



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 262 of 2012

ALPHAXAD GENYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an application for bond from the original Criminal case No.565 of 2012 in SRM's court at Kehancha)

RULING

1. On the 20th December 2012, I delivered a ruling in respect of the Notice of Motion dated 22nd November 2012 refusing the application for bail. By the said application, drawn and filed by the firm of Kerario Marwa & Co. Advocates, the applicant prayed for ORDERS:-

1. *THAT this application be certified as extremely urgent and be admitted in the 1st instance.*
2. *THAT this Honourable Court be pleased to admit the applicant bail pending hearing and determination of the Appeal No..... of 2012 filed by the applicant and now pending before the High Court of Kenya at Kisii.*
3. *THAT this Honourable Court be pleased to admit the applicant to bail pending the hearing and determination of Criminal Suit No.565 at Kehancha.*

2. Inadvertently in paragraph 1 of my said ruling of 20th December 2012, I said that the applicant had been tried, found guilty and convicted of the offence of defilement contrary to **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act**, and that on conviction he had been sentenced to life imprisonment for alleged defilement of a 7-year old girl.

3. Upon delivery of the ruling dated 20th December 2012, counsel for the applicant Mr. Odhiambo Kanyangi, sought a review of my ruling on the basis that the applicant was a remandee and not a convict.

4. In his response to the application, Mr. Mutai, counsel for the respondent submitted that indeed the matter before this court is an appeal by the applicant against the decision of the trial court refusing to grant him bail, and that the case against the applicant was still pending before the trial court. Counsel submitted that the only correction that needs to be made is with regard to paragraph 1 of the ruling dated 20th December 2012 in which the court said that the applicant had been convicted of the charge of defilement and sentenced to life imprisonment.

5. In reply, Mr. Odhiambo submitted that there was an error apparent on the face of the record, and that

in the circumstances, the court ought to review the whole ruling since the conclusion may have been reached on the assumption that the applicant was a convict.

6. I have looked at my ruling dated 20th December 2012 and note that paragraphs 1, 2 and 5 thereof refer to the applicant herein as a convict. The correct position is that the applicant who has appealed against the ruling of the trial court denying him bail is a remandee awaiting trial.

7. Although counsel for the applicant in this case did not name any section of the law under which he made his application, it appears to me that he may have had in mind the provisions of **section 382** of the **Criminal Procedure Code** which section reads as follows:-

“382. Subject to the provisions hereinabove contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

8. From the above provisions, it is clear that an error, omission or irregularity in the order and ruling dated 20th December 2012 does not give rise to an automatic revision/review in favour of the applicant.

This court must be satisfied that the error, omission or irregularity has occasioned a failure of justice and whether the applicant could have raised the objection at an earlier stage in the proceedings.

9. In the instant case, there was no way the applicant could have known that he was referred to as a convict until the ruling was read out to him. Secondly, the error in this case is that the applicant was referred to as a convict when he is only a remandee awaiting the trial and determination of his case now pending before the court at Kehancha. Can it then be said that the fact of the applicant being referred to as a convict in paragraphs 1, 2 and 5 of my ruling has caused a failure of justice?

10. After carefully considering submissions by counsel vis-à-vis the reasons given in my ruling of 20th December 2012, I do not think that the fact of referring to the applicant as a convict has occasioned a failure of justice in this case. In parts of paragraph 5 and in paragraphs 6, 7 8 and 9 of the ruling, I gave my reasons that informed my decision to refuse to grant the applicant bail pending appeal.

11. In the circumstances, I do not find it necessary to interfere with the conclusion I reached on the bond application. I will however correct the error apparent on the record by making the following adjustments to paragraphs 1, 2 and 5 of the ruling:-

Paragraph 1 shall read:

“1. The appellant herein, Alphaxad Genya was arraigned before the Kehancha Senior Resident Magistrate’s Court on 2 counts. In

Count I he is charged with defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No.3 of 2006. In Count II, he is charged with the offence of committing an indecent act with a child contrary to section 11 (1) of Sexual Offences Act No.3 of 2006. The two offences are alleged to have been committed on the 5th November 2012 at Kehancha township in Kuria West District within Migori County.”

Paragraph 2 shall read:-

“2. The appellant applied to the trial court to be released on bond pending hearing and determination of his case. The application having been refused, he has appealed to this court against the ruling and also applied vide a Notice of Motion dated 22nd November 2012 seeking to be admitted to bail pending hearing and determination of his appeal.”

Paragraph 5:

“The whole of the third sentence in that paragraph shall be deleted”.

12. It is so ordered.

Dated and delivered at Kisii this 30th day of January, 2013.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Kerario Marwa for Kisera for Applicant

Mr. Shabola (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.