REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVIISON

CRIMINAL APPEAL NO. 77 OF 2017

JAMES MAINA MUNENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application.

The applicant herein was charged vide Makadara Cr. Case No. 2300 of 2010 with the offence of defilement of a child contrary to **Section 8(1**) as read with **Section 8(2) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 7th June, 2010 at Kariobangi North Location in Nairobi within Nairobi Area Province unlawfully and intentionally committed an act which caused the penetration of his penis into the vagina of A.N. a child aged nine and a half years. In the alternative, he was charged with indecent act contrary to **Section 11(1) of the Sexual Offences Act number 3 of 2006** in that he intentionally and unlawfully touched the private parts namely the vagina of A.AN. a child aged nine years. He was convicted of the main charge and sentenced to serve 21 years imprisonment. He has preferred the current appeal against his conviction.

The instant application was brought by way of a Chamber Summons dated 18th July, 2017. It is brought under **Section 357(1) of the Criminal Procedure Code**. The main prayer sought is that the applicant be released on bail pending the hearing and determination of the appeal. The application is supported by the affidavit of Mwende Munguti, counsel for the applicant having the conduct of the application on his behalf. It is deposed that the appeal has a high chance of success and that the conviction of the applicant was not safe in the circumstances. In addition, that the applicant is not a flight risk because he was on bond at trial and he never absconded.

Submissions.

The application was canvassed before me on 22nd November, 2017. Learned counsel, Mr. Kang'ahi represented the applicant whilst learned State Counsel Ms. Atina argued the application on behalf of the Respondent. According to Mr. Kangahi, the application was meritorious because the appeal was likely to succeed. He cited the lack of prosecution to call a crucial witness, one teacher Joan to whom the complainant who testified as PW1 confided about the incident. According to the counsel, this is the teacher who sent PW1 home after she disclosed that she had been defiled. He submitted that the failure to call teacher Joan meant that crucial evidence relating to what PW1 told her was not adduced thereby weakening the prosecution case.

Counsel also cited the lack of corroboration of PW1's evidence by the medical evidence. He submitted that the learned trial magistrate in his judgment noted that the evidence of PW4, Dr. Kamau of police surgery did not support that of PW1 with respect to the fact that PW1 had been defiled. In that regard, counsel queried the basis on which the Appellant was convicted. Furthermore, according to the counsel, Dr. Kamau relied on the medical report from Nairobi Women's Hospital to write his P3 form. He submitted that that medical report was not adduced in court. With respect to Dr. Kamau's report, counsel submitted that the same was indicative that PW1 had not been defiled. He specifically cited that the doctor noted that PW1 suffered no injuries and that her hymen was intact. In that respect, the medical evidence having contradicted that of PW1 meant that the conviction was based on no cogent evidence. In addition, it was the counsel's submission that the court misdirected itself in arriving at a finding that PW1's evidence was truthful. He also submitted that the court misdirected itself by relying on a case law that related to rape as opposed to defilement as a result of which a wrong finding was arrived at.

Ms. Atina opposed the application. She submitted that although teacher Joan was not called to testify, what was paramount was that the prosecution called such a number of witnesses as would establish their case. In that respect, she submitted that sufficient evidence was adduced which founded a case against the Appellant. Furthermore, although another witness by the name Nduta was also not called, since she was not an eye witness, her evidence would not have added value to the prosecution case.

On the issue of the medical evidence, she testified that PW4, Dr. Kamau identified the medical report from the Nairobi Women's Hospital

which he read out to the court. The same indicated that PW1 had suffered bruises which were a sign of defilement. She referred the court to the definition of defilement under the Sexual offences Act which can be partial or full. In that case, although PW1 did not sustain a broken hymen was not, of itself, evidence that she had not been defiled. Furthermore, Dr. Kamau examined PW1 two weeks after the incident and therefore his report would not have been the same as that of Nairobi Women's Hospital. It was her view that the medical evidence supported the report of the defilement. Respectively, at the hearing of the appeal, the respondent shall seek the enhancement of the sentence against the Appellant.

Ms. Atina conceded that the judgment made a note that the medical evidence did not corroborate the evidence of PW1. She was however quick to note that the court was not clear on which medical evidence between the two produced in court it was referring to. Be that as it may, it was the counsel's view that this court had a duty to reevaluate the evidence afresh and come up with its independent conclusion. She persuaded the court to make a finding that the conviction of the Appellant was based on sufficient evidence on record. Counsel added that the mere fact that the Appellant was granted bail during the trial did not constitute a special circumstance that would warrant the issuance of bail pending appeal. It was her view that the application lacked merit and urged that it be dismissed.

