REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 16 OF 2015

GEOFFREY MAINA NDUNGU……...……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

RULING

The appellant was charged in the Chief Magistrates' Court at Nanyuki with the offence of attempted defilement contrary to **section 9(1)** as read with section **9(2) of the Sexual Offences Act, No. 3 of 2006.** It was alleged that on the 6th March, 2011 at [Particulars withheld] village in Nyeri North District within Central province, the appellant intentionally attempted to cause his penis to penetrate the vagina of JNN a girl aged 14.

In the alternative, the appellant was charged with the offence of indecent act with a child contrary to **section 6(a)** of the **Sexual Offences Act**. According to the particulars in this alternative count, it was alleged that on 6th March, 2011 at [Particulars withheld] village in Nyeri North District within central province, the appellant intentionally and unlawfully touched the vagina of JNN a child aged 14 against her will, an act which was indecent.

The appellant was found guilty and accordingly convicted of the alternative count; he was sentenced to serve five years imprisonment. Being aggrieved by this decision he appealed to this Court against both the sentence and the conviction. Alongside the appeal, he filed an application dated 22nd May, 2015 in which he sought to be released on bail pending the hearing and determination of his appeal. The application is supported by his counsel's affidavit sworn on the same date; it is this application that is the subject of this ruling.

According to the applicant's counsel, his client was a civil servant who served as an assistant chief prior to his prosecution and incarceration. The applicant, according to the learned counsel, will have served a substantial part of his sentence when his appeal is finally heard and since, in his view, the appeal has overwhelming chances of success, and in order to mitigate any hardship that may be visited upon the appellant, it is only proper that the appellant be admitted to bail in the meantime.

Amongst the reasons given by counsel in his submissions to support the argument that the appeal has overwhelming chances of success were that the accused person was put to his defence before the prosecution closed its case; that the court proceeded on the presumption that only five witnesses had testified when in fact six witnesses testified for the state; and, that the learned magistrate based her conviction of the appellant on the evidence of the complainant alone yet her evidence was taken by a different magistrate. Counsel also urged that there were contradictions in the prosecution evidence with particular regard to the date of the offence and when the complainant is said to have reached home on the

fateful evening. Finally, he urged that the court did not comply with **section 169** of the **Criminal Procedure Code** to the extent that the court did not give reasons for rejecting the appellant's defence.

Counsel cited the decisions in **Criminal Application No. 3 of 2006, Simon Mwangi Kirika versus Republic** (Court of Appeal sitting at Nairobi) on the principles upon which the bail pending appeal may be granted and **High Court Criminal Appeal No. 49 of 2006, Reagan Mokaya versus Republic** on the necessity of the trial court to comply with **section 169** of the **Criminal Procedure Code** and give reasons for its decision.

The learned counsel for the state opposed the application and urged that there is no chance that the appeal will succeed. Responding to the question on the complainant's evidence counsel urged that **section 124** of the **Evidence Act** entitled the lower Court to rely on the evidence of the complainant and it could convict on her evidence without the need for corroboration. Again, so the counsel urged, the magistrate need not have seen the complainant testify before she could rely on her evidence. He also relied on **section143** of the **Evidence Act** for the submission that the state need not call any particular number of witnesses to prove a particular fact.

As to whether the prosecution had closed its case before the appellant was put to his defence, counsel for the state urged that the record indicates that at some stage the prosecutor informed the court that the state had one more witness to call; this witness was the investigations officer who testified as the last prosecution witness. In the circumstances there was no doubt as to whether the prosecution had closed its case or not.

Counsel admitted that the trial magistrate analysed the evidence of five witnesses in her judgement; however, the omission to consider the evidence of the 6th witness cannot be said to have vitiated the appellant's trial.

On whether the judgment complied with **section 169** of the **Criminal Procedure Code,** it appears to me that the learned magistrate complied with that provision of the law and her judgment comprised all the elements of a judgment as contemplated under that particular provision.

