REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CRIMINAL APPLICATION CASE NO. 126 OF 2020

MATTHEW KIPMWETICH..... 1ST APPLICANT

HILARRY KIPCHUMBA KIMOSOP ..... 2ND APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

AND

ROSE JEBET NGETICH..... COMPLAINANT/ INTERESTED PARTY

RULING

1. The applicants were charged in **Iten in Sexual Offence case No. 30 of 2017 as consolidated with Sexual offence case No. 35 of 2017** with *inter-alia,* the offence of gang rape ***Contrary to Section 10*** **of the *Sexual Offences Act,*** where it was alleged that on the 8th day of May 2017 within Kimnai Village in Elgeyo Marakwet County one after another willfully and unlawfully caused their genital organs namely penis to penetrate the genital organ of RJN. The 1st applicant was also charged with an additional count of rape contrary to *Section 3(1)* as read with *Section 3(3)* of the *Sexual Offences Act, where* it was alleged that on the 17th of September, 2017, at Kimnai sub-location within Elgeyo Marakwet County Willfully and unlawfully caused his genital organ namely penis to penetrate the vagina of LJ.

2. On 10th July 2018, the learned trial Magistrate N.C. Adalo RM, found the applicants guilty as charged, convicted them and sentenced them to 15 years imprisonment. On the second count, the 1st applicant was acquitted.

3. Aggrieved by that decision, the applicants filed Criminal Appeal No. 48 of 2018 as consolidated with Criminal Appeal No. 49 of 2018 before the Eldoret High Court challenging the conviction. The appeal was heard and determined by Justice Majanja whereby the appeal was dismissed and the conviction of the trial court upheld.

4. The appellants have now filed a notice of appeal dated 27/6/2019 before Eldoret Court of Appeal against the dismissal of the appeal. It is in the backdrop of the said intended appeal at the Court of appeal that the applicants have filed the present application.

5. The Notice of Motion application has been brought under several Articles of the Constitution among them *40(1)(h)(sic), 50(2)(a), 159 (1) and (2) and 258 (1); Sections 356* and *357* of the *Criminal Procedure Code.* The Applicants seek orders as follows:

(i) Spent

(ii) That this honourable court be pleased to grant the Applicants Bond/ Bail pending the hearing and determination of instant Appeal.

(iii) That the honourable court be pleased to acquit and/or discharge the appellants/applicants having reconciled with the Complainant/ Interested party herein.

(iv) Any other order and/ or relief that the honourable court may be pleased to grant

6. The application is supported by the affidavit sworn on the 18th November,2020 by the applicants whereby they depose that they have preferred an appeal to the Court of appeal and that their families and that of the complainant have met and reconciled under the Keiyo customs.

7. The application was then fixed for virtual hearing on 12/5/2021 where counsel for the applicants averred his case in support of the application. M/s Limo, counsel for the state opposed the application and averred that withdrawal would have been considered at the lower court but not at the appellate court. She contended that the main complainant is the state. She further averred that the application for bail or bond pending appeal would be properly made at the Court of appeal and not at this court.

Determination

8. I have considered the application, the affidavits in support thereof, the oral submissions advanced by both parties as well as the written submissions on record. I do find issues arising for determination as follows:-

i) Whether the applicants should be acquitted or discharged based on their alleged reconciliation with the complainant and;

ii) Whether the applicants can be granted bail pending the appeal at the Court of Appeal.

9. On the first issue, I note that there is an affidavit on record sworn by the complainant in support of the claim that the parties have reconciled. However, I do find that the offence with which the applicants were convicted of is one that would not allow a settlement out of court as it would be against public policy.

10. *Section 176 of the Criminal Procedure Code states:-*

> ***"In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms approved by the court, and may thereupon order the proceedings to be stayed or terminated."***

11. *The offence of Gang Rape is a felony and is therefore disqualified in terms of promotion of reconciliation by the court under Section 176 of the Criminal Procedure Code.*

12. *Section 204 of the Criminal Procedure Code provides that:-*

> ***"If a complainant, at any time before a final order is passed in a case under this part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused."***

13. *The use of the words,* ***"the court may permit him to withdraw,"*** *shows that the court has discretion to weigh the circumstances of the expressed wish to withdraw the complaint and consider whether to allow or reject the application.*

14. *Both Section 176 and 204 of the Criminal Procedure Code refers to proceedings in the subordinate court; that is during the initial trial, and not after conviction and sentence, and the proceeding in the superior courts. A convict though is free to reconcile with the complainant; and such is admirable and fair, such reconciliation does not entitle him to freedom from serving a legal sentence.*

15. *Such application arising after conviction by the lower court and failing in the appeal at the high court, is definitely time barred. He should bank on the pending appeal in the court of appeal.*

16. On the last issue before me for determination, Bail or Bond pending appeal; ***Section 357(1)*** of the *Criminal Procedure Code* provides as follows:

> ***"S. 357. Admission to bail or suspension of sentence pending appeal (1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal."***

17. In the case of JK *v Republic [2020] eKLR*, Justice Matheka while dealing with a similar matter made a distinction between an application for bail under *Article 49(1)(h)* of the *Constitution* and under *Section 357(1)* of the *Criminal Procedure Code* and observed that;

> ***"In the former the prosecution must establish compelling reasons to warrant the denial of bail. This is because the accused at that stage is presumed innocent. Here the applicant has already been found guilty and does not enjoy the presumption of innocence. It is for him now to establish reasons as to why, instead of being in prison serving his sentence he should be out pending the hearing and determination of his appeal."***

18. In the case of ***Chimambhai vs Republic (No 2) {1971} E.A.343*** **the court had this to say;**

> ***"The case of an appellant under sentence of imprisonment seeking bail lacks one of the strongest elements normally available to an accused person seeking bail before trial, namely, the presumption of innocence, but nevertheless the law of today frankly recognizes, to an extent at one-time unknown, the possibility of the conviction being erroneous or the punishment excessive, a recognition which is implicit in the legislation creating the right of appeal in criminal cases."***

19. The Court of Appeal in ***Jivraj Shah v Republic [1986] eKLR*** **stated;-**

> ***"…. the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist."***

20. In short, a successful applicant for bail pending appeal have to demonstrate existence of exceptional or unusual circumstances in their case. These circumstances must be such that the court is moved to exercise its discretion in the interest of justice; and this include that the appeal appears likely to succeed, that it raises a substantive point of law, that there may be delay in hearing the appeal which may lead to the applicant having served a substantial part of the sentence.

21. I have weighed the circumstances of the instant case and in my view, an appeal at the Court of appeal cannot be said to be prima facie arguable as there is a concurrent finding of guilt by the trial court and this court.

22. From the foregoing it is clear the application does not meet the threshold for grant of bail pending appeal.

23. The entire application lacks merit and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF JUNE, 2021.

In the presence of:-

Mr. Mogambi holding brief for Mr. Nabasenge for the applicant

Ms Limo for the state

Gladys - Court assistant