



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 145 OF 2014

AMOS JOHN CHEBOI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 434 of 2014 Republic vs Amos Cheboi in the Resident Magistrates' Court at Kabarnet by E. Kigen, Resident Magistrate dated 12th September 2014)

RULING

1. The appellant was convicted on a charge of defilement contrary to section 8 (3) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to twenty years imprisonment.
2. The particulars were that on 15th May 2014 in Baringo County, he intentionally and unlawfully caused his penis to penetrate the vagina of C. S. (*name withheld*), a girl aged fourteen.
3. The appellant has preferred an appeal. The petition of appeal was filed on 26th September 2014. It raises ten grounds. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 24th November 2014 praying for bail. It is supported by a deposition sworn by the appellant on even date.
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 he is a man of good character; that he had been admitted to bail in the lower court; that the appeal may be rendered nugatory; and, finally, that he will abide by any conditions that may be set by the Court. Those matters are buttressed by the deposition of the appellant sworn on 24th November 2014.
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. He contended that the evidence of the complainant was inconsistent and contradicted that of the medical examiner (PW4). The petition of appeal challenges the medical evidence because the complainant was examined a day after the incident. The appellant states that he was not positively identified because there was no natural light at 6:00 a.m. His learned counsel submitted that the charge was not proved beyond reasonable doubt; and, that the learned trial magistrate erred by meting out a harsh and excessive sentence.

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. The court stated that “*the defence [was] full of inconsistencies and not relevant to this case*”. It is thus not entirely true as urged by the appellant’s learned counsel that it was *not* considered at all. Regarding the credibility of the complainant, the trial court said as follows-

“The minor’s evidence is well corroborated and supported by medical evidence...I find that the witnesses lined up by the prosecution were credible witnesses and their evidence systematic...”

8. As to whether the points raised in the petition are 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.

9. 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 was a first offender; and, the mitigation proffered by the appellant. From the record, the appellant in mitigation told the trial court as follows: “*I did not commit the offence and if I did commit the offence I am sorry*”. It is also not lost on me that section 8 (3) of the Sexual Offences Act provides for a minimum sentence. On the face of it, the sentence handed down is not illegal. Fundamentally, I cannot say that a substantial part or the whole of the sentence will be served before the appeal is determined.

10. 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. See *Somo v Republic* [1972] EA 476, *Jivraj Shah v Republic* [1986] KLR 605. In the certificate of urgency annexed to the motion the applicant stated that his health has deteriorated in prison. That fact is *not* deposed to in his affidavit or the body of the motion. But even assuming it was the case, it does not constitute an *exceptional* factor for 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.

11. In the result, the notice of motion dated 24th November 2014 is devoid of merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 14th day of May 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

The appellant.

Mr.....for the appellant.

Ms.....for the State.

Mr. Kemboi, Court Clerk.