REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 1 OF 2019

MOHAMED DAQANE ABDI.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a Notice of Motion dated 20/1/19 the Applicant/Appellant seeks the orders –

(1) Spent

(2) That this Honourable Court be pleased to admit the Applicant/Appellant to bond pending the hearing and determination of his appeal and suspend his sentence of life imprisonment upon such terms and conditions that it may consider and deem just and fit in the circumstances.

(3) That the bond of Ksh.200,000/= paid and held by the Judiciary vide log book of motor vehicle registration KCL 383H in Wajir Sexual Offence Case No. 15 of 2018 (Republic vs Mohamed Dagane Abdi) be utilized as bond pending the hearing and determination of the Appellant's appeal.

(4) Such other orders be made and directions issued as the court may deem just and expedient.

2. The application is based on the provisions of section 357 Criminal Procedure Code Cap. 75 Laws of Kenya, Articles 50 (2) (q), 159 (2) (d) of the Constitution of Kenya.

3. It is based on the grounds on the motion namely;

(5) The Applicant was charged and convicted vide Wajir Sexual Offence Case No. 15 of 2018 to serve life imprisonment.

(6) He has since preferred an appeal against the conviction and sentence.

(7) The appeal has great and overwhelming chances of success as it raises weighty legal issues for determination.

(8) The sentence of life imprisonment is devoid of alternative sentence of pay fine or any other mode.

(9) The appeals take time to be concluded and in the likely event the Appellant succeeds in his appeal, he shall unduly have served an illegal sentence which will greatly prejudice and comprise his rights as to fair trial and against the tents of the Constitution of Kenya as to his fundamental rights.

(10) A myriad of issues were not considered and put in perspective whilst sentencing the Appellant to serve a life imprisonment term among others being that he is a student below 18 years of age and therefore not available for a defilement charge.

(11) The 2019 school term is ongoing and the Appellant is losing a lot by being incarcerated whereas his colleagues are in class learning thus the urgency.

4. The application is supported by the affidavit of Mohamed Dagane Abdi sworn on 24/1/2019 and the attached documents.

5. The Respondent has not opposed the same and during the hearing the Respondent via Mulati State Counsel stated that the State concedes the application.

6. The Applicant's advocate has submitted orally at length on the reasons why the application should be allowed –It was submitted that, the appeal is merited. That the Appellant was born on 2/2/00 vide birth certificate. July 2017 is date of offence. The proceedings of 11/1/19 page 14 of proceedings – the Appellant was a child when allegedly committed the offence.

7. The dates of offence not stated. The merited is disclosed. The time to consider is at time of commission not judgement day. The appellant has annexed petition of appeal which raises triable issues. See 10 grounds. The intended appeal has high chances of success. The Appellant is a student vide annexures.

8. The Appellant has missed 1st term of this year. He ought to be in Form 3 today. By the time of hearing appeal, the Appellant will have lost a lot of school time.

9. Section 191 Children's Act – the sentencing violates the same provisions of law as at the commission of offence date he was a child. In any event this was two children defiling one another if there was sex act as alleged. The two could not consent to sexual activities.

10. He was non-represented in violation of Article 50 (2) (g) of the Constitution, also Article 159 (2) (d). He ought to have benefited to least sentence.

11. There was a child produced out of the act subject matter. There was no DNA or scientific prove of the father of the child. The victim's mother learned of issue 8 months of the alleged defilement.

12. The court held the child was a product of act – which was not proved. On Penetration – there was allegation of other boys who defiled her. The prove was supposed to be beyond reasonable doubt. Same prove was threshold was not established.

13. On ***voire dire*** hearing conduct – same was faulty. It ought to have been taken. Same was not taken in accordance with the law. It is submitted that the appeal is merited and with overwhelming chances of success.

14. Appellant seeks to be allowed to resume studies. In trial court he had a bail - bond of Ksh. 200,000. Motor vehicle security had been placed in court.

15. In the case of ***Francis Ngobu Murathe –vs- Republic,*** **Hon. Justice Ngaah Jairus** held that;

> ***"…. the most important consideration is whether the appeal has overwhelming chances of success and should it be deemed, there would be no justification for depriving the applicant freedom. A passage from … Somo –vs- Republic (1972) EA 476 is useful on this point. The Learned judge said at page 480 of his judgement that;***
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> ***"But generally speaking, whatever grounds may be properly be taken into account in favour of the grant of the application … the most important of them is that the appeal will succeed. There is little, if any, point granting the application if the appeal is not thought to have overwhelming chance of being successful … I have used the word "overwhelming" deliberately and for what I believe to be good reason. It seems that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is an overwhelming probability that it will succeed."***

16. In our instant case, as rightly conceded by the state, there many legal flaws apparent on the face of the record. First the charge sheet talks of unknown dates as to the dates of the alleged penetration. On commencement of the testimony of the minor PW2, the court just recorded that ***"voire dire examination conducted on the complainant"***

17. The record does not show what was asked and answers given and the conclusion of the trial court on the status of PW2 intelligence thereof.

18. In the case of ***John Otieno Oloo –vs- R[i],*** the court of appeal held that failure to form an opinion on a *voire dire* examination occasioned a miscarriage of justice.

19. In ***Kiune –vs- R[ii]***, the court said that, "***in any proceeding before any court, a child of tender years is called as a witness, the court is require to form an opinion on a*** *voire dire* ***examination whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth."***

20. The procedure for admitting a child witness was set in **Kinyua v R[iii]**. This was a murder where two school boys gave evidence in court. The accused was convicted and appealed on the ground that the court erred in admitting evidence from the two boys as the trial judge did not conduct a proper *voire dire* and the evidence of the boys was not corroborated as required in section 124 of the Kenya Evidence Act. The Court of Appeal held that two steps were to be followed.

21. Improper *voire dire* conduct is enough to nullify proceedings. The record I have is incomplete on *voire dir*e aspect. During the hearing of the appeal, I will peruse the trial court record to confirm the status.

22. On evidence on record, I find that the alleged penetration was allegedly done 8 months prior to the report to the mother PW1 by PW2.

The PW3 says that the PW2 stated that she had a boyfriend who she engaged with severally and probably impregnated her.

23. However she PW2 told court appellant was the one who had sex with her and impregnated her. She said it was one single incident. The question is who was the boyfriend whom she told PW3 about?

24. The appellant testimony of oath that PW2 implicated 3 persons on her pregnancy was unchallenged.

25. The entire testimony point to the gap on pointing to the defiler and the impregnator. This leads to the question as to why DNA was not conducted.

26. The above issues raised together with the fact that the appellant a minor was un-represented during trial disclose overwhelming chances in the appeal.

27. The court thus makes the following orders;

(1) The appellant is admitted to bail pending appeal.

(2) He will execute a bond of Ksh. 200,000/= plus One (1) surety.

Dated and delivered at Garissa this 2nd day of April, 2019.

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C. KARIUKI

JUDGE