

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISCELLANEOUS CRIMINAL APPEAL NO. 3 OF 2014

STEPHEN KIRAGU MUGWE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant moved this court vide a notice of motion dated 30th January, 2014 seeking to be admitted to bail or bond pending the hearing and the determination of his appeal. The motion was brought under section 349 of the Criminal Procedure Code (cap 75) and was supported by the applicant's own affidavit sworn on 30th January, 2014.

It is not clear why the motion was made under section 349 of the Criminal Procedure Code; that section simply states the time within which an appeal should be entered from the date the order or the sentence appealed against. It also makes a provision for extension of time whenever the appeal is not filed within the limitation period. There is nothing to do with bail or bond under section 349 of the Code.

The applicant's counsel told the court that that his client had filed an appeal in High Court Criminal Appeal No. 537 of 2013 against a decision of the subordinate court where the applicant had been convicted of the offence of defilement contrary to section 8(1) of the Sexual Offences Act, No. 3 of 2006 and sentenced to serve 20 years in prison.

The appellant's counsel argued that the appellant's appeal had high chances of success and for this reason it was necessary that the applicant is admitted to bail before the appeal is heard and determined.

The major contention by the appellant was that the age of a complainant is vital element in any offence under section 8 (1) of the Sexual Offences Act and to that extent it must be proved beyond reasonable doubt. According to him, the age of the complainant in the case against him was not established all. Of all the witnesses who testified on behalf of the prosecution, it is only the complainant herself who alluded to her age.

In her response to the appellant's application, Ms Keya for the state asked this court to find that the appellant is serving a lawful sentence. The state counsel contended that there was medical evidence showing that the complainant had been defiled and generally the evidence at the trial was consistent. Counsel did not make any submissions on the issue of the age of the complainant.

I have had occasion to peruse the trial court's record of proceedings and I have not been able to find any evidence that the complainant's age was established by the prosecution. I agree with the learned counsel for the appellant that under section 8 of the Sexual Offences Act, proof of the complainant's age is a mandatory ingredient for any conviction under section. It suffices to say at this stage that without such proof, the appellant's appeal has overwhelming chances of success and if that is the case it may not be of any help to keep the appellant in jail serving a sentence that may very well be overturned.

In the Court of Appeal decision of Dominic Karanja versus Republic (1986) KLR at page 612, it

was held that where an appeal has overwhelming chances of success, there was no justification for depriving the applicant of his liberty.

Again in the Court of Appeal decision of Jivraj Shah versus Republic (1986) KLR 605, the court was also of the view that if it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, then bail should be granted.

I would therefore allow the applicant's application and admit him to bail on the following terms:

1. The appellant shall execute a bond of Kshs. 100,000/= with a surety of the like sum;
2. The appellant shall not leave the jurisdiction of this court without the courts prior permission;
3. The appellant shall report to the deputy registrar, High Court, Murang'a once every month until his appeal is heard and determined.

Dated, signed and delivered in open court this 20th day of June, 2014

Ngaah Jairus

JUDGE