



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 37 OF 2013

ALFRED KIBET KORIR APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

Alfred Kibet Korir, the Appellant/Applicant has taken out the Motion dated 22nd August, 2013, in which he beseeches this court to release him on bail/bond pending appeal. He has deponed in the affidavit he swore and filed in support of the Motion that he has an appeal with overwhelming chances of success and that unless he is given the orders his appeal will be rendered nugatory Mr. Mutai, learned Senior Prosecution Counsel, opposed the Motion claiming the Appellant has not shown exceptional or unusual circumstances. He also stated that the appeal has no overwhelming chances of success. Mr. Mutai further pointed out that the sentence of 20 years is enough enticement for the appellant to jump bail.

I have considered the rival submissions and the material placed before me. Before I can delve into the merits or otherwise of the motion, let me state in brief the case that was before the trial court. The Appellant was arraigned before the Senior Resident Magistrate's Court, Sotik to face a charge of defilement contrary to **Section 8(1) (3) of the Sexual Offences Act**. After undergoing a full trial, the learned Ag. Senior Resident Magistrate convicted him and sentenced him to serve 20 years imprisonment. Being aggrieved by the decision the Appellant preferred this appeal. In his petition of appeal, the Appellant put forward the following grounds:

1. **That the learned trial magistrate erred in law and in fact by failing to note that there no eye witness in this matter and the P3 form speaks for itself.**
2. **That the learned trial magistrate erred in law and in fact by relying on the evidence of PW1 and PW2 which was inconsistent.**
3. **That the learned trial magistrate erred in law and in fact by failing to evaluate that DNA results exclude the Appellant as the victim's child father.**
4. **That the learned trial magistrate erred in law and in fact by failing to consider the evidence of the defence.**
5. **That the learned trial magistrate erred in law and in fact by holding that the prosecution had proved its case beyond reasonable doubt without supporting evidence and in view of the unresolved contradiction in the prosecution case.**
6. **That the learned trial magistrate erred in law and in fact by convicting the Appellant despite**

the contradiction in dates of commission of the offence.

- 7. That the learned trial magistrate erred in law and in fact when she misdirected herself on the applicable law and procedure in conduct of the matter.**
- 8. That the learned trial magistrate erred in law and in fact by conviction and sentencing is not supported by the evidence on record as the prosecution failed to prove its case beyond reasonable doubt.**

Pending the hearing and determination of the appeal, the Appellant prays to be admitted to bail. The principles to be considered in such an application were restated by the **Court of Appeal in Ademba -vs- R [1983] K.L.R. 442** in which the Court of Appeal held inter alia:

“1. Bail pending appeal may only be granted if there are exceptional or unusual circumstances.

- 2. The likelihood of success in the appeal is a factor taken into consideration in granting bail pending appeal. Even though the Appellant showed serious family and personal difficulties, in view of the unlikelihood of success in this appeal, the application could not succeed.**
- 3. The Court of Appeal has no jurisdiction to entertain an appeal from a refusal of the High Court to grant bail to a convicted person pending an appeal against the decision of that court.**
- 4. The applicable law regarding applications to the High Court for bail pending appeal were sections 356 and 357 of the Criminal Procedure Code (Cap 75) and not section 379(4) as stated by the Appellant's advocate”**

The Appellant has specifically stated that his application should be allowed on the ground that his appeal has overwhelming chances of success. The Director of Public Prosecution is of the view that the appeal has slim chances of success hence the motion should be rejected. I have critically examined the grounds of appeal put forward. I have also re-evaluated the recorded evidence presented before the trial court. A total of five witnesses testified in support of the prosecution's case while the Appellant testified and summoned his wife to testify in support of his defence. The particulars of the offence are that on diverse dates between September, 2010 and May, 2011 at [particulars withheld] Bomet County, intentionally caused his penis to penetrate the vagina of S.C a child aged 13 years. The victim informed the trial court that she used to visit the Appellant's house where she had sex with him on several occasions between September, 2010 and May, 2011. The victim stated that she became pregnant in the month of May, 2011. It is apparent that the complainant left her parents' home for many days before she was found. In cross-examination, the victim claimed that one Titus used to also live in the Appellant's house when she visited that home. The complainant's father (PW2) told this court that his daughter (complainant) left home for an unknown destination until the family later learnt she was with her brother in Narok. The complainant with the help of the area chief was later apprehended. She was interrogated and that is when it is said she revealed having had an affair with the Appellant during her absence from home. Upon receipt of the aforesaid information the Appellant was tracked down and arrested. In cross-examination, PW2, the victim's father confirmed that he knew one Titus lived with the Appellant. It is the evidence of PW3 that the Appellant was arrested alone. One Mathew Keter (PW4), a Clinical Officer attached to Kapkatet District Hospital said he examined the victim and found her not pregnant though her hymen was broken. PW4 stated that no age assessment was done on the victim. There was also no trace of spermatozoa. P.C. John Wambua (PW5) told the trial court that on 10.5.2011 he received a complaint that the Appellant had defiled the complainant. PW4 said he took the victim and the Appellant to Kapkatet District Hospital for medical examination. He claimed the victim's age was ascertained. The prosecution closed its case after which the learned Resident Magistrate issued an order directing the Appellant to undergo a DNA test pursuant to the provisions of **Section 36(1)** of the **Sexual Offences Act**. The order is to the effect that it was meant to ascertain whether or not the Appellant was the father of the victim's child. The test did not connect the Appellant with the child. In other words the Appellant was convicted on the word of the victim. I have taken time to examine the prosecution's evidence which

was used to convict the Appellant. The learned trial magistrate stated that there is evidence from the victim which the court can believe that there was sexual intercourse. I have already put bare the grounds of appeal. The question is whether the appeal has overwhelming chances of success? One of the grounds of appeal is to the effect that the Appellant was convicted on contradictory evidence and that the case against the Appellant was not established to the standard of beyond reasonable doubt. In my humble view, I have no doubt that the Appellant's appeal has overwhelming chances of success. On this ground alone, I will allow the Applicant's motion. The Appellant is hereby admitted to bail/bond pending appeal. The Appellant may be released from custody upon signing a bond of Kshs. 100,000/= with one surety of like sum or in the alternative he may be released on a cash bail of Kshs. 50,000/=.

Dated, signed and delivered this 20th day of September, 2013

J.K. SERGON

JUDGE

In open court in the presence of Mr. Bii for Applicant and

Mr. Mutai for the Respondent