REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 34 OF 2013

(Being an appeal against the Judgment and sentence of Hon. Nthuku Senior Resident Magistrate at the Chief Magistrate's Court Adult Criminal Case No. 52 of 2011 at Nakuru dated 11th March 2013)

JOSEPH KAMAU GITHU ….....APPELLANT/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION ….....….....RESPONDENT

RULING

Joseph Kamau Githu in this ruling referred to as *("the Applicant")* was charged in Nakuru Chief Magistrate's Court Criminal Case No. 52 of 2011 with one principal count.

1. ***Defilement contrary to Section 8 (1) read together with section 8 (2) OF The Sexual Offences Act 2006 and one alternative charge,***

2. ***Indecent act with a child contrary to Section 11 (1) of the Sexual Offffences Act 2006 (No. 3 of 2006).***

2. He was on the evidence convicted on both the principal charge and sentenced to life imprisonment, and to 25 years imprisonment on the alternative charge of indecent act with a child, and the sentences were ordered to run concurrently. The applicant was aggrieved by both his conviction and sentence. He filed an appeal in this court being Nakuru H. C. Criminal Appeal No 34 of 2013.

3. However before the appeal could be admitted and argued the applicant came to this court with an Miscellaneous Application No. 16 of 2013. It is that application that is the subject of this Ruling. The Application is dated 19th March 2013, and the Applicant seeks the following orders:-

(a) That the Application be certified urgent and heard exparte in the first instance.

(b) That the appeal herein be admitted for hearing on priority basis.

(c) That the court do admit the Appellant to bail/bond by releasing him on favorable conditions pending the hearing and determination of the appeal herein.

(d) That the sentence imposed upon the Applicant in a Ruling delivered by the Hon. Trial Magistrate on 11th March 2013,be suspended pending the hearing and determination of the appeal filed herein.

4. The Application was based upon the Supporting Affidavit *(not of the Applicant)*, but of his Advocate Njoroge Wachira Esq, and the arguments on the face of the Application. Said counsel appeared before this court on 19th March 2013, and I certified the application, as urgent and in addition suspended the warrants of arrest issued against the applicant for non – attendance of court on several occasions both the delivery of the judgment by the lower court. These orders have been extended from time to time, pending the hearing inter-partes, and this Ruling.

(5) This Ruling therefore principally concerns prayers 3 *(admission to bail pending appeal, and suspension of th sentence pending appeal).*

(6) Learned counsel for the Applicant submitted that the appeal has overwhelming chances of success. The main ground for this submissions is based upon the fact that judgment was read and sentence was pronounced in the absence of both the applicant and his counsel, and that this constituted a miscarriage of justice.

(7) To determine whether the delivery of judgment in the absence of either the Applicant and his counsel constituted a miscarriage of justice, it is necessary to examine, keeping in mind the fact that this is a Ruling on a bail application and not on the appeal.

(8) The lower court shows that after the full hearing of the prosecution and defence case, the parties made their submissions on 26/11/2012 and the court ordered that judgment would be delivered on 21/1/2013. The court was, for good reason was not sitting on this date. The matter however came up on 4/2/2013. The Applicant was absent from court but his counsel was present. Counsel explained to the court that the applicant was sick on that day and that he had been put to two weeks bed rest and could not therefore attend court. There was however no documentation produced to support these submissions and the court quite properly issued orders for warrant of arrest against the Applicant. The delivery of the judgment was deferred to 18/2/2013. Counsel for the Applicant submitted proof that the Applicant had been taken ill and further made an application for the trial magistrate to recuse herself from hearing the case on the alleged ground that she was not being fair to the Respondent.

(9) Following the production of documentary proof that the applicant had been unwell, the warrant of arrest was lifted but the application for recusal was properly rejected and disallowed. The matter was consequently set down for judgment on 27/2/2013 at 2.30 pm when a Mr. Chege Advocate held brief for the Applicant's counsel but again the Applicant was absent. This Mr. Chege informed the trial court that the was not aware of the whereabouts of the Applicant, and had been instructed to collect the judgment. The trial magistrate once again issued warrants of arrest against the Applicant and deferred the judgment to 1/3/2013. On that date neither the applicant nor his counsel attended court.

