



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 33 OF 2014

LMKAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 122 of 2014 at the Principal Magistrate's Court Wanguru by HON. S.N. NGII – RM on 30/5/2014

RULING

1. This is the Notice of Motion dated 11th June 2014 brought under section 356 Criminal Procedure Code for bail pending appeal. It is supported by the two grounds on the face of the application, and the affidavit of D.G. Ngari an advocate.
2. The State though served did not file any replying affidavit.
3. When the application came for interpartes hearing Mr. Gitonga based his submissions on the following;
 - i. The appellant/applicant is a student in Form 3 at [Particulars Withheld].
 - ii. Witnesses were coerced into recording statements
 - iii. The Defence of the appellant/applicant was never considered.
 - iv. The appeal therefore has high chances of success.
4. In her submissions M/s Mbae learned State Counsel did not oppose the application on the following grounds;
 - i. The appellant/applicant is a student.
 - ii. The appellant/applicant's defence was never considered by the learned trial Magistrate.
 - iii. The appeal has high chances of success.
5. The grounds upon which bail pending appeal may be granted are as follows;
 - i. The existence of exceptional or unusual circumstances upon which a Court of appeal can fairly conclude that it is in the interests of Justice to grant bail.
 - ii. *Prima facie* from the totality of circumstances the appeal is likely to be successful on account of some point of law to be urged.
 - iii. The sentence or a substantial part of it will have been served by the time the appeal is heard.

6. The prosecution called a total of six (6) witnesses. At the time the offence is said to have occurred the appellant/applicant was in the company of two ladies i.e. PW2 and another who was not called as a witness.
7. The evidence of PW2 plus her statement to the police were so contradictory. She in cross-examination stated that she was forced by the brother (Cyrus) to record what she stated in her statement to the police, which statement contradicted what she told the Court in her testimony.
8. From the evidence of the defence the appellant says it's the complainant (PW1) who actually attacked and injured her. The evidence adduced confirms that PW1 was seriously injured as a result of the confrontation between PW1 on one side and PW2, appellant/applicant and another on one hand.
9. The High Court will have to consider all this evidence and choose who to believe between PW1 and the appellant/applicant. The existence of grudges *per se* is not reason to discredit the evidence of the prosecution witnesses.
10. The ground that the appellant/applicant is a Form 3 student at [Particulars Withheld] would be a very exceptional circumstance. However there is no material placed before me to confirm that the appellant/applicant is a student.
11. Even in her defence and mitigation she did not indicate anywhere that she was a student. It is PW1 who said he was a student at [Particulars Withheld] Secondary School – Embu County.
12. I am therefore left wondering where the learned State Counsel M/s Mbae and Mr. Gitonga got the record showing that the appellant/applicant is a student in Form 3 at [Particulars Withheld].
13. Be it as it may, on my assessment of the evidence of PW1 and all other witnesses save for PW2, I would not confidently say the appeal has high chances of success. That will however be for the Court that will be hearing the appeal.
14. However, on the ground of delay of hearing the appeal, I find it to have merit considering that Kerugoya High Court Judge where this appeal ought to have been filed is on leave. I will allow the application on the following conditions:-
 - a. ***The appellant/applicant to deposit a cash bail of Kshs.40,000/=***
 - b. ***The appellant/applicant to execute a bond of Kshs.200,000/= with a surety in similar sum.***
15. This appeal is hereby transferred to Kerugoya High Court for hearing and determination.
16. If the conditions in paragraph 14 are fulfilled the Deputy Registrar must give mention dates when the appellant/applicant should appear until the appeal is heard and determined.

DATED, SIGNED AND DELIVERED AT EMBU THIS 19TH DAY OF JUNE 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Miiri for the Respondent (State)

Mr. Gitonga for Applicant

Njue – C/c

Appellant