



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 4 OF 2014

GIDEON CLAIN KARAKACHA APPELLANT/APPLICANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the Judgment , Conviction and Sentence of Hon. C. G. Mbogo (Chief Magistrate) in the Chief Magistrate's Criminal Case No. 4306 of 2012 delivered on 17th January, 2014)

RULING

The Appellant Gideon Clain Karakacha by Notice of Motion dated 28th day of February, 2014 prays that there be a stay of execution of sentence against the accused in Eldoret Chief Magistrate's Criminal Case No. 4306 of 2012, Republic -Vs- Gideon Clain Karakacha pending the hearing and determination of this appeal and that he be released on bail/bond pending the hearing and determination of this appeal.

The application is on the following grounds:-

- 1. That the Appellant being dissatisfied with the judgment, conviction and sentence by the trial court has preferred this appeal.***
- 2. That the appeal herein is merited and has high chances of success.***
- 3. That the Appellant is already serving the sentence appealed against and will suffer irreparable harm should the appeal herein be allowed.***
- 4. That the final hearing and determination of the appeal herein is likely to take a long period of time hence this application.***
- 5. That the Appellant is not likely to abscond court sessions.***
- 6. That the Appellant is willing to comply with conditions of this court.***
- 7. That the Appellant has constitutional rights to apply for bail/bond.***
- 8. That this application is made timely and in utmost good faith.***

It is further supported by the Applicant's own affidavit sworn on 28th February, 2014.

The gist of the Supporting Affidavit is that the appeal has high chances of success, that he was granted a bond of Ksh. 200,000/= by the trial court and so he is unlikely to abscond if granted bond in the appeal and that he is willing to abide with the conditions that this court shall set for his release on bond.

In submissions, learned counsel for the Applicant, Mr. Namiti submitted that the prosecution's case was riddled with contradictions and was not sufficient to sustain a conviction against the Appellant.

He further submitted that, although the Applicant was initially charged with only one count of defilement, the charge sheet was amended with the effect of including 27 counts.

He submitted that, during the defence hearing he applied to have the complainant's clothes examined but the request was declined by the court. He stated that the examination of the clothes was necessary given that another suspect by the name Jack had been adversely mentioned. It would then be ruled out that the said Jack did not also defile the complainant.

He submitted that there was evidence particularly by DW1 that the complainant had other boyfriends including Jack and that at one time DW1 had found the complainant in Jack's house. In this respect, it was not conclusive that although the complainant had had sex, the same was with the Applicant.

In addition, Mr. Namiti submitted that the court did not take into account the defence of the Applicant. He also submitted that the Applicant has a heavy family responsibility and ought to be released on bond.

Learned state counsel, Miss Oduor opposed the application. She submitted that the prosecution tendered overwhelming evidence against the Applicant and that the appeal had no chance of success. She submitted that the Applicant had cohabited with the complainant and had had sex with her between 14th September and 10th October, 2012. Hence it was immaterial whether the complainant had had sex with someone else. She said that, although the complainant knew one Jack, there was no evidence that she had sex with him.

Factors to be considered in granting bail pending appeal were laid down in the case of **DOMINIC KARANJA -VS- REPUBLIC (1986) KLR, 612** in which the Court of Appeal said as follows:-

“The most important issue was that if the appeal had such overwhelming chances of success there was no justification for depriving the Applicant of his liberty and the minor relevant considerations would be whether there were exceptional circumstances. The previous good character of the Appellant and the hardships, if any facing the family were not exceptional or unusual factors.

A solemn assertion by the Applicant that he will not abscond if released, even if supported by sureties is not sufficient ground for releasing a convicted person on bail pending appeal.”

Also, in the case of **ADEMBA -VS- REPUBLIC (1983) KLR, 442**, it was held, inter alia, that;

“1. Bail pending appeal may only be granted if there are exceptional or unusual circumstances.

2. The likelihood of success in the appeal is a factor taken into consideration in granting bail pending appeal. Even though the Appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the

application could not succeed.”

In the Mutua case, court held as follows:-

“1. The main problem was whether the appeal had overwhelming chances of success for if it did not, then this Court would not grant bail pending the appeal by virtue of the Court of Appeal Rules, rule 5 (2) (a).

2. The test was whether there were exceptional or unusual circumstances, the most important being whether the appeal had overwhelming chances of being successful.

3. It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise to set the Applicant at liberty either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.

4. There was no overwhelming probability that the sentence would be reduced since the Appellate court could not deal with the issue of sentence, and on the other grounds, it was not apparent as a matter of law that the Appellant would succeed.”

As regards the success of the appeal, there is very clear evidence that the Applicant took in the complainant on 14th September, 2012 and stayed with her upto 10th October, 2012 when the complainant decided to go home. During this period, the Applicant had sexual intercourse with the complainant. The complainant was below 18 years and this necessitated the drawing up of the charges against the Applicant.

The P3 form produced by PW1, Doctor Cynthia Jemutai showed evidence of penetration into the vagina of the complainant.

Thus, given this link between the Applicant and the complainant coupled with the medical evidence, it cannot be outrightly concluded that the appeal has a high chance of success.

As to the extent of other person's culpability, it is my view the determination should be made by the Judge who will hear the appeal. If I further analyse the grounds of appeal raised by the Applicant I may altogether pre-empt the entire appeal.

May I also candidly point out that the trial Magistrate considered the Applicant's defence before arriving at the finding that he was guilty. An excerpt of the judgment reads:-

“The evidence on record shows that the complainant was aged 17 years old when she had sex with the accused and this is an issue not denied save for his feeble denial that he did not know her I found that the complainant and the other witnesses consistent and credible as opposed to the accused who in my view is a liar. There is no probative value in the evidence of the two defence witnesses. From the foregoing reasons, I am satisfied that there is sufficient evidence to connect the accused with the twenty seven counts that he has been charged with.”

Having said the above, I now consider whether there are any unusual and exceptional circumstances to warrant the granting of the orders sought.

Under this head, the only issue that was raised is that the Applicant has a heavy family responsibility. Counsel for the Applicant did not however expound on the particulars of the responsibility. Be that as it may though, as was held in the case of **ADEMBA -VS- REPUBLIC (Supra)** **“Even though the Appellant showed serious family and personal difficulties, in view of the unlikelihood of success of this appeal, the application could not succeed.”**

A similar scenario obtains in the instant case. Equally therefore the Applicant cannot be granted the orders he seeks.

It is also important to note that the mere fact that the Applicant can afford the terms of the bail or will satisfy the conditions to be set by the court in granting the application, are also not favourable factors to be considered in an application of this nature. It must be borne in mind that he was convicted by a competent court, and that conviction stands unless and until it is quashed and the sentence set aside by an appellate court. In this regard, the request to have the Judgment of the trial court stayed until the determination of the appeal is not tenable.

Accordingly, the application is dismissed in its entirety.

DATED and **DELIVERED** at **ELDORET** this 30th day of June, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Okara holding brief for Omondi for the Appellant/Applicant

Miss Mwaniki for the State/Respondent