



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 50 OF 2015

SIMON GICHUKI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant was convicted of the offence of **defilement of a girl** contrary to **Section 8(1)** of the **Sexual Offences Act No. 3 of 2006** and sentenced to 25 years imprisonment by the Resident Magistrate's Court at Nakuru.
2. He appealed to this court against both the conviction and sentence. Together with his Petition of Appeal, he filed the notice of motion dated 3rd March 2015, under **Section 356** of the **Criminal Procedure Code** wherein he sought to be granted bail pending the hearing and determination of the appeal.
3. The application was supported by the affidavit sworn by the Appellant's Counsel on 3rd March 2015. The main ground argued in support of the application was that the appeal has a high chance of success. Counsel for the Appellant argued that the trial court failed to consider the DNA results produced as evidence which exonerated the appellant from the offence. PW4 who conducted the DNA tests testified that the Appellant was not the complainant's child.
4. The evidence of PW2, the complainant's mother, also negated the contention that the Appellant defiled the complainant. On 9/06/2011 she told the court that the complainant's child was born two weeks before the day she testified, that is sometimes towards the end of May. Therefore, the date of conception of the complainant's child could not have been in July 2010 as contended by the complainant. This evidence also contradicts the medical evidence which showed that in December 2010, the complainant was six months pregnant.
5. Counsel submitted that this evidence excluding the Appellant from being the complainant's child was conclusive proof that he did not commit the act of defilement. She therefore asked the court to grant the application and release the Appellant on bail. She added that the Appellant was willing to abide by any condition that may be set by the court.
6. The Respondent filed the Grounds of Opposition dated 5th March 2015 in opposition of the application. Prosecution Counsel argued that the bail pending appeal is not granted as a matter of right. The Appellant must satisfy the conditions laid out in **Somo V. Republic**, [1972] E.A. 476.
7. The Appellant failed to satisfy the first condition as he had not shown that the appeal had a high chance of succeeding. The evidence of PW1 was on its own sufficient to form the basis of a conviction. The fact that the DNA results were negative did not have any impact on the case. In any event, the trial court noted that the DNA report was not produced procedurally.
8. On the contradictions between the date when the offence was alleged to have been committed and

- the testimony of PW2 together with the medical evidence, Counsel urged the court to take judicial notice of the fact that the complainant is a minor. Therefore, it should place high regard to the specific date of the offence. It was his submission that the conviction and sentence were lawful.
9. The second condition was also satisfied by the Appellant who failed to offer any special circumstances which would enable this court to release him on bail. For these reasons, Counsel asked the court to dismiss the application.

ANALYSIS

10. I have considered the submissions of Counsel. **Section 356** of the **Criminal Procedure Code** permits admission of a convicted person to bail pending the determination of an appeal.
11. At this point, the court is minded that the presumption of innocence of the appellant under the Constitution is not applicable.
12. The primary consideration in an application for bail pending appeal is whether the appeal has a high likelihood of being successful. The existence of exceptional or unusual circumstances or whether the entire sentence or a substantial part of it may have been served by the time the appeal is concluded are considerations which also inform the court's decision to deny or grant bail. The proper approach is the consideration of the circumstances against the weight and relevance of the points to be argued. See **Somo V. Republic**, 1972 EA 476, **Jivraj Shah V. Republic [1986] KLR 605**, and **Dominic Karanja V. Republic**, [1986] KLR 612
13. Upon reviewing the memorandum of appeal against the evidence before the trial court, I find that the appellant has raised the substantial question on the relevance and effect of the DNA results to be determined at the hearing of the appeal and that there are reasonable prospects of succeeding.
14. For this reason, I find that this is a proper case to exercise my discretion in favour of the Appellant and grant him bail pending appeal.
15. In the circumstances, this court admits the applicant to bail in the sum of Kshs. 250,000 together with one surety of a similar amount. The appellant is to be of good conduct during this period and to observe timeliness at all court attendances until the appeal is heard and determined.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 24th day of July, 2015.

A. MSHILA

JUDGE