



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 123 OF 2013

J K C:.....: APPLICANT

VERSUS

REPUBLIC:.....: RESPONDENT

RULING

The appellant was convicted for the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He was then jailed for 35 years.

Having lodged an appeal to challenge both the conviction and the sentence, the appellant has now filed an application for Bail pending the hearing and determination of his said appeal.

Mr. Namiti, the learned advocate for the appellant, submitted that his client raised arguable grounds, which are likely to result in a successful appeal.

As regards his state of health, the appellant pointed out that he was HIV positive. He was therefore in need of constant medical support.

The appellant is said to be 45 years old. He has several children who depended directly upon him for everything which they needed. Therefore, for the sake of those children, the appellant asked this court to grant him bail.

If granted Bail, the appellant undertook to comply with all such terms as the court may impose.

He also drew attention to the fact that during the trial, he was out on Bail. According to Mr. Namiti, the appellant never failed to attend court during his trial.

Ms. Ruto, Learned state counsel, opposed the application. In her considered opinion, the appeal did not have overwhelming chances of success.

The Respondent also submitted that the appellant was unlikely to have served a substantial part of the sentence of 35 years imprisonment before his appeal was heard and determined.

Meanwhile, on the issue regarding the HIV status of the appellant, this court was told that the same could be addressed in prison. Therefore, the Respondent concluded that the application for bail pending appeal had no merits.

The appellant submitted that the offence of Defilement was bailable. Therefore, he was of the view that unless the prosecution persuaded the court that there were compelling reasons to warrant a denial of bail, it was his constitutional right to be granted bail.

The appellant also indicated that he was ready, able and willing to comply with any such reasonable terms or conditions as the court may impose upon him, when granting him Bail or Bond.

Finally, the appellant reiterated that he never failed to attend court, during the trial, even though he was out on Bail.

As the appellant did not highlight any particular ground of appeal as constituting the primary foundation for his belief that his appeal was likely to succeed, it was difficult for the court to know what the appellant's assessment was pegged on.

Of course, the Petition of Appeal was available to this court. It was thus arguable that this court could simply give consideration to the grounds of appeal, and determine whether or not the appeal had overwhelming chances of success.

Much as that is a possibility, I do not think that it would be a prudent way of handling an application for bail pending appeal. I say so because it is not the function of the court to advance the cause of either the appellant or the respondent. My function, as a court, is to adjudicate on the issues placed before me.

The process of adjudication comes into play after the rival parties have put forward their respective cases, for consideration. Therefore, when the appellant did not advance his case, the court could not step into his shoes.

In any event, I have found nothing which was so glaringly wrong with the judgement, or the manner in which the learned trial magistrate presided over the trial, that could vitiate either the trial or the judgement.

The issue of the complainant's age was addressed by the Child Health Card.

As regards the amendment to the charge, the same was done very early in the proceedings. The first witness was still giving evidence. And she was thereafter cross-examined by the appellant. On a prima facie basis, I cannot see anything wrong with the decision to allow the amendment at that stage.

The other point raised in the Petition of Appeal was as regards the absence of **“Foreign sick evidence.”** I would like to believe that the appellant intended to make reference to **“Forensic Evidence.”**

I know of no general rule of law that requires the investigating officers to ensure that samples were taken from both the complainant and the accused person for purposes of analysis.

If samples were taken but not analysed, it may be important for the prosecution to explain that omission.

Or if there was evidence which was barely sufficient, together with the possibility that another person may have been the perpetrator of the offence of rape, then there may have been a need to get further evidence that would definitely link-up the accused to the victim.

The circumstances in this case do not appear to fall within that kind of scenario.

In summary, the appellant failed to demonstrate to me that his appeal has overwhelming chances of success.

Finally, the record shows that the appellant failed to attend court on 12th December, 2011 when he was out on Bond. Consequently, a warrant was issued for his arrest.

On 28th March, 2012, the trial court noted that the accused had absconded from the court for about 2 months.

That fact did not help advance the appellant's plea for bail pending appeal.

I therefore reject the appellant's application for bail.

I make no order as to the costs of the application.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 29TH DAY OF APRIL, 2014

FRED A. OCHIENG

JUDGE