In rejoinder, learned counsel, Mr. Kangahi submitted that the mere finding of the learned trial magistrate that the medical evidence did not support the evidence of PW1 meant that the appeal was arguable, reasons wherefore bail was merited. He also emphasized that the failure to call teacher Joan meant that the information she got from PW1 after interrogating her was not adduced for court to evaluate it and arrive at an independent finding. He also underscored the fact that since the offence carries life imprisonment, it was important that the court gave weight to re-evaluation of evidence and find that the conviction was not safe. He urged that the application be allowed.

Determination

It is now settled law that bail pending appeal is not an automatic right to an applicant. The rationale to this is that " ***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 to set the applicant at liberty either from the point of view of his welfare or of the state unless there is real reason why the court should do so''.*** **See Mutua v Republic (1985) KLR, 497.**

Respectively, courts of superior jurisdiction have set the criterion that should guide courts in granting bail pending appeal. These are that the Applicant must demonstrate that his appeal has an overwhelming chance of success or that there exists unusual or exceptional circumstances to warrant the grant of bail. Needless to say, the case law in this field is very rich. **See Ademba v Republic (1983) KLR, 442, Dominic Karanja v Republic (1986) KLR, 612.** A third criterion was added, that bail pending appeal may be granted where the applicant is likely to serve his sentence or a substantial part of it before the appeal is heard and determined. However, this applies only, if, on evaluation of the entire evidence, the appeal is likely to succeed. **See Jivraj Shah v Republic (1986) KLR, 605** in which the Court of Appeal in part delivered itself as follows;

> ***"If it appears from the totality of circumstances that the appeal is likely to be successful on an account of some substantial point of law to be argued and the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.''***

The Applicant herein argues that the appeal is likely to succeed on account of insufficient medical evidence. His counsel cited that although the government doctor, PW4, relied on a report made at the Nairobi Women's Hospital, the latter was not produced in court. Furthermore, it had indicated that the complainant, PW1, suffered no injuries and her hymen was not broken. That taking into account that defilement is proved by penetration, in the absence of a broken hymen, then, no defilement was established. It was also argued that the learned trial magistrate in his judgment noted that the medical evidence did not support that of PW1. Therefore, the conviction of the Applicant was based on no cogent evidence. Counsel also faulted the failure of the prosecution to call one teacher Joan who interrogated PW1 and sent her home after noting that she was feeling unwell. It was argued that she held material information relevant to the case that would have aided the court arrive at an independent decision.

I have considered the rival submissions made before me. I have also thoroughly read record of proceedings. It is my humble opinion that the conviction of the Applicant was safe. At the hearing of the appeal, I bear in mind that the court is enjoined to independently reevaluate the evidence and arrive at its own independent conclusions. My analysis drives me to conclude that the medical evidence corroborated the testimony of PW1. In brief, she was first examined at the Nairobi Women's Hospital on 9th June, 2010. It indicated that the external genitalia was normal, the vaginal opening was hyperemic and that there was purulent vaginal discharge. The hymen was intact. Similar observation was made by PW4 who filled the P3 form after examining PW1 on 24th June, 2010. In addition, PW4 testified that he observed normal residues as sign that there were bruises. He also explained that purulent discharge is an abnormal discharge mainly caused by infection of the genital. With respect, the two reports were indicative that penetration had taken place. I make this conclusion bearing in mind the definition of the word defilement under the Sexual Offences Act. Indeed, PW4 concluded that it was a case of defilement. The report from Nairobi Women's Hospital did also indicate that the diagnosis was of sexual assault.

It was submitted that the report from Nairobi Women's Hospital was not produced in court. Nothing can be further from the truth because the same was produced by PW5, the investigating officer after counsel for the applicant consented to its production. With respect to the trial court's judgment and the finding that the medical evidence did not corroborate the testimony of PW1, as I have noted above, the duty of this court is to reevaluate the evidence afresh and make its own conclusion. Without preempting the outcome of the appeal, prima facie, my view is that the learned trial magistrate misdirected himself on this point.

On the issue of failure to call teacher Joan, my view is that what is paramount is whether the evidence called by the prosecution established a cogent and water tight case against the Appellant. The absence of her evidence would be material if it created a void in the prosecution case. I will not deeply evaluate this aspect safe to hold that I think that the prosecution's case was strong enough.

On existence of unusual or exceptional circumstances, learned counsel for the applicant submitted that the applicant was on bail during the trial and he was therefore not a flight risk. It has however severally been held that the personal good conduct of an applicant does not

constitute an exceptional or unusual circumstance to warrant the grant of bail pending appeal. **See Dominic Karanja vs Republic (supra).**

The upshot of my findings is that the appeal is unlikely to succeed and that this application is therefore unmeritorious. I accordingly dismiss it with no orders on costs.

DATED AND DELIVERED THIS 11TH DAY OF DECEMBER, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Kang'ahi for the Applicant/Appellant.

2. Miss Sigei h/b for Miss Atina for the Respondent.