(10) At the same time the court's Prosecutor informed the trial magistrate that they had been unable to execute the warrants allegedly because the applicant could not be traced. The court consequently directed that the matter be mentioned on 11/3/2013. Whereas this date was given in the absence of both the Applicant and his counsel, they offered no explanation as to whether or not Mr. Chege whom the applicant's counsel had sent to collect the judgment on 27/2/2013 had not informed them that the judgment would be delivered on 1/3/2013. There was also no averment in the Affidavit of Njoroge Wachira, the Applicant's Advocate, that he had sent Mr. Chege to collect the judgment on 1/3/2013 and that Mr. Chege would invariably have informed them that the matter would be mentioned on 11/3/2013, when the court decided to deliver the judgment.

(11) Mr. Chirchir, learned Prosecution Counsel conceded that judgment was delivered in the absence of the applicant. Said counsel was however quick to add that the Applicant had been accommodated severally, and from the record, it was clear that the applicant was deliberately delaying the conclusion of the trial by delivery of judgment, and had gone underground and could not be traced as the court Prosecutor had informed the trial magistrate. The trial court could therefore not be faulted for delivering the judgment in the Applicant's absence or that of his Advocate.

(12) I entirely agree with the submissions by Prosecution Counsel. In any event the absence of the

applicant did not invalidate the judgment by virtue of Section 168 (3) of the Criminal Procedure Code, *(Cap 75, Laws of Kenya)* which provides:-

Section 168

(1) .....

(2) .....

(***3) No judgment delivered by a court shall be invalid by reason only of the absence of a party or his advocate on the day or from the place notified for the delivery thereof, or of any omission to secure, or defect in serving on the parties or their Advocates or any of them, the notice of the day and place.***

(13) On the question of sentencing the Applicant's Counsel argued that the applicant was not granted an opportunity to mitigate before being sentenced to life imprisonment. It is correct that emerging jurisprudence over the last decade or so suggests that even in instances where the law provides for only one punishment, the court should nevertheless allow the convicted person to be heard on any mitigating factors before sentencing. One such recent case is **EDWIN OTIENO ODHIAMBO VS. REPUBLIC [2009] eKLR** where the court said:-

> ***"We are of the view that the superior court had a duty to record the mitigation after a conviction and before sentencing. This statement is not a re-invention of the wheel"***

That court also cited with approval, the following holding in the case of **JOHN MUKI MUOKI Vs REPUBLIC** *(Criminal Appeal No.72 of 2007 unreported)-*

> ***"As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because in mitigation, matters such as age, and pregnancy in cases of women convicts, may affects the sentence even in cases, where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentence should be reserved and be pronounced only after the court receives mitigating circumstances if any, are offered".***

Article 50 *(2) of the Constitution of Kenya 2010),* provides:-

"50 (1).....

2. ***Every accused person has a right to a fair trial, which includes: the right.***

(a) - (e)

(f) to be present when being tried unless the conduct of the accused person makes it impossible for the trial to proceed".

(14) There is no question that judgment and sentencing are twin ultimate parts of a trial and mitigation is an important congruent part of it. However, in view of the antecedents to the delivery of judgment, the applicant cannot be heard to claim either that he did not receive a fair trial or that he was denied an opportunity to mitigate for the purpose of sentence. The Applicant by his conduct appeared disinterested in hearing the judgment in respect of the serious charges of defilement leveled against him. The trial court was in tandem with the provisions of Section 168 (3) *(supra)* of the Criminal Procedure Code, perfectly in order to deliver its judgment, and also to sentence the applicant in his absence.

(15) The second aspect of the Applicant's case for bond pending appeal related to the evidence before the trial court. Counsel for the applicant cited part of the evidence of PW1 and PW2. For instance

in cross examination, PW1, also testified -

> ***"I have done tabya mbaya" before with M. That is another boy. I did not feel pain. M is my school mate, we did it in our house".***

(16) The Clinical Officer (PW4) admitted during cross examination that the wounds on PW1 were old and that she must have been injured before the date of the alleged defilement.

