



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 50 OF 2015

PATRICK KINGORI GICHUHI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. This ruling is in respect to an application brought by **PATRICK KINGORI GICHUHI**, the appellant herein vide a Notice of Motion dated 21st January, 2016 brought under **Section 357** of the **Criminal Procedure Code** for orders that the applicant/appellant be admitted to bail pending appeal. The application is based on the following grounds namely:
 - i. ***That the appellant was convicted and sentenced to serve 20 years imprisonment for defilement on 17th November, 2015 vide Baricho PMCCR NO. 463 of 2014.***
 - ii. ***That the appellant has high chances of success in the appeal that was preferred herein.***
 - iii. ***That the appellant will have served a substantial part of his sentence by the time this appeal is heard and determined.***
2. In his supporting affidavit the applicant exhibited his petition of appeal as PKG2 to urge this honourable court to find that he has an arguable appeal with high chances of success. He has also cited his medical condition which he has deposed to be recurrent asthmatic attacks as a good ground to be released on bond. In this respect he has annexed a copy of a treatment chit from Sagana sub County Hospital as Exhibit 3 in his affidavit.
3. In his oral arguments made through his learned counsel Mr. Ngigi, the appellant contended that the evidence adduced at the trial court did not support the particulars contained in the charge and cited the issue of dates which he argued showed that the offence took place in the night between 2nd and 3rd May, 2013 while the testimony of the complainant only showed that the offence took place on 2nd May, 2013 with no mention of 3rd May, 2013. According to the appellant the framing of the charge sheet prejudiced him as it disclosed 2 counts which breached his right to a fair hearing under **Article 50(1)** of the **Constitution**. His position was that this fact demonstrated that he has high chances of success in his appeal.
4. It was further contended on behalf of the appellant that the evidence relied on by the trial court was weak as evidence tendered in his view did not conclusively show that there was defilement owing to the state of the victim at the time which was said to be drunk. He also took issue with the P3 arguing that part 2 of the form was not filled.
5. Finally the applicant relied on the case of **Ben Maina Mwangi -Vs- R (2006) eKLR** in urging this honourable court to allow the application now before court.
6. The application for bond was opposed by the respondent through learned counsel from the Office of the Director of Public Prosecutions Mr. Omooria who swore an affidavit in response to the

- application. He contested the appellant's contention that the Charge Sheet was defective arguing that the Charge Sheet was proper and in tandem with the evidence tendered by the prosecution witnesses. In his view the evidence adduced was overwhelming and proved beyond reasonable doubt that the offence had been committed by the appellant. He cited the fact that the age of the complainant was established (15 years old) and the identity of the appellant was proved as he was closely related to the victim. He contended that the appellant took advantage of the minor to get her drunk and that the minor found herself in the appellant's house the following day defiled.
7. Mr. Omooria further argued that the fact that the Charge Sheet reads the night of 2nd and 3rd May, 2013 was not fatal as that was when the offence took place. It was also the Respondent's contention that the omission to fill part II of the P3 form was not fatal as the material part that showed defilement took place, was in Part III which was filled. The state opined that the appellant's chances of success in the appeal was nil and contended that the facts in **Joseph Gatimu Muriithi -Vs- R (2015) eKLR** were materially different from the facts in this appeal and the *ratio decidendi* did not apply in this present appeal. He contended that the appellant's medical condition was not an exceptional circumstance to be considered.
 8. I have considered the application and arguments from both sides. Under **Section 357** of the **Criminal Procedure Code Cap. 75 Laws of Kenya**, admission to bail or suspension of sentence pending appeal is a discretion to an appellate court to be exercised of course in a judicious manner. In the case of **SIMON MWANGI KIRIKA -VS- R [2006] eKLR**, the Court of Appeal citing the case of **JIVRAJ SHAH -VS- REPUBLIC [1986] KLR 605** confirmed the guiding principles in the exercise of discretion in release of an appellant on bail pending appeal.
 - i. ***The principal consideration is existence of exceptional or unusual circumstances upon which an appellate court can fairly conclude that it is in the interest of justice to grant bail.***
 - ii. ***If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard.***
 - iii. ***That the main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal being allowed and the proper approach is the consideration of the particular circumstance and weight and relevance of the points to be argued.***
 9. The applicant has cited medical condition which in some circumstances can be taken to be unusual circumstance but where the condition or ailment such as the one suffered by the applicant herein can be well taken care of at prison, such arguments cannot hold. In this case the applicant has annexed an exhibit "PKG3" showing that he was treated at Sagana Sub County Hospital on 7th December, 2015 after conviction. This shows that his condition was managed well at that level and there is no basis for the applicant to claim that his medical condition is such that bail pending appeal would be the only way to manage the condition.
 10. Another issue which requires determination is the length of his sentence *visa viz* the time the appeal is likely to take to be determined. The applicant herein was sentenced to serve 20 years imprisonment. This Court takes judicial notice of the fact that appeals in this Court when all factors remain constant, usually take less than 2 years. In fact within the next one year, this appeal will have been determined as the appeal has been admitted to hearing and dates for hearing of appeal cases are still plentifully available from June this year going forward. This in my view dispels the notion that a substantial part of the appellant's sentence will have been served by the time this appeal is heard and determined.
 11. On the question of chances of success of the appeal it is true that when an appellant demonstrates in his appeal that he has high chances of success there is no justification to deprive him/her of his/her liberty. This was the decision made in the case of **Daniel Dominic Karanja -Vs- R (1986) eKLR**. I have carefully considered the arguments made by the appellant on his chances of success and the response made by the state on the same and I am of the opinion that it is fair and in the interest of justice not to delve into the merits of either arguments as that would mean rendering a decision prematurely on the merit of the appeal itself. It is my considered view that the appellant has not satisfactorily pointed out a substantial point of law that would *prima facie* demonstrate that his chances of success are so clear cut such that it would be unjust to deprive him

of his liberty. I have considered his arguments on **Article 50(1)** of the **Constitution** and the question of dates on the Charge sheet *visa vis* the evidence tendered and find that valid arguments can be made both ways. It is therefore better to leave the issue for more canvassing at the hearing of the appeal.

12. In view of the foregoing, I find no merit in the application dated 21st January, 2016. The same is disallowed. The appellant is at liberty to fix the appeal for mention for directions.

Dated and delivered at Kerugoya this 15th day of March, 2016.

R. K. LIMO

JUDGE

15.3.2016

Before Hon. Justice R. Limo.,

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant present

Interpretation English/Kikuyu

Ngigi for Appellant present

Sitati present for State

COURT: Ruling signed, dated and delivered in the open court in the presence of Ngigi counsel for Appellant and Sitati for Director for Public Prosecutions for the State.

R. K. LIMO

JUDGE

15.3.2016