



Phillip Barasa Mukhwana V Republic

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL NO.47 OF 2012

(Being appeal from the ruling of Principal Magistrate Hon. E. C. Cheronno in Webuye court in cr. case no.975 of 2011)

PHILLIP BARASA MUKHWANA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with subjecting a child to sexual exploitation contrary to section 15 as read with section 20 of the Children's Act no.8 of 2001 whose particulars were that on diverse dates between December 2009 and June 2011 at M village in Webuye Location in Bungoma East District of the Bungoma County he subjected M N M a child aged 17 years to sexual exploitation an act which resulted in pregnancy and forced her to drop out of school. He pleaded not guilty and was released on bond of Ksh.200,000/= with two sureties to await trial.

During trial, the complainant (PW1) testified as did her mother T W M (PW2). The case was adjourned to get the investigating officer and clinical officer to testify. When the matter next came up the witnesses were not present. The prosecutor then applied that the Appellant's bond be cancelled because he was living with PW1 and therefore "*interfering with prosecution witnesses.*" The prosecutor was relying on a

report from a children's officer. The Appellant agreed that PW1 had come to live with her saying she was otherwise going to commit suicide. The court agreed to cancel the bond after finding that because the Appellant was staying with PW1 he was interfering with prosecution witnesses.

This appeal challenges the cancellation of the Appellant's bond. The contention by Mr. Ocharo for the Appellant was that the cancellation of bond was both arbitrary and unconstitutional. Mrs. Leting for the State conceded the appeal.

The Appellant was on bond to which he was entitled under Article 49 (h) of the Constitution of Kenya, 2010. His bond was cancelled on the allegation that he was interfering with prosecution witnesses. The witness allegedly being interfered with was the complainant. The record shows that the complainant and her mother had already testified, and there was no indication that they were going to be recalled. The Appellant was therefore not going to influence the evidence of the complainant as it had been tendered. It should be noted that interference with a witness as a factor to be considered when dealing with the issue whether or not to release an accused to bail relates to the protection of the evidence that the witness is going to give at the trial. When there is a substantiated claim that the accused will interfere with a prospective witness by seeking to influence what the witness will tell the court during trial the court has to step in and may order that the accused be remanded in custody. There is no danger to the evidence or the trial where the witness has already testified.

The evidence of the complainant was that she was living with the Appellant as wife and husband and they had got a child. The prosecution case was that the complainant was below 18, and therefore a child. The evidence of her mother was that

“My daughter is living with the accused.”

It follows that when the prosecutor waved the children officer's report which said that the complainant had gone to stay with the Appellant he was not saying anything new. If the prosecutor wanted the complainant to be protected by being kept away from the Appellant he should have said so. The court had not made any order in regard to the complainant which the Appellant had disobeyed.

The result is that the Appellant had not interfered with any prosecution witness and therefore the order canceling his bond had no factual or legal basis. It was an unnecessary curtailment of the right of the Appellant to bail. The appeal is allowed. The order canceling bond is set aside. The Appellant shall continue being on bond as he awaits the finalization of the case.

Dated, signed and delivered at Bungoma this 2nd day of May, 2012.

A. O. MUCHELULE

JUDGE