REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CRIMINAL APPLICATION NO. 15 OF 2012

P K K………………...……………..APPLICANT

VERSUS

REPUBLIC…………………………………...………..RESPONDENT

RULING

This ruling is in respect of the applicant's summons dated 23rd February, 2012 filed in this Honourable Court under **section 349** and **357** of the **Criminal Procedure Code** primarily seeking for the order that the applicant be admitted to bail pending the hearing and determination of his appeal.

The applicant was charged and convicted of the offence of incest by a male person contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006;** the particulars were that on the 20th day of February, 2011 in Nyeri District within Central Province, the applicant intentionally and unlawfully did an act causing his penis to penetrate vagina of B W K aged 3 who to his knowledge was his granddaughter.

He was also charged, albeit, in the alternative, with the offence of indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act, No. 3 of 2006** and in this alternative count the appellant is alleged to have intentionally and unlawfully committed an indecent act with B W by causing his penis to touch her vagina; the alternative charge was based on the same particulars upon which the principal count was based except for the particulars that constituted indecent act.

At the conclusion of his trial, the learned magistrate convicted the applicant on both the principal count and the alternative count; he sentenced him to 10 years imprisonment on the principal count and five years imprisonment on the alternative count with both sentences running concurrently.

The appellant appealed against both the conviction and sentence. I gather that there are three appeals to his name against the same decision and the first of these appeals is **Criminal Appeal No. 22 of 2012**; this appeal was filed by the appellant himself on 8th February, 2012; there is also **Appeal No. 30** of **2012** filed by his counsel on 17th February, 2012 and **Appeal No. 29 of 2012** filed by yet another counsel on the appellant's behalf. For purposes of this application, I will consider Appeal **No 22 of 2012**, to be the appeal properly on record, for the reason that it was filed first in time and there is no evidence that it was ever withdrawn.

One of the grounds upon which the appellant appealed was that he was not accorded a fair trial and therefore his fundamental constitutional rights were violated. When the application came up for hearing, his counsel urged that it was established during the trial that there was bad blood between the applicant and the complainant's mother and thus the charges against the appellant were probably motivated by malice. Counsel also urged that the evidence adduced at the trial was inconsistent with the particulars of

the charge and the trial court erred in failing to take note of this inconsistency. With these errors, the learned counsel urged that the appellant's appeal has overwhelming chances of success and therefore the appellant should be admitted to bail pending the determination of his appeal.

Counsel for the state opposed the application but perhaps admitting that there was an error on the charge sheet, she urged that it was the sort of error that could be cured under **section 382** of the **Criminal Procedure Code** and **section 20(1)** of the **Sexual Offences Act** where an indecent act by a certain class of persons is also categorised as incest.

One thing I am conscious of is that the appeal itself is yet to be urged and therefore it would premature for me to delve into its merits or lack thereof at this stage; all I am concerned with is whether the appeal has such overwhelming chances of success that it would be imprudent to keep the applicant in prison to the extent that by the time his appeal is heard he will have served the whole sentence or a substantial part of it effectively thereby rendering the outcome of his appeal inconsequential.

I have considered the evidence at the trial and for the reason I have stated I can only comment on it only as far as it is necessary for purposes of determining whether the appeal has overwhelming chances of success.

According to the prosecution only the complainant and the applicant were in the latter's house when the offences with which the appellant was charged and convicted are alleged to have been committed and thus there was no other independent evidence against the appellant apart from the complainant's testimony. It follows that the complainant's evidence was pivotal to the prosecution case.

The complainant herself was a little over three years old; she gave unsworn testimony whose crucial aspect was that on the fateful day the appellant touched her private parts using his finger and with what she referred to as a "blackish" paper. She testified that she was seated on her seat when her grandfather was doing all these things and that she felt pain. She demonstrated by her left hand that the applicant used his finger to touch her private parts.

On the face of it, her testimony appears to be inconsistent with the particulars in the charge sheet which as noted, was clear that the appellant caused his penis to penetrate the vagina of the complainant. Despite her testimony having been given at the very beginning of the trial, there was not attempt to amend the charge sheet to mirror the complainant's evidence.

I understood counsel for the state to say that this is an error that did not cause prejudice to the defendant and that such error is excused under **section 382** of the **Criminal Procedure Code, Cap 75**. That section provides as follows:-

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

To the extent that the charge sheet is inconsistent with the evidence proffered there is certainly an error or irregularity in the complaint or charge as contemplated under this provision; the only lingering question is whether this error or irregularity has occasioned a failure of justice and whether an objection in this regard should have been raised earlier in the proceedings. These are legitimate questions but which cannot be answered at this stage of the proceedings; all I can say about them is that they constitute a substantial point of law to be urged at the hearing of the appeal and if they will be resolved in the appellant's favour then the appeal has overwhelming chances of success.

The other aspect of the appellant's trial which this court has taken note of, though not expressly raised in the grounds of appeal, is the conviction and sentencing of the appellant both on the principal count and on the alternative charge. This is a question that the court will certainly not sidestep; it will be incumbent upon it to consider whether, legally, it was proper for the trial court to convict and sentence the appellant on both the principal count and the alternative charge. Again without pre-empting its answer, it is a substantial question of law whose answer will likely enhance overwhelmingly chances of success of the appellant's appeal.

In **Jivraj Shah versus Republic (1986) KLR 605** at **page 606**, the Court of Appeal (Nyarangi, Gachuhi & Apaloo JJA) held that:-

"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 a substantial part of it, will have been served by the time the appeal has been heard, conditions for granting bail will exist."

I think the appellant's appeal is likely to be successful on account of at least two substantial points of law to urged; it is also possible that by the time this appeal is heard a substantial part of the sentence will have been served. On the whole, I am persuaded that the conditions of granting bail do exist; accordingly, I allow the applicant's application for bail pending appeal. He shall be released on a bond of Kshs 100,000/= or a cash bail of Kshs 50,000/=. Orders accordingly.

Signed, dated and delivered in open court this 22nd April, 2016

Ngaah Jairus

JUDGE