The principles upon which bail pending appeal can be granted have been outlined in several court decisions; apart from those cited by the learned counsel for the appellant others include **Somo vs. Republic 1972 EA 476, Jivraj Shah versus Republic (1986) KLR 605 and Dominic Karanja v. Republic [1986] KLR 612.**

In **Somo vs. Republic (supra) at page 480** the court (Trevelyan, J), speaking of the grounds to be considered in an application for bail pending appealed said:-

> ***"The most important of them is that the appeal will succeed. There is little, if any, point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word "overwhelming" deliberately and for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption that when the applicant was convicted, he was properly convicted."***

In **Jivraj Shah versus Republic (supra) at page 606,** which was cited with approval **Simon Mwangi Kirika versus Republic (supra) 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."***

The learned judges cited with approval their decision in **Daniel Dominic Karanja versus Republic**

(supra) where it was stated at page 613:-

> "***The most important issue here is if the appeal has such overwhelming chances of success then there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The previous good character of the appellant and the hardship, if any, facing the wife and the children of the applicant are not exceptional or unusual factors…a solemn assertion by an applicant that he will not abscond if he is released is not sufficient ground, even with the support of the sureties, for releasing a convicted person on bail pending appeal. The applicant was certified to be fit by a doctor …and so no issue of health arises. We are not to be taken to mean that ill-health per se would constitute an exceptional or unusual circumstance in every case. There exist medical facilities for prisoners in the country."***

Chances of the appeal succeeding is the linchpin upon which an application for bail pending appeal turns; as the forgoing decisions demonstrate, if the chances of success of the appeal are that overwhelming, then there is no pointing keeping the appellant in prison until his appeal has been heard since he is presumably homebound anyway. As it has been asked in these decisions, it has to be asked in the application at hand whether the chances of the appellant's appeal are so obvious that he ought to be admitted to bail.

In considering the answer to this question, I am minded that it will not be necessary to delve into the merits of the appeal at this stage; that exercise can only be undertaken upon hearing the substantive appeal; however, if my remarks point towards the appeal's merits (or lack thereof) it will only be to such an extent as is necessary for the determination of the applicant's application.

The first issue raised by the appellant is that of the closure of the prosecution; it is the applicant's case that he was put on his defence before the prosecution closed its case. The record shows that after calling five witnesses, the prosecutor informed the court on 23rd October, 2014 that he had only one more witness to testify; the witness was the investigations officer who eventually testified on 18th March, 2015. Immediately after this witness' testimony, the learned magistrate reserved the ruling on whether the appellant had a case to answer for delivery on 26th March, 2015.

Although the prosecutor did not inform the court that he had closed the prosecution case after the testimony of the investigations officer, the learned magistrate proceeded on that presumption which no doubt was informed by the prosecutor's remarks on 23rd October, 2014, that he had only one more witness to call. I doubt the omission by the prosecution to inform the court that the state had closed its case in these circumstances, and presumption by the court that the state case had been closed, is an issue that be categorised as a substantial point law to be urged and which is likely to be resolved in favour of the applicant.

For good order and in practice the prosecutor always informs the court that it has closed its case at the conclusion of the testimony of its last witness; in this case the information appears to have been given before the last witness testified.

My reading of the Criminal Procedure Code does not, in any event, suggest that it must always be recorded in categorical terms that the state has closed its case when it is clear that the prosecution has called its witnesses. The relevant provision would be section 211 (1) which states:-

> ***(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).***

Once it is apparent that the evidence in support of the charge is closed then the court may proceed as it did subject, of course, to such submissions as the state or the accused person may want to make.

More importantly, it has not been demonstrated how the appellant may have been prejudiced in his trial for the simple reason that prosecution did not inform the court or rather the latter did not record that the state had closed its case. Neither has it been demonstrated that the appellant had any particular witness in mind whose evidence was not taken because of the assumption, on the appellant's part, that the state case against him was still open, and that failure to call this witness may have prejudiced his trial.

