REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 213 OF 2019

JK.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

BAIL PENDING APPEAL RULING

Before me is the Notice of motion dated the 15th January 2020 brought under **Section 356(1) the Criminal Procedure Code** and **Article 159 of the Constitution of Kenya 2010.**

It seeks the order that the appellant applicant be released on bond terms to be determined by the court pending the hearing and determination of his appeal.

The applicant was charged in **Eldoret CMCRC no. 1771 of 2017** with *inter-alia*, the offence of **Defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act,** where it was alleged that on the 9th of July 2016 within Nandi County he intentionally and unlawfully did cause his penis to penetrate the vagina of ML a girl aged 16 years old.

On 14th December 2019, the learned trial Magistrate PW Wasike SRM, found him guilty as charged, convicted him and sentenced him to 15years imprisonment.

Aggrieved, he filed his petition of appeal on the 30th December 2019, challenging the conviction, on grounds that it was based on insufficient evidence full of material contradictions which did not establish the statutory ingredients of defilement; and sentence, for being too harsh, and failure to consider his defence as per **Martin Charo v R [2015] eKLR.**

It is in the backdrop of this conviction and sentence that his application for bail pending appeal is to be considered.

It is supported by his affidavit sworn on the 15th January 2020 in which he depones: *inter alia* that he is a student at [particulars withheld] University and if incarcerated, and his appeal succeeds (the success of which he is convicted following advice from his counsel on record) he will be prejudiced, and his appeal may be rendered nugatory. He is also sickly, and annexed his medical report. In addition, that the respondents will not be prejudiced.

Mr. Rotich argued the application and submitted that the applicant was on bond of Kshs. 200,000/= in the subordinate court before he was convicted, and attended court faithfully and without fail. That the child who was born out of the offence was in the applicant's custody and the same would suffer prejudice if the applicant continued being incarcerated.

Mr. Chacha for the state opposed the application. He submitted that though he had empathy for the applicant because he was a student, he had to oppose the application because the prosecution had proved all the ingredients of the offence. Defilement had happened. There was penetration. Proof was the child who was born out of the offence as paternity was established. Hence it was not correct of the defence to stand on the footing that the appeal had an overwhelming chance of success.

That it was up to the applicant to establish exceptional or unusual circumstances to meet the requirements for bail pending appeal.

That health issues, were not exceptional as they could be dealt with in prison; that having been on bond during the trail was not an exceptional issue; that perhaps having custody of the baby could be considered exceptional but that had not been demonstrated. The state relied on **Douglas Mutunga Muthenya v R [2017] eKLR.**

In response Mr. Rotich submitted that the evidence on record was overwhelming that the conduct of the complainant suggested that she was an adult; that applicant's sickness was as unusual circumstance, that he had custody of the child and that in the event he was successful having served a term of imprisonment, there was no reparation.

The applicant added to his counsel's submissions added that he was supposed to go to 4th Year and depended on his education for his future. He urged this court not to paralyse his right to education as provided for under Article 48(1) of the Constitution. That he had chronic ulcers, feared for his health and was undergoing psychological torture. His prayer was that he just wanted to finish school.

Although the applicant relies on **Section 356(1) of the Criminal Procedure Code** the correct provision of the law is **Section 357(1)** since the applicant has already lodged an appeal. It states:

> ***"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."***

There is a difference between bail pending trial or charge as indicated at **Article 49(1) h)** and bail pending appeal under **Section 357 of the Criminal Procedure Code**. 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. This can be seen in the words of by Haris *J in* **Chimambhai vs Republic (No 2) {1971} E.A.343;**

> ***"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."***

A successful applicant will have to demonstrate the 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; These include that the appeal appears likely to succeed, that it raises a substantive point of law, that there may be such a delay that the appellant will have served most of his sentence: This is what the Court of Appeal in **Jivraj Shah v Republic [1986] eKLR said:**

> ***"…. 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."***

These *'unusual an exceptional'* circumstance are further expounded in the list set out in **Arvind Patel -vs- Uganda S.C Cr. Appeal No. 1 of 2003** as hereunder;

1. *The character of the offender*
2. *Whether the applicant is or not a first offender;*
3. *Whether the offence of which the applicant is convicted involved personal violence;*
4. *The appeal must not be frivolous and has reasonable chance of success;*
5. *The possibility of substantial delay in the determination of appeal and;*
6. *Whether the applicant complied with bail conditions granted before the applicant's conviction during the pendency of the appeal.*

One circumstance was the applicant's health issues. From the treatment chit annexed to the affidavit this was not a pre imprisonment condition but one that developed while he was in prison. These, as was submitted by the prosecution could be dealt with through the Prison authorities.

On the applicant being a student at the [particulars withheld] University; He urged that his utmost desire was to 'finish school and urged this court not to paralyse his right to education as provided for under **Article 43(1) (f) of the Constitution.**

It is noteworthy that despite these arguments there was not a single annexure to his affidavit to support the alleged fact. There was no indication was to what he was studying or what faculty at the [particulars withheld] University. Even in his defence, he simply stated that he 'came from school'. He did not name the school or what he was studying. How can such an important fact be presented with such paucity of information?

In any event, and according to the record before the learned trial magistrate, and, without prejudice to the appeal, the appellant did not give any thought to the complainant's right to education when he had sex with her, she being a minor, who got pregnant and had to drop out of school for a while to give birth. Her right to her childhood was violated. This was a fact proved by the prosecution as is supported by the record.

Does this appeal have high chances of success? I perused the record. There is a P3 that states the complainant was 16. There is DNA results that prove that the applicant is the father of the child. It is submitted on his behalf that he has custody of the child. Although the fact of

custody was not established in any way, and ought not to have come from the bar, it is apparent that the fact of sexual intercourse having taken place is not contested.

Prima facie, the conviction appears sound.

No substantive point of law has been raised.

Though the applicant was a 1st offender, attended court diligently, defilement is an offence, by whose nature, is an act of personal violence.

There is nothing before me to demonstrate that the hearing and determination of the appeal will be delayed. The Record of Appeal is ready. Parties can get a date immediately.

From the foregoing it is clear the application does not meet the threshold for bail pending appeal. It is dismissed with no orders as to costs.

Dated, Delivered and Signed virtually this 9th Day of November, 2020.

Mumbua T Matheka

Judge

In the presence of:

CA Koech

Appellant/ applicant

Mr. Rotich for appellant

N/A for Prosecution (though notified)