



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 33 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 216 OF 2014)

(Being appeal from original Conviction and Sentence in the Chief Magistrate's Court at Naivasha Criminal Case No. 497 of 2013)

STEPHEN GITWA KIMANI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. Before me is an application for bail pending appeal, which has been opposed by the Director of Public Prosecutions. Counsel for the Appellant, Mr. Odero argued during the hearing that the appeal filed herein has high chances of success.
2. In this regard, he pointed out the failure to provide the Appellant with statements before the trial. He complained that the Appellant did not understand the evidence, did not question witnesses and that on some occasions, he was compelled to proceed when not ready.
3. He concluded by stating that the Appellant was not accorded a fair trial under article 50 of the Constitution. Regarding the actual evidence at the trial, Mr. Odero charged that it was riddled with contradictions which the trial court did not address.
4. Mr. Kibelion for the Director of Public Prosecutions opposed the application on grounds that the appeal has no overwhelming chances of success. Referring to the proceedings he contended that witness statements were supplied to the Appellant who was also accorded time to prepare before the evidence of the complainant was taken.
5. As proof of the provision of statements, Mr. Kibelion said the record does not show that the issue was raised again, while the Appellant participated in the trial. He contended that the evidence tendered at the trial proved all the elements of the charge and the conviction was proper.
6. In reply Mr. Odero disputed that the Appellant was furnished with witness statements, referring to his denials at page 5 of the proceedings. In his view, the Appellant's participation was not of any value as he failed to cross-examine key witnesses. He relied on the authority of **Denis Wesonga Masangala –Vs- Republic [2007] eKLR**.

7. I have considered the submissions made in respect of the application. I have also perused the record of the lower court. The Appellant was convicted on the evidence of four prosecution witnesses, including the complainant, for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offence Act. The particulars stated that between 27th February, 2013 and 1st March, 2013 at Site Kaburi Estate Gilgil, he caused the penetration of his penis into the vagina of J.N.M. aged 15 years.
8. The principles established in many past decisions govern the grant of bail pending appeal. In **Raghib Singh Lamba –Vs- Republic [1958] EA** the court held:
 - “1) The principle to be applied is that bail pending appeal should only be granted for exceptional or unusual circumstances.**
 - 2) Neither the complexity of the case nor the good character of the Applicant nor the alleged hardship to dependants justified the granting of bail, but where the court is satisfied that there was an overwhelming probability that the appeal would succeed the Applicant could be granted bail.”**
9. These principles have been restated in many cases over the years such as **Somo –Vs- Republic [1972] EA 476**. The operative words are that the appeal must have “overwhelming” chances or probability of success.
10. The proceedings of the trial court on the whole do not seem to bear out the complaint that he Appellant was coerced to proceed with the trial or that he was not issued with witness statements. There is on record an order of the court made prior to the evidence of the complainant on 27/5/2013, and apparent confirmation at the end of the day that the Appellant was indeed furnished with statements.
11. Although the Appellant seemed reticent about cross-examining witnesses, he did give a defence at the close of the prosecution case. The supposed contradictions contained in the medical evidence vis-à-vis other evidence were not highlighted in the Appellant’s submissions and for my part, there are no apparent or glaring contradictions.
12. All in all I do agree with the Director of Public Prosecutions that this application does not come within the applicable principles regarding the granting of bail pending appeal and I will dismiss it.

Delivered and signed at Naivasha, this 31st day of July, 2015.

In the presence of:-

State Counsel : Miss Waweru

For the Appellant : Mr. Wahome holding brief for Mr. Odero

C/C : Steven

Appellant : Present

C. MEOLI

JUDGE