



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL No. 90F 2014

LESIIT, J

DOMINIC SIBI PETER.....ACCUSED

V E R S U S

REPUBLIC.....RESPONDENT

RULING

1. The Accused **DOMINIC SIBI PETER** was charged with Defilement contrary to section 8(1)(3) of the Sexual offences Act No. 3 of 2006. The particulars of the offence are that on diverse dates between 25th and 28th December 2012 at [particulars withheld] area in Isiolo County of the Eastern Province, intentionally and unlawfully caused his penis to penetrate the vagina of S A child aged 15 years.
2. The Applicant filed an application for bail pending appeal in which he cited the following grounds:

(a) **That the Appellant has a good appeal with a very high chance of success.**

(b) **The Appellant will obey bond terms issued by this court.**

(c) **The Appellant is suffering in jail.**

3. There is an appeal on record in which the Applicant/Appellant cited the following grounds of appeal:

The learned AG Senior Principal Magistrate erred in law in convicting and sentencing the appellant on scanty and is sufficient evidence.

The learned AG Senior Principal Magistrate erred in law and in face in convicting and sentencing the appellant when medical evidence did not support the charge.

The learned Ag Senior Principal magistrate erred in law in convicting the appellant on uncorroborated evidence.

4.The learned Ag Senior Principal Magistrate relied merely on suspicious as there was no evidence tendered to support count 2 of the charge.

The learned Senior Principal Magistrate failed to consider the evidence of the appellant and hence arrived at a wrong conclusion.

6. The learned Senior Principal Magistrate erred in law in shifting the burden of proof to the appellant.

7. The sentence meted on the appellant is manifestly excessive.

8. The Learned Senior Principal Magistrate failed to appreciate that the collapse of court I would seriously affect the proof in court No. 2

4. Mr. Ayub K. Anampiu Represented the Applicant in this application. Counsel urged that his client fell ill while in prison. Counsel admitted that he did not have any documents to prove illness. Counsel urged that the Applicant was on bond during the trial in the lower court and that he would obey the bond terms if granted bond.

5. Mr. Moses Mungai was for the State. The learned State Counsel opposed bail and urged that the Applicant had not demonstrated that there were exceptional and unusual circumstances to warrant the court granting bond as applied. Counsel urged further that the Applicant had not shown that his appeal had high chances of success. Mr. Mungai submitted that the Applicant's appeal did not have high chances of success. Counsel urged that the fact the Applicant was on bond during the trial in the lower court was not sufficient to support his application.

6. At this stage the burden lies with the Applicant to establish that the appeal has high chances of success and that the Applicant is likely to serve a substantial part of his sentence before his appeal is heard. For this proposition I am guided by Case of Somo vs. Republic 1972 EA 476 where the court held.

iii. the most important ground is that the appeal has an overwhelming chance of being successful; in that case there is no justification for depriving the application of his freedom;

7. In Chimambai versus Republic 1971 EA 343 the court held:

“anticipated delay in the hearing of the appeal together with other factors constitute good grounds for granting bail pending appeal (R. v. Akbarali Juma Kanji)”

8. In Dominic Karanja v. Republic [1986] KLR 612 the court of Appeal considered conditions an Applicant for bail pending appeal should satisfy before the application for bail pending appeal can be granted. The court held:

- 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. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.**
- 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.**
- d. **Upon considering the relevant material in this case, there was no overwhelming chance of the appeal being successful.**

9. Unlike an application for bail pending trial where the Applicant has a constitutional right to be considered innocent until proved guilty (Article 49 of the Constitution) an Applicant for bail pending appeal stands on the premise that he has already been found guilty of the offence. In an

application for bail pending appeal the principle consideration is whether the appeal has a likelihood of success (Ademba vs Republic 1983 KLR PG 442 and Somovrs Republic 1972 EA 476).

10. The other considerations are whether there exist exceptional circumstances that would justify the Applicant being granted bail pending his appeal. The other grounds upon which bail may be granted is where there is an anticipated delay in the hearing of appeal which ground should be considered together with other factors which constitute good grounds for granting bail pending appeal (see Chimambhai 1971 EA 343)

11. When considering an application for bail pending appeal the court has discretion in the matter. However, that discretion must be exercised judicially.

12. The Applicant in this case was convicted of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. He was sentenced to 10 years imprisonment on the 16th January, 2014. I have perused the record of the proceedings and without prejudicing the pending appeal, the appeal may be arguable. However I do not see overwhelming likelihood of success. The offence of defilement is a serious offence and carries a maximum sentence life imprisonment. The circumstances of that offence, from a cursory perusal of the proceedings and the judgment were serious.

13. I have personal knowledge of the fact that dates for the hearing of appeals are open and that this appeal is likely to be heard before the Applicant has served a substantial part of his sentence. I find the application has no merit and is accordingly dismissed.

DATED SIGNED AND DELIVERED AT MERU THIS 20th DAY OF MARCH, 2014.

J. LESIIT

JUDGE