



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 1 OF 2015

ELIAS KIAMATI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Sentence and Conviction of Ag. Principal Magistrate Runyenjes in Criminal Case No. 538 of 2014 on 15/1/2015)

R U L I N G

The applicant Elias Kiamati Njeru and in his notice of motion dated 22/01/15 seeks for orders for bail pending appeal. The grounds relied on are on the face of the application and the supporting affidavit.

The facts leading to this application are that the applicant was charged with the offence of defilement contrary to Section 8(1) of the Sexual Offences Act. There was an alternative charge of committing an indecent act with a child contrary to Section 11 of the same Act. The case was heard and determined by Siakago Senior Resident Magistrate on 30/12/2014 resulting in an imprisonment sentence of 10 years. The applicant filed this appeal on 08/07/2015 against the judgment of the trial court.

The grounds supporting the application are that the applicant has an arguable appeal with very high chance of success. The appellant says he was on bond during the trial and attended court faithfully adding that he is a person of extremely good character. He is apprehensive that the hearing of the appeal may delay which may prolong his stay in prison.

Mr Gachuba represented the applicant and he raised several issues in the pending appeal arguing that the appeal has high chances of success. Firstly, it was argued that the charge was defective and that the alternative charge was not proved beyond reasonable doubt. Secondly, that the prosecution was unconstitutional and void *ab initio* having been conducted in violation of Article 157(6)(a) as read with Section 5(1)(i) and Section 29 of the Directorate of Public Prosecution's Act. Thirdly that the alibi defence was not rebutted by the prosecution and this fact was not given due consideration in convicting the appellant. Finally that the applicant ought to have been given the benefit of the doubt in view of the poor investigations done and inadequate evidence tendered by the prosecution.

The application was opposed by the respondent who argued that the case was proved as required. Ms. Matere for the respondent described the complainant's evidence as clear and descriptive of the incident including the threats by the appellant to harm the complainant if she ever told anyone what he had done to her. This evidence was found credible by the trial magistrate. The court convicted on a lesser charge which is allowed by the law. The counsel dismissed the applicants authority of **BERNARD KIAI NGARUIIYA VS REPUBLIC [2008] eKLR** as irrelevant in that it consisted of totally different facts.

I have considered the applicant's arguments in support of his application for bail pending appeal and the responses made by the respondent. I proceed to look into the issues with a view of assessing whether the appeal has high chances of success.

The principles for granting bail pending appeal were set out in the case of **DOMINIC KARANJA VS REPUBLIC [1986] KLR 612** where it was held:-

1. *The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.*
2. *The previous good character of the applicant and the hardships, if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.*
3. *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.*
4. *Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.*

The two principles set out have guided courts in granting bail pending appeal.

The appellant raised the issue of having a young family and that he is a person of extremely good character, these two grounds culminated in the argument that he was not likely to abscond. The **DOMINIC KARANJA CASE (SUPRA)** ruled out these two factors as relevant to an application of this nature when the court held:-

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

The applicant argued that the charge was defective. On perusal of the typed proceedings from Siakago court, I noted that they were not accompanied by a copy of the charge sheet. The original file had not been forwarded to this court at the time of hearing this application. In the absence of the charge I was not in a position to interrogate this ground.

In his submissions, the applicant did not explain or argue the ground challenging the validity of the prosecution. In regard to Article 157(6)(a) of the constitution as read with Section 5 and 29 of the Director of Public Prosecutions Act. The applicant was represented by a counsel and it may have been decided to drop this particular ground for some reason known to them. I leave the ground to rest.

The magistrate in her defence explained reason of rejecting the alibi defence because it was raised at a late stage in the proceedings. She referred to it as an after thought. The defence cannot be said to have been ignored.

On convicting of a lesser charge than the one facing the appellant, the court is empowered by the law.

The appeal of the appellant has chances of success but it fails to reach the threshold of the **DOMINIC KARANJA CASE (SUPRA)** which requires that the appeal must have overwhelming chances of success.

The second principle requires that the applicant demonstrate exceptional circumstances which have not been done in this application.

It is my finding that this application is not merited and it is hereby dismissed. The appeal to be fast tracked for admission and hearing for the court diary has dates in the course of this year.

DELIVERED, SIGNED AND DATED THIS 30TH DAY OF APRIL, 2015.

F. MUCHEMI

JUDGE

In the presence of :-

Mr Gachuba for applicant

Applicant present

Ms Matere for respondent