentence or the entire sentence before the appeal is heard and determined. **see Jivraj Shah v Republic [1986] eKLR**).

8. Also in the case of **Ademba v Republic (1983) KLR** it was held that:

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

**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,”**

9. The case for the Applicant herein is that the prosecution case was laced with contradictions. The contradictions pointed out by the Applicant's counsel regards the amount of money PW5 gave to PW1 to take to the Appellant. That is not factually reflected by the evidence. This is because, the evidence clearly states that the Appellant gave PW1 Kshs. 150 as purchase price for the clothing delivered to him by PW1. What is inconsistent is the figure of the amount given to PW1 by the Appellant to pay for the pregnancy test. On the one hand PW1 stated that she was given Ksh. 80/ whilst her mother PW5 gave a figure of Kshs. 300/=. In my view, this is not an issue that brings to fore the weight of the prosecution evidence given that PW1 had a pregnancy test done, anyway.

10. The most paramount question which even in the appeal the court will have to grapple with is whether the Appellant defiled PW1. Of course the issue of identity of the Appellant is not in issue. His culpability is the question for determination. Although pregnancy *per se* is not a determinant factor in penetration, it is factual to state that where an issue is born out of an alleged defilement, the only pointer that an accused is responsible is to conduct a DNA test. The same would squarely pin down the person culpable.

11. In this case, PW1 testified that the person who was culpable was the Appellant. The Appellant is said to have been living in a house with three men where defilement took place. To rule out that any of the other two men was responsible for the pregnancy, the DNA test was a mandatory procedure. The failure to conduct the same created a gaping hole in the prosecution case that cannot be filled by mere testimony that the Appellant defiled PW1. For this reason, I am of the view that although further reevaluation of the evidence shall be done at the hearing of the appeal, *prima facie*, the appeal has high chances of success.

12. As regards to whether there exists unusual or exceptional circumstances to warrant of bail pending appeal, the Applicant stated in his application that he was married and had school going children for whom he was the sole bread winner. As stated in the case of **Dominic Karanja v Republic (1986) KLR,612**, “ *the previous good character of the applicant and the hardships, if any, facing his family were not exceptional and unusual factors.*

13. I conclude that this is a merited application and I allow the same. I admit the Applicant to a bond of Kshs. 200,000/= with one surety of a similar amount or to a cash bail of Kshs. 100,000/=. The surety shall be assessed by the Deputy Registrar of this court. It is so ordered.

**Dated and Delivered at Nairobi this 29<sup>th</sup> day of October, 2019.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Mr. Bosire for the Applicant.

2. Miss Kimaru for the Respondent.