(17) Counsel for the Applicant also submitted that PW1 must have been coached because during cross examination PW1 testified:-

> ***"…….Mama M told me to come and say that B M (the accused) is bad..... but B M is not a bad person. My mother told me to come and say B M did to me bad manners"***

(18) On alleged victim PW2 Counsel for the applicant submitted that the medical examination report showed that her hymen was intact and there were no bruises or injuries to her private parts. There was no indication that she had been defiled.

(19) These issues raised by counsel for the Applicant indicate that there is a need for the appellate court to re-evaluate the evidence adduced before the trial court in order to arrive at its own independent findings and conclusions on whether or not the charges against the applicant were proved beyond reasonable doubt as is required by law in all criminal matters. However, as I have already observed above, I should not pre-empt the appeal or usurp the functions of the appellate court by purporting to analyze and re-evaluate the evidence in order to determine the applicant's appeal has merit. That is clearly the function of the appellate court. I have consequently restrained and restricted myself from addressing pertinent issues and evidence. Nevertheless the issues raised by the applicant's counsel are both fundamental and substantial and may require to be addressed by way of an appeal.

(20) However, the fact that the Applicant had an arguable appeal is not sufficient to warrant this court from granting the applicant the orders sought. The applicant must also demonstrate rare and special circumstances in order to be granted bail pending appeal. This is because at this stage, the applicant has lost his presumption of innocence. He has been found guilty and convicted and sentenced by a competent court of law. In **MUIDIA VS REPUBLIC (1986) KLR 623,** one court said:-

> ***"There is a presumption that once a person is convicted he was properly convicted. Bail pending appeal may be granted where there is a risk and the sentence will have been served by the time the appeal will be heard. But there must exist the major issue of the overwhelming chance of the appeal in the first place."***

(21) In **ABDUS VS REPUBLIC [1991] KLR 171** the court held -

> ***"The appellant has already been convicted by a competent court and his position and status before the court is markedly different from that of a person who is to face trial the situation is materially different and is comparatively in favour of an applicant"***

In **ISAACK TULECHA GUYO VS. REPUBLIC [2011] eKLR** the court held:-

> ***"The court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by the Constitution and that during the hearing of the pending appeal the burden would be upon the convicted person to show that the conviction was wrong. It is not therefore surprising that it has been stated time and time again, that bail pending appeal will only be granted in rare and exceptional circumstances".***

(22) In determining the application for bail pending appeal, the court should therefore exercise its discretion judiciously keeping in sight all the facts relating to the application, all the matters material to

the trial at the lower Court, grounds submitted in the petition of Appeal and the chances of success, **(Isaac Tulicha Guyo vs Republic *(supra)*.**

(22) In the present case, it was submitted that the Applicant are old man aged 75 years, and that at the time of filing the application he had been admitted at Kenol Hospital *(off the Thika – Nyeri – Mt. Kenya Highway) (and not any of the Hospitals in Nakuru or Nairobi)*, and the medical report of admission and other medial reports were annexed to the Applicant's counsels Supporting Affidavit. Whereas there are all circumstances which would persuade the court to grant the Applicant bail, his conduct before the trial court make this court apprehensive that he may be jump bail. The appellant did absent himself from the trial court on several occasions and in particular on 27/2/2013 and on 1/3/2013 when his counsel knew that the matter would be in court and no reasons were given for his absence.

(23) The Prosecutor before the trial court informed the court that the Police had been unable to execute Warrants of Arrest issued against the applicant as he could not be found in his usual place of residence and his whereabouts were unknown. At one instance, upon information of the complainants mother, the trial court was suspicions that the appellant may have left the jurisdiction. For these reasons, I am not entirely convinced that the applicant will not jump bail and should not perhaps be released on bail. I will however, grant the applicant the benefits of doubt and grant him bail pending appeal on these terms:-

(1) He deposits his passport with court.

(2) He executes a bond of Kshs 500,000/= with a surety of the same amount.

(3) He goes to jail pending compliance with the orders (1) and (2).

(4) The record of appeal be compiled and filed within the next 60 days.

(5) The appeal be heard on priority on account of the applicants age.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of June, 2013B

M. J. ANYARA EMUKULE

JUDGE