



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO. 90 OF 2013**

**CALEB WAAYI BARASA.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The Applicant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** and an alternative charge of indecent assault of a female contrary to **Section 11(1)** of the **Sexual Offences Act**. He was convicted and sentenced to twenty (20) years imprisonment. Being dissatisfied, the Applicant lodged an appeal through **HC Cr. Appeal No. 79 of 2012** to challenge the conviction and sentence.
2. He has now come to Court by way of a Chamber Summons under **Section 357** of the **Criminal Procedure Code** dated 26<sup>th</sup> March 2006 seeking to be released on bail pending the hearing and determination of the appeal. The salient reasons that the Applicant gives in support of his Application are that the Appeal has overwhelming chances of success and that given the time it will take to hear the appeal, if successful, the sentence will be rendered nugatory. The Application is supported by the Affidavit sworn by Francis Etole, Advocate for the Applicant, dated 26<sup>th</sup> March 2013. He depones that the appeal raises serious issues of law and has overwhelming chances of success taking into consideration the errors on the Court records. He also depones that the Applicant always attended lower court proceedings when required to and will always continue to do so if released on bail pending appeal.
3. The parties filed written submissions. In submissions made on his behalf, the Applicant submitted that the Appeal has overwhelming chances of success for the reason that the prosecution did not prove the element of intention, a factor which the trial Magistrate overlooked when drawing a conclusion as to the guilt of the Applicant. Further, the Applicant submitted that the trial Magistrate failed to take into account of the fact that the evidence of **PW1**, which differed with that of **PW2** and **PW5** on the issue of the year of her birth, was not corroborated as is the requirement under **Section 124** of the **Evidence Act**. The Applicant relied on the reasoning of the Court in the case of ***James Njiru v Republic Criminal Appeal No. 135 of 2000***.
4. The Applicant also submitted that there are unusual or exceptional circumstances that warrant the grant of prayers sought in the Application. In support of this assertion, the Applicant invited me to consider the decision of the Supreme Court of Uganda in the case of ***Arvind Patel v Uganda SCCC Application No. 20 of 2011***, where the Court set out the factors to consider in granting

bail pending the hearing and determination of an appeal including the character of the applicant, whether or not he is a first offender and the substantial delay in the determination of the appeal. In this regard, it was submitted that the Applicant was 21 years old at the time of the alleged offence with no previous convictions and further that the Applicant reasonably believed that the Complainant was his wife. It was further submitted that the Applicant had demonstrated good character during the hearing and would undertake to do the same during the hearing of the Appeal.

5. It was further argued that there has been substantial delay in hearing of the appeal and the Applicant has been serving his sentence since 2009. The Court was urged to take into consideration the time it will take to hear the Appeal and allow the Application. In this regard, the Applicant relied on the cases of ***Simon Mwangi Kirika v Republic (2006) eKLR*** and ***Jeffrey Kitwake Wabuge & Another v Republic 2006 eKLR***
6. The Respondent opposed the Application and submitted that the prosecution established its case beyond reasonable doubt and there are no overwhelming chances of success of the appeal. On the issue of the age of the Complainant that was contested by the Applicant, the Respondent submitted that the issue was not in contention since the same was confirmed through the Birth Certificate that was produced by **PW7**, the production of which was not objected to by the Applicant.
7. The Respondent further submitted that the Applicant's defence that he did not know that the Complainant was aged 15 years at the time could not suffice for the reason that he did not show to the Court of any misrepresentation by the Complainant as to her age. and therefore, he ought to have taken the necessary steps to establish the age of the Complainant before purporting to marry her. The Respondent added that the Applicant, despite having been informed by the Complainant that she was in school, did not make any effort to ascertain her age. The Respondent submitted that the assertion by the Applicant that the complainant was his wife is not a defence available to him under the Sexual Offences Act. The Respondent added that contrary to the Applicant's submission, the provisions under which the Appellant was convicted did not require the prosecution to prove the element of intention.
8. The Respondent urged the Court to note that the attendance of the Applicant could not be guaranteed having been convicted of a serious offence that attracts a severe sentence. The Respondent dismissed the Applicant's argument that there has been substantial delay in the hearing of the appeal since the appeal was filed in 2012 despite the fact that the case was concluded in 2009. The Respondent urged that the Applicant did not demonstrate any ground upon which the Application can be considered and urged the Court to disallow it and order the Appeal to be heard and determined on priority basis.
9. Under the provisions of **Section 357 of the Criminal Procedure Code**, the Court has discretion to release a convicted person on bail pending the determination of the appeal. The Court must primarily be alive to the fact that the Applicant does not enjoy the presumption of innocence since he has been convicted, and the the presumption is that when the applicant was convicted, he was properly convicted. ( ***Somo v Republic, Criminal Application No. 105 of 1972, [1972] EA 476***). For this reason, the Applicant bears the burden of showing the Court that the appeal has overwhelming chances of success. This was well stated by the Court in the above cited case that:-

**“There is little, if any, point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court.....he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed.”**

10. The Applicant relies on the fact that the prosecution did not prove the element of intention in the offence of defilement. It is his submission that the trial Court failed to consider the inconsistency

on the age of the Complainant, thus, the trial Magistrate in convicting him, relied on extraneous matters. Further, the Applicant believes that the trial Court erroneously relied on uncorroborated evidence of the complainant contrary to the provisions of **Section 124** of the **Evidence Act**. On the age of the Complainant, PW2 corroborated the age of PW1, which is further given credence by the documentary evidence. Further, even with the inconsistency referred to, the same does not overturn the fact that the Complainant was a minor at the time of commission of the offence. I do not wish to preempt the appeal by evaluating and analyzing the issues in detail which is for the appellate court to consider. However, I have considered the issues raised in the Amended Petition of Appeal, the submissions and authorities cited and the record of proceedings of the trial Court. I am not persuaded that the Applicant has demonstrated overwhelming chances of success of the pending appeal.

The fact that there is a risk of delay in the hearing of the appeal thus, the applicant may have served substantially part of the imprisonment term imposed by the trial court is secondary to the existence of overwhelming chances for the success of the appeal. The judgment in this matter was delivered on 9<sup>th</sup> November 2011. The Applicant was convicted and sentenced to 20 years imprisonment. This being a single Judge appeal, the hearing is likely to be before the end of the year. Furthermore, the circumstances in the cases relied on by the Applicant on this issue are different and do not render any support to the Applicant's case. The principles applicable in Uganda as supported by the corresponding authorities cited do not apply in our jurisdiction. The assertion that there might be delay in the hearing of the appeal, and the good character of the Applicant do not point to any exceptional circumstances. Accordingly, this Application is dismissed.

Orders accordingly.

**SIGNED DATED and DELIVERED in open court this 11<sup>th</sup> day of July 2013.**

**A.MBOGHOLI MSAGHA**

**JUDGE**

**Section 124 Evidence Act**

Evidence of a child can be relied upon even when not corroborated. The evidence of PW1 was supported by PW2 and backed by documentary evidence, the birth certificate.