



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 82 OF 2014

ALEX LUSAVA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2377 of 2013 Republic vs Alex Lusava in the Resident Magistrates' Court at Kapsabet by B. Kiptoo, Resident Magistrate dated 6th May 2014)

RULING

1. The appellant was convicted on a charge of attempted defilement contrary to section 9 of the Sexual Offences Act, No. 3 of 2006. He was sentenced to twenty years imprisonment.
2. The particulars of the charge were that on 4th October 2013 at *Index* area within *Nandi* County, he intentionally and unlawfully attempt to cause his penis to penetrate the vagina of *S. C. (name withheld)*, a child aged eleven.
3. The appellant has preferred an appeal. The amended petition of appeal was filed on 18th December 2014 and raises nine grounds. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 11th November 2014 praying for bail. It is supported by a deposition sworn by the appellant on 12th November 2014.
4. The appellant contends that the appeal has overwhelming chances of success; that the offence was not proved beyond reasonable doubt; that there are exceptional circumstances to warrant grant of bail; that the sentence meted out was harsh and oppressive; that his wife ran away from home leaving his two children aged seven and eleven unattended; that the appeal may take a considerable time before it is heard; and finally, that he will abide by any conditions that may be set by the Court.
5. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj Shah v Republic* [1986] KLR 605-

*“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 is heard, conditions for granting bail will exist. The decision is Somo v Republic [1972] EA 476 which was referred to by this court with approval in *Criminal Application No. NAI 14 of 1986*, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal*

which could result in the appeal being allowed.”

6. The appellant’s learned counsel submitted that the trial court disregarded the *alibi* of the applicant. The trial court considered the evidence of the applicant and his witness who both testified that on the material day, the appellant was picking tea at a place called *Tilwala*. But the trial court formed the opinion that the appellant was positively identified by PW1 and PW2 as the assailant. PW1 knew the appellant as *Baba Rembo* in reference to his daughter known as *Rembo*. She identified the appellant. PW2 was the grandmother to PW1. She responded to the plea for help by PW1.

7. It would be inappropriate at this stage to comment about the veracity or otherwise of the evidence presented at the trial. I would be pre-empting the hearing of the appeal. I have noted however that the court referred to the *alibi* and discounted it. It is thus not entirely true as urged by the appellant’s learned counsel that it was *not* considered at all. As to whether the point is arguable, I would say yes. Like I have said, it will be the true province of the appellate court to re-evaluate all the evidence and draw its own conclusions; and, in particular, whether the charge was proved beyond reasonable doubt from a totality of the evidence. But I am not persuaded that a substantial point of law or evidence has been urged to sway the court to grant bail pending appeal.

8. The appellant was sentenced to twenty years jail term. It will be for the appellate court to determine whether the sentence was lawful considering all the circumstances of this case; the fact that the appellant is a first offender; and, the mitigation proffered by the appellant. From the record, the appellant in mitigation told the trial court as follows: “*I have a family of two children; they are school going and I am the sole bread winner*”. In the present motion, the appellant refers to the same children and their circumstances. The only new matter is his claim that his wife ran away. Those matters do not constitute *exceptional circumstances* for grant of bail pending appeal. See *Somo v Republic* [1972] EA 476, *Jivraj Shah v Republic* [1986] KLR 605.

9. Applying the legal principles I set out earlier, I am unable to say that there are *exceptional* factors in this case to warrant grant of bail pending appeal. It is true that the appellant had been admitted to bail in the lower court. It is also true that bail is a constitutional right. But I am alive that the appellant has already been *convicted*. The *presumption* of innocence no longer holds true. The considerations for grant of bail at this stage are thus markedly different. I am not persuaded that a substantial point of law has been urged or that the sentence of *twenty* years or a substantial part of it will have been served by the time the appeal is heard and determined.

10. In the result, the notice of motion dated 11th November 2014 is devoid of merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 26th day of February 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

The appellant.

Mr. Birech for the appellant.

Ms. K. Mwaniki for the State.

Mr. Kemboi, Court Clerk.