



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CONSOLIDATED CRIMINAL APPEALS NOS. 17 & 18 OF 2020

MUGENDA MWANGI IRUNGU.....1ST APPELLANT

ZEPHANIA MACHARIA WANJIKU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An application for bail pending appeal from the decision of P. M. Kiama, Senior Principal Magistrate, in S.O. Case No. 35 of 2018 at Kangema dated 7th July 2020]

RULING

1. The appellants were adjudged guilty of *gang defilement* contrary to section 10 of the **Sexual Offences Act**. Each of them was sentenced to *fifteen years' imprisonment*.
2. The particulars were that on 7th November 2018 at *[particulars withheld]* in Murang'a County they caused their penises to penetrate the vagina of GWC *[particulars withheld]* a girl aged 16 years.
3. The appellants lodged separate petitions of appeals which have since been consolidated.
4. Pending the hearing and determination of the consolidated appeals, the appellants have presented *notices of motion* pleading for bail. There are depositions sworn on 8th October 2020 by their learned counsel, *Mr. Mwaniki Warima*.
5. The appellants submitted that the appeal has overwhelming chances of success. They contended that the evidence of the complainant was unbelievable and devoid of corroboration. In a synopsis, they argued that the key ingredients of the offence were not proved. Regarding the sentences, learned counsel submitted that it was too harsh in all the circumstances of the case.
6. Learned counsel further submitted that a substantial part of the sentence may be served before the hearing and determination of the appeals.
7. The application is *conceded* by the Republic.
8. The legal parameters in an application of this nature were well stated by the Court of Appeal in ***Jivraj Shah v Republic*** [1986] KLR 605-

*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. The decision is **Somo v Republic** [1972] EA 476 which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, **Daniel Dominic Karanja v Republic** where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.*

9. I decline the invitation to interrogate the full merits of the appeal. That will be the true province of the first appellate court to *re-evaluate* the veracity of the evidence; and, to consider whether the punishment was deserved.
10. The complainant alleged that on the material night, the two appellants came to her grandmother's house. The 1st appellant led her to a

farm. She bent by a tree and he penetrated her using his penis which was sheathed in a condom. He then summoned the 2nd appellant who was keeping watch at the gate. The 2nd appellant took her inside her grandmother's house and defiled her on the bed. He was interrupted by a knock from the complainant's sister who is deaf and dumb. The 1st appellant also alerted him that there were some people approaching. The appellants fled from the scene.

11. The complainant only disclosed the incident to her mother the following day when she interrogated her about a used condom she found in the compound.

12. From the materials before me, I find that a substantial point of law and evidence arises on two fronts: Firstly, on the *reliability* of the evidence of the complainant; and, secondly, whether on the totality of all the evidence by the prosecution's four witnesses and the defence, the primary *ingredients* for the offence were proved.

13. Regarding the sentences, it is true that the penal section provided for a *minimum* sentence of fifteen years. The sentence handed down was thus *not* illegal. But the appellate court may still interrogate the sentence in view of the landmark decision of the supreme Court in ***Francis Karioko Muruatetu & another v Republic***, Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR.

14. In the end I find that the points raised in the consolidated appeals are *arguable* and that they disclose *exceptional grounds*; or, *substantial points of law and evidence*. That is *not* to say that the appeals will succeed.

15. Each of the appellants *may* be released upon executing a cognizance in the sum of Kshs 300,000 (three hundred thousands) together with *one* surety of a similar amount. The sureties shall be approved by the Deputy Registrar of this Court.

16. The appellants *must* appear at the mention or hearing of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 1st day of July 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. W. Ongoro holding brief for Mr. Mwaniki for the appellants instructed by Mwaniki Warima & Company Advocates.

Mr. S. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.