



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL CASE NO. 99 OF 2015

JIMMY KIPRUTO APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The appellant was tried and convicted of the offence of rape contrary to *Section 3(1) (a)* as read with *Section 3(3)* of the Sexual Offences Act. The particulars of the offence were that on the 21st day of March 2012 in Koibatek District within Baringo County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of *I K* (Name withheld) without her consent.
2. Following his conviction, the appellant was sentenced to ten years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.
3. On 9th March 2013, the appellant through his advocates *Adalo Bitok & Company Advocates* presented a Notice of motion seeking two substantive prayers. The first prayer was that he be granted leave to amend his grounds of appeal and secondly, that he be admitted to bond pending the determination of his appeal.
4. The application is supported by a deposition made by the appellant 4th March, 2016. He contends that he had been advised by his advocates on record that there was a need to amend his grounds of appeal and that his appeal has high chances of success.
5. At the hearing of the application, learned counsel *Mr. Awi* in support of the first limb of the application submitted that at the time the appellant filed his petition of appeal, he was acting in person and he had not obtained typed copies of the lower court proceedings.
6. Regarding the prayer for bond pending appeal, in a bid to demonstrate that the appellant's appeal had high chances of success, counsel submitted that the appellant's conviction was based on identification evidence which was weak as no identification parade was conducted to positively identify the appellant as the person who had raped the complainant; that the appellant was denied the benefit of calling evidence in his defence as he was allegedly denied an opportunity to call five witnesses.
7. Relying on the case of *Somo V Republic [1972] EA 476*, *Mr. Awi* submitted that as the appeal had overwhelming chances of success, there was no justification for denying the appellant his freedom as he waited for the hearing of his appeal. He further submitted that there was a probability of inordinate delay in the hearing of the appeal and such delay would cause injustice to the appellant in the event that his appeal is successful.

8. The state conceded to the prayer sought in the first limb of the application but opposed the prayer for grant of bond pending appeal. Learned prosecuting counsel Ms Oduor submitted that the appellant was properly convicted as the prosecution adduced credible and consistent evidence which proved every element of the offence; that the appellant was positively identified by the complainant and that as he was sentenced to 10 years imprisonment, he will not have served a substantial part of his sentence before his appeal was heard and determined.

9. I have considered the application and the rival submissions made on behalf of the appellant and the state. With regard to the prayer for leave to amend the petition or grounds of appeal, I find that the prayer is well grounded considering that the appellant filed the petition in person without the benefit of legal counsel. The state is also not opposed to that prayer. In the circumstances, the first limb of the application is allowed under *Section 350 of the Criminal Procedure Code*. The appellant is granted leave to file and serve his amended grounds of appeal within 14 days of today's date.

10. Turning now to the prayer for bond pending appeal, the law at *Section 357 of the Criminal Procedure Code* gives the High Court wide discretion in deciding whether or not to admit an appellant to bond or suspend his or her sentence pending the hearing and determination of an appeal. That discretion being a judicial one must however be exercised in accordance with the law.

11. The legal parameters in applications of this nature have been laid down in a number of authorities including the authority relied on by the appellant, that is, **Somo V Republic [1972] EA 476**.

In that case, the court when considering an application for bond pending appeal expressed itself as follows;

“...it seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed..... Even then, if the appeal is overwhelmingly probable of success, there is no justification in keeping the applicant deprived of his freedom...”

12. In **Dominic Karanja V Republic (1986) KLR 612**, the Court of Appeal when discussing the principles which ought to guide the court in deciding an application for bond pending appeal held that;

“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

The previous good character of the applicant and the hardships, if any facing his family were not exceptional or unusual factors. His health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal...”

12. The common thread that runs in all the authorities on bond pending appeal is that there are two main principles that guide the court in the exercise of its discretion when determining such applications. The appellant must demonstrate that his appeal has high chances or overwhelming chances of success or that there are unusual or exceptional circumstances which would entitle him to grant of bail pending appeal.

13. These two principles are founded on the presumption that an appellant was properly convicted by the trial court unless and until the conviction was overturned on appeal. They are also predicated on the fact that the constitutional presumption of innocence accorded to accused persons is immediately extinguished

upon conviction.

14. In this case, the appellant has maintained that he deserves to be admitted to bond pending trial because his appeal has overwhelming chances of success. I have gone through the evidence tendered before the trial court as well as the judgment of the learned trial magistrate.

15. At this stage, it would be imprudent for me to comment on the veracity or credibility of the evidence presented at the trial as doing so might prejudice the hearing of the pending appeal. I have however noted that the complainant testified that she was accosted at 4 p.m and was raped by a man she was able to positively identify as the appellant herein through his physical appearance. He had plaited his hair and she scratched his face leaving him with scratch marks above his left eye. PW2 in his evidence confirmed that when he arrested the appellant about one week later upon identification by PW1, his hair was still plaited and he had a fresh mark on his face. It will be the true province of the appellate court to re-evaluate this evidence and come up with its own independent conclusion on whether the appellant's identification was reliable and credible given the circumstances surrounding the commission of the offence.

16. Going by the evidence on record, I am satisfied that the appellant's appeal is arguable but I do not share his optimism that it has high or overwhelming chances of success.

17. On the claim that there may be inordinate delay before the appeal is heard and determined, I note that the appellant was convicted on 29th July, 2015 and was sentenced to ten years imprisonment, the minimum sentence prescribed by the law.

I am aware that the court's criminal appeal's diary is flexible and there is no possibility that the appellant will serve a substantial part of his sentence before his appeal is heard and determined. There is also no material placed before the court to demonstrate that there are unusual or exceptional circumstances that would warrant the grant of bond pending appeal in this case.

18. For all the foregoing reasons, I have come to the conclusion that the appellant has not met the legal threshold for grant of bond pending appeal. The upshot is that the Notice of Motion dated 4th March 2016 partially succeeds.

19. As the appellant has been granted leave to file and serve his amended grounds of appeal within 14 days of today's date, I direct that the appeal be mentioned on 17th August, 2016 before the Deputy Registrar to confirm compliance and for further orders.

It is so ordered.

C. W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of July 2016

In the presence of:-

The Appellant

Miss Biwott holding brief for Mr. Awi for the appellant

No appearance by the state

Naomi Chonde – Court clerk