It would, of course have been a different case altogether if it was the state complaining that it had more witnesses to call but the court had slammed to the door against them by making a ruling on whether the accused person had a case to answer before their evidence was taken.

As to the question whether the court considered the evidence of one of the prosecution witnesses in its judgment, I would suppose that the proper question would be how crucial or relevant the evidence alleged to have been omitted was to the final decision that the learned magistrate came to. Whether that evidence was so relevant to the fact in issue that had the learned magistrate considered it, she would probably have decided differently is an issue I think that will be resolved at the hearing of the appeal. For purposes of determination of this application, it suffices to say that without any proof that the appellant would have benefited if the evidence alleged to have been omitted had been considered, I am hesitant to conclude that the mere omission to consider certain evidence stokes my mind into believing that the appellant's appeal has overwhelming chances of success.

The learned counsel also raised at least two issues on the evidence of the complainant; as I understood him, he was of the opinion that her learned magistrate erred in convicting the appellant based on the evidence alone and secondly, she erred when she convicted on the evidence of a witness she did not see or hear.

As for the second part of this question, the record shows that when Hon. T.W. Cherere took over the case from her predecessor, she complied with **section 200(3)** of the Criminal Procedure Code and gave the appellant the opportunity to exercise his rights under that provision to have the complainant recalled if he thought it was necessary. If he opted, as he did, to have the case proceed from where it had reached, when the convicting magistrate took it over, it smacks of bad faith for the appellant to turn around and complain that the learned magistrate could not rely on the evidence of a witness she did not see or hear.

The other prong to the appellants question on the complainant's evidence is whether corroboration was necessary. It is true, as suggested by the learned counsel for the appellant, that under **section 124 of the Evidence Act** corroboration is necessary in criminal cases; the proviso to that section, however, says where the offence committed is a sexual offence, the court can receive and convict on the evidence of the victim alone without any need for corroboration as long as the court records its reasons for acting on such evidence.

The learned magistrate gave her reasons why she believed that the complainant's evidence that the appellant did an indecent act with her; these reasons may or may not have been sufficient but for purposes of determination of this application, the record is clear that some reasons were given. Whether those reasons were sufficient enough for the court to believe the complainant is an issue that will properly be addressed at the hearing of the appeal.

Counsel for the appellant also submitted that there were inconsistencies in the testimony of the complainant and that of her mother on the date when the offence occurred; the complainant testified that the offence took place on 6th March, 2011 but her mother testified that her daughter told her that the offence was committed on 2nd March, 2011. The question here again is how material these inconsistencies were when the evidence is considered in its entirety. Inconsistencies in evidence may not per se upset a conviction if they are not of such a fundamental nature as to occasion a miscarriage of justice or prejudice the accused person's case; all that the trial court needs to consider is whether such inconsistencies cast a shadow of doubt on whether the prosecution case has been proved to the required

standard. Now, whether this happened in the trial against the appellant is again an issue that will be dealt with adequately at the hearing of the appeal.

As to the question of the court's compliance with **section 169** of the **Criminal Procedure Code** and whether the learned magistrate considered the appellant's defence, it is clearly indicated in the judgment that the learned magistrate outlined the questions for determination, her determination of those issues and the reasons for determination. The question whether those questions or her determination or the reasons given for the determination were proper are not questions for this court to discuss at this particular juncture; suffice it to say, it is not so obvious that the learned magistrate did not comply with **section 169** of the **Code** to the extent that it can be concluded at this stage that the appellant's appeal has overwhelming chances of success.

The upshot of all these is that I am not convinced that the appellant's appeal has overwhelming chances of success and I therefore do not find any merit in the applicant's application dated 22nd May, 2015.

I also direct that this appeal be transferred to the High Court at Nanyuki under whose jurisdiction it falls for hearing and determination.

Signed, dated and delivered in open court this 19th August 2016

Ngaah Jairus

JUDGE