



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CRIMINAL APPLICATION NO.82 OF 2015

JOSEPH KABATHA WAWERU.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This application was brought by way of Notice of Motion dated 9th March 2015 brought under Article 49(1)(h) and 159(2)(d) of the 2010 Constitution, Section 357 of the Criminal Procedure Code Cap. 75 of the Laws of Kenya and all enabling provisions of the law.

The applicant herein prays that he be admitted to bail pending the hearing and determination of the appeal in the High Court Criminal Appeal No.25 of 2015, being an appeal against the conviction and sentence in Criminal Case No. 636 of 2013 at Githunguri Law Courts.

The grounds on which the application is premised are that;

1. **The appeal raises serious triable issues on both points of law and fact and it has high chances of succeeding.**
2. **Given the time it will take to hear the appeal, the appellant will have suffered to the extreme and hence the urgency to grant bail pending the hearing of the appeal.**
3. **The applicant is the sole breadwinner for his family comprising of his wife and children who are school going.**
4. **The applicant is a first time offender and a law abiding citizen who respects the law and court process.**
5. **The applicant has a fixed place of abode and that is Githunguri and he will always appear before this court for his trial.**

The application is supported by the affidavit of the applicant sworn on the 9th day of March, 2015, which reiterates the grounds upon which the application is premised. Further, the applicant depones that he is apprehensive that if he is not granted bail he will suffer irreparable damage for he will have stayed in prison for a considerable time.

To his supporting affidavit, the applicant attached a copy of the charge sheet, the judgment and proceedings of Criminal Case No. 636 of 2013 from which he was convicted on a charge of defilement contrary to section 8(1) (2) of the Sexual Offences Act No.3 of 2006 and sentenced life imprisonment.

The learned counsel for the applicant submitted that the age of the complainant was not proved for want of an age assessment report and Birth Certificate or other document, and that the court relied on P3 form and the evidence PW3 who is the mother of the complainant that were not sufficient to prove the offence. He further wished to rely on written submissions filed on behalf of the applicant dated 7th July, 2015 where he submitted that bail/bond is a constitutional right and a facet of fair hearing based on the presumption that one is innocent until proven guilty as captured in Article 50(2) (a) of the 2010 constitution.

Learned counsel referred to the case of **Jivraj shah Vs Republic [1986] KLR 605** and **Dominic Karanja Vs R [1086]** as cited in the case of **Munjia Michubu Vs Republic [2014] eKLR** where the court of appeal spelt out the considerations for granting bail pending appeal.

On the ground that the appellant's appeal raises serious triable issues and has high chances of success, Counsel submitted that the evidence relied on by the learned trial magistrate as a basis for convicting and sentencing the applicant was not sufficiently trustworthy. He submitted that PW5, the medical doctor did not clarify whether the blood stains on the complainant's underpants were human blood of the complainant. Further, counsel submitted that PW5 did not indicate whether the breakage of the hymen was present or past. He submitted that this was a serious gap in the medical report since there was no link of the breakage of the complainant's hymen to the act of the applicant. Counsel submitted that PW5's failure to indicate whether the bruises found on the labia minora of the complainant were present or past created a gap in the report hence making it unreliable.

Counsel further emphasized that the age of the complainant was very crucial. He referred to the case of **Kaingu Elias Kasomo V R, Malindi Cr. No 504 of 2014**, where the court of appeal stated that *age is a key ingredient and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.*

Counsel submitted that there were massive contradictions in the evidence of PW1, PW2, PW3 and PW5 which the trial court should not have relied upon. He submitted that the prosecution's case was not proved beyond reasonable doubt as required by the law. He finally submitted that the applicant's defence was not properly taken into account since the appellant testified that he was at a different place from the one where the complainant alleged to have been defiled. He urged this court to grant the application for bail.

Learned counsel for the respondent conceded to the application based on two grounds; One, that as seen on page 28 the doctor said there was penetration but in cross-examination he said there was an attempt to penetrate. Two, that the age was not proved. He submitted that the P3 form presented by PW5 indicates that the age was only assessed. He submitted that the complainant said she was 10 years old but could not recall her date of birth.

Learned counsel submitted that in the medical report, it was indicated that there were blood stains but which were not subjected to examination. As such it remained unknown to whom the blood stains belonged.

I have had the opportunity to read through the proceedings and judgment on record. I have also considered the application and the respective submissions by both parties.

I shall now refer to the circumstances that must be considered in order to determine whether or not this application should succeed.

This application is premised on five grounds. However, grounds 3, 4 and 5 are not sufficient to warrant the determination of this application in favour of the applicant. See the case of **Dominic Karanja Vs Republic (1986) KLR 612**, the Court of Appeal held, inter alia that;

- a. **The most important issue was that if the appeal had such overwhelming chances of success. There is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances**
- b. **The previous good character of the applicant and the hardships, if any, facing his family**

were not exceptional or unusual factors....

- c. **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.**

On the second ground, I have noted that the judgment was delivered on 27.1.2015. In this respect, the applicant has been in custody for only eight months. He is in position to wait for the hearing and determination of the appeal. In any case this ground would be heavily determined by the consideration on whether the appeal has a chance of succeeding. I say so because if on evaluation of the evidence the appeal appears hopeless, the fact that the applicant may have served his jail term by the time the appeal is heard cannot be a factor for consideration in his favour. In the case **Abdi vs. Republic (1991) KLR at 171** the court held, inter alia;

“2. To admit an applicant to bail is the decision of the court which must be judicially exercised keeping in sight all the facts relating to the application, all the matter material to the trial at the lower court, the grounds submitted in the petition and the chances of success and the nature of the trial. The time it would take for the appeal to be prosecuted and determined is by itself not a sufficient ground.”

I then need to determine whether there is a high likelihood that the appeal will succeed.

Counsel for the applicant submitted that the medical report adduced by PW5 had no cogent evidence to link the appellant to the defilement. He submitted that the presence of blood stains on the complainant's underpants was not conclusive evidence there was defilement. He submitted that the medical report did not indicate whether the breakage of the hymen and the bruises on the labia were present or past. Further he submitted that the appellant was denied an opportunity to cross examine the PW5's evidence and which was contrary to Article 50(g) and (h) of the constitution. However when I read through the record of proceeding from the trial court at page 29, I noticed that the appellant who was then the accused cross examined PW5. On the issue of the evidence given by PW5, counsel for the respondent submitted that PW5 contradicted himself by stating first, in evidence in chief, that there was penetration and then later stating in cross examination that there was an attempt to penetrate. An attempt to penetrate is still an offence which if proved at the hearing of the appeal would warrant a conviction under section 9(1) and 9(2) of the sexual offences Act no.3 of 2006. Thus the appeal would only partially succeed.

Regarding the age of the complainant, the same was well canvassed by PW3, her mother. I shall leave it to the appellate court to determine whether the same was proved to the required degree as it is trite that the age of a complainant need not necessarily be proved by adduction of documents.

In the end, the grounds on which the applicant relies on do not warrant the granting of bail pending the determination of the appeal. This application therefore fails. The same is hereby dismissed with no orders as to costs.

DATED and DELIVERED at NAIROBI this 23rd day of September, 2015

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Businge for the Applicant*
2. *Miss Ngetich for the Respondent*