



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 137 OF 2014**

**JAPHETH KIPLAGAT KOECH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal***

***Case No. 602 of 2013 Republic vs Japheth Kiplagat Koech in the***

***Resident Magistrates' Court at Kapsabet by B. Limo, Resident***

***Magistrate dated 7<sup>th</sup> August 2014)***

**RULING**

1. The appellant was convicted on a charge of defilement contrary to section 8 (2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to thirty five years imprisonment.
2. The particulars were that on 21<sup>st</sup> March 2013 at *[particulars withheld]*, Kapsabet Township, Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of S.C. *[name withheld]*, a girl aged ten years. The trial court found that the minor was above eleven years at the time of the offence. It thus sentenced the appellant under section 8 (3) of the Act.
3. The appellant has preferred an appeal. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion dated 10<sup>th</sup> September 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 was no medical evidence linking him directly with the offence; that the age of the complainant was not properly established by documentary evidence; that the documents tendered in that regard are contradictory (one states the age as ten while the other shows the complainant was over eleven); and, that the documents were not produced by their makers or a recognized medical practitioner. He contends that in the circumstances, the evidence was at variance with the charge sheet. He also submitted that the ages or gender of witnesses were never recorded by the trial court. One of the key submissions in that regard is that there was non-compliance with section 200 of the Criminal Procedure Code. In a synopsis, the appellant contends that there are exceptional circumstances to warrant grant of bail.

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. It would be inappropriate at this stage to comment about the veracity or otherwise of the evidence presented at the trial. It is true that the charge sheet stated the age of the minor was ten. However, the trial court relied on exhibit 3, a medical card, that showed the complainant was born on 5<sup>th</sup> November 2001. That meant that at the time of the offence, she was above eleven. The trial court thus proceeded to sentence the appellant under section 8 (3) of the Act, which was more favourable to the appellant. PW1 in fact testified that she was eleven. I also agree that there are discrepancies as the P3 form produced by PW4 puts the age at ten. It will be for the appellate court to determine whether the discrepancies are *material*. It will also be for the appellate court to determine whether the documents were produced in accordance with the *rules* of evidence. I would be pre-empting the hearing of the appeal if I commented on those matters now.

7. I have noted however that the trial court was alive to the issue of age of the minor and dealt with it at length. The trial court believed the evidence of the complainant. PW1 had identified the appellant as the person who defiled her. The trial court found that her evidence was corroborated by PW2 and the medical evidence of PW4. The medical examination on the appellant may have been negative. But the trial court was satisfied that he was positively identified as the person who defiled PW1. The court thus discounted the defence tendered by the appellant. It will now be the duty of the appellate court to re-evaluate that corpus of evidence and reach its independent conclusions. The less I comment about the matter, the better.

8. All the matters raised by the appellant in his petition are important: but they do *not* raise a *substantial point of law*. For example, the appellant contends that section 200 of the Criminal Procedure Code was not complied with. But from the record, it appears that all evidence was taken by Mr. B. Limo, Resident Magistrate. He also wrote the judgment. It is only the sentence that was imposed by the succeeding magistrate.

9. As to whether the points raised in the petition are *arguable*, I would say *yes*. Like I have stated, it will be the true province of the appellate court to re-evaluate all the evidence and draw its own conclusions. But I am not persuaded that there are *exceptional grounds* or that a *substantial point of law or evidence* has been urged to sway the court to grant bail pending appeal.

10. The appellant was sentenced to *thirty five 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. 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 heard and determined. See Somo v Republic [1972] EA 476, Jivraj Shah v Republic [1986] KLR 605.

11. 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.

12. In the result, the notice of motion dated 10<sup>th</sup> September 2014 is devoid of merit. It is hereby dismissed.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 15<sup>th</sup> day of June 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.