



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 78 OF 2013

NOAH KORIR..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 423 of 2012 Republic vs Noah Korir in the Resident Magistrates' Court at Kabarnet by E. Bett, Resident Magistrate dated 17th September 2012)

RULING

1. The appellant was convicted on a charge of attempted rape contrary to section 4 of the Sexual Offences Act, No. 3 of 2006. He was sentenced to seven years imprisonment.
2. The particulars of the charge were as follows-

“On 3rd day of July 2012 at around 9.00 p.m. at [Particulars Withheld] in Baringo County did intentionally and unlawfully attempted [sic] to commit an act which cause [sic] his penis to penetrate the vagina of [name withheld] a woman aged 53 years without her consent.”

3. The appellant has preferred an appeal. The petition of appeal was filed on 22nd April 2014 and raises four grounds. Pending the hearing and determination of the appeal, the appellant has presented a notice of motion praying for bail. The motion is dated 31st March 2014. It is supported by a deposition sworn by the appellant on even date.
4. In a synopsis, the appellant contends that he has an arguable appeal; that the offence was not proved beyond reasonable doubt; that the sentence meted out was harsh and oppressive in all the circumstances of the case; that bail is a constitutional right guaranteed by article 49(1)(h); that the appellant had been admitted to bail in the lower court and faithfully attended his trial; that he is ready to abide by any conditions that may be set by the Court; and, finally, that there are no compelling reasons in this case for denial of bail.
5. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj Shah v Republic* [1986] KLR 605-

“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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is Somo v Republic [1972] EA 476 which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, Daniel Dominic Karanja v Republic

where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.”

6. The appellant faults the trial court for relying on the evidence of PW1 and PW2 which the appellant contends was “doubtful and questionable”. PW1 was the complainant. She testified as follows-

“I know the accused. He is Korir. We are not related. I know his home. It is not far from my home. I remember on 3/7/2012 at 9:00 p.m. I was asleep in my bed when I heard somebody come through the window. I thought it was a cat. Then I saw the accused. I was able to identify him through the moonlight. There was no lantern. He dragged me from the bed to the floor. He covered my mouth with his hand. He then proceeded to rape me”.

7. It would be inappropriate at this stage to comment about the veracity or otherwise of that evidence. I may pre-empt the hearing of the appeal. The other two grounds in the petition of appeal are that the trial magistrate failed to take into account the appellant’s defence; and, that he denied the appellant an opportunity to mitigate the sentence. Like I have said, it will be the true province of the appellate court to re-evaluate all the evidence and draw its own conclusions. In his defence, the appellant stated as follows-

“I am Noah Korir. I come from Kituro. I am not working. I have only been framed up. That is all.”

After his conviction, the appellant stated in mitigation as follows: *“I have nothing to say.”*

8. The appellant was sentenced to seven years jail term. Section 4 of the Sexual Offences Act provides for a term of *“not less than five years but which may be enhanced to imprisonment for life.”*
9. Applying the legal principles I set out earlier, I am unable to say that there are exceptional factors in this case to warrant grant of bail pending appeal. It is true that the appellant had been admitted to bail in the lower court; and that he faithfully attended his trial. It is also true that bail is a constitutional right. But I am alive that the appellant has already been convicted. The *presumption* of innocence no longer holds true. The considerations for grant of bail at this stage are thus markedly different. I am not persuaded that a substantial point of law has been urged or that the sentence or a substantial part of it will have been served by the time the appeal is heard and determined.
10. In the result, the notice of motion dated 31st March 2014 is devoid of merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 18th day of September 2014.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

The appellant.

Mr.....for the appellant.

Ms.....for the State.

Mr. Kemboi, Court Clerk.