



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 115 OF 2011

ROBERT IRERI NGARI.....

.....APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

RULING

This is the Appellant's Notice of Motion dated 22nd September 2011. The Appellant is seeking to be released on bail pending appeal. Further he seeks stay of execution of the 20 years imprisonment.

The main grounds are that he has filed an appeal which had good grounds of appeal. Secondly there could be delay in determining his appeal contrary to Article 50(2)(e) of the Constitution of Kenya. The Application is supported by the affidavit of his advocate Mr. Njeru Ithiga.

The main ground for the application is that the appeal has high chances of success because the complainant's age is in doubt. No documentary evidence was availed to confirm age. He cited 2 authorities.

1. *Benson Wambasi Nyongesa Vs Republic Bungoma HCCCRA No. 128 of 2009*
2. *Elijah Onguti Vs Republic Kitale HCCCRA No.95 of 2010*

Both appeals were allowed for lack of age assessment and he submitted that failure to have the complainants' age assessed would result in the appeal being allowed.

He further submitted that the Appellant/Applicant had been on bond in the lower court. Ms. Matiru opposed the application saying the Appellant/Applicant had not shown any special circumstances to warrant his release on bond. She said the evidence on record confirmed identification and occurrence of the offence and that the complainant had in *voire dire* examination indicated she was 10 years of age.

The Criminal Procedure Code (Cap 75 Laws of Kenya) Section 357 permits admission to bail pending appeal. I would not really wish to get into evaluating the evidence on record in detail as that would be getting into the arena of the actual appeal, and actually determining the appeal before it is heard.

The prosecution in the lower court called evidence through four witnesses. The victim who was PW1 was taken through *voire dire* examination which confirms that the court appreciated that the victim was a minor.

However, the Sexual Offences Act is very particular and specific with the ages of the victims and

that is why the Honourable Judges in the above quoted cases arrived at the decisions they did.

In the case of *Dominic Karanja Vs Republic [1986] KLR 612* and *Mundia Vs Republic [1986] KLR 632* it comes out clearly that bond pending appeal may be granted where:

- (a) There are chances of success of the appeal
- (b) There are exceptional or unusual circumstances
- (c) There is a risk that the sentence will have been served by the time the appeal is heard but the element of success must exist.

In the present application I find no exceptional or unusual circumstances which have arisen. There is also no risk of the 20 years sentence being served before the Appeal is heard. In fact the lower court record is ready and already housed in the Appeal file.

The only other issue for consideration is the overwhelming chances of success. The main argument raised by the Appellant's counsel is that this application is the issue of age as per the Sexual Offences Act. This element should not be looked at in isolation of all the other evidence. It is clear from the record that the victim was a minor but her age was not established. Section 358(1) Criminal Procedure Code gives this court power to take further evidence. I do find that for the ends of justice to be met it is imperative that the victim's age be determined.

Therefore under provisions of Section 358(1) Criminal Procedure Code, I hereby direct the state counsel to arrange for the victim to be medically examined by the MOH Embu for the purposes of age assessment. This report should be filed within 21 days from today.

Meanwhile I decline to have the Appellant released on bail. Appeal should be set down for hearing.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT EMBU THIS 25TH DAY OF OCTOBER 2011.

**H. I. ONG'UDI
JUDGE**