



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL 19 OF 2019

MOSES KIMINYI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Application herein is for bail pending appeal, filed vide Chamber Summons dated 14th February, 2019. It is filed in the instant appeal which arose from the decision of the Hon E. Kanyiri SRM in Sexual Offence Case number 45 of 2017. The Appellant/ Applicant was charged with two counts. In the first Count he was charged with committing an indecent act with a minor contrary to **Section 11(1) of the Sexual Offences Act**. The particulars were that on 31st of July 2016 at [Particulars Withheld] Police Station within Nairobi County touched the buttocks, anus and vagina of BN a minor aged 5 years. He was charged with a second count of abuse of authority contrary to **Section 24(2) of the Sexual Offences Act**. The particulars were that on the 31st of July 2016 took advantage of his position as a Police Officer to commit an indecent act with a child BN at his house within the limits of the station to which he is appointed. Upon conclusion of trial, he was convicted of the first count and acquitted on the second count. He was sentenced to serve ten years imprisonment.

2. The application is grounded on two issues firstly that the Applicant will serve a substantial part of the sentence before the appeal is heard and determined and secondly that the appeal has high chances of success.

3. Learned counsel for the Applicant Mr. Mathenge only submitted on the second ground. He submitted that the court relied on the evidence of a single identifying witness to found a conviction. It was submitted that at the material time of the alleged incident, the minor was alone and in any case, she failed to call a child, one A whom she was playing with before the Appellant called her into his house where the offence took place. In that case, it was argued that the minor's evidence could not be solely relied upon.

4. Counsel also poked holes in the evidence of the prosecution in that the actual time and date the offence took place was not clear. He argued that the offence charged took place on 31st July, 2016, yet PW2, 3 and 4 testified of an offence that took place on 30th July, 2016. He submitted that since the Appellant was charged of an offence of 31st July, 2016, then the witnesses must have been referring to a different offence.

5. In addition, counsel argued that the Appellant was not properly identified as the culprit. This was with regard to the assertion that the offence allegedly took place within police lines where there were many police officers. It was argued that the minor could not in the circumstances of a heavily built –up area be able to identify where and who committed the offence.

6. Counsel also argued that the learned trial magistrate failed to consider the Applicant's alibi defence and more so, the evidence of the witnesses who supported his defence. Furthermore, it was doubtful that the Applicant committed the offence taking note that he was arrested a year after the fact.

7. Learned State Counsel, Mr. Momanyi for the Respondent opposed the application. He submitted that the Applicant was properly identified by the minor. Although the minor did not know the Applicant before the incident, he took police officers to his house and a subsequent identification parade picked him out as the assailant.

8. Mr. Momanyi submitted that the minor gave a candid account of what transpired on the fateful evening. He also submitted that the court allowed PW8 and 9 to be called as defence witnesses but unfortunately did not support the Applicant's case. It was his argument that the appeal had no chances of success and urged the court to dismiss the application.

9. I have accordingly considered the application, the respective rival submissions, the record of proceedings and I take the following view of the application. In an application for bail pending appeal, the court is enjoined to determine whether the appeal has high chances of success or whether there exists any exceptional or unusual circumstances to warrant the grant of bail pending appeal. The court may also consider whether the Applicant is likely to serve the sentence or a substantial part of it before the appeal is heard and determined. See: **Jivraj Shah V R [1986] eKLR**.

10. In the instant application, the Applicant zeroed in on the first factor, arguing that indeed the appeal has high chances of success premised on the grounds enunciated above. Without pre-empting the intended appeal and upon reading through the evidence in the trial court, my view is that the Applicant was properly identified as the person who committed the offence. Further, the evidence established the elements of the offence charged as defined under the Sexual Offences Act. The alibi defence did not ultimately oust the prosecution case. Again, the minor discrepancies in the evidence do not go into the core of the threshold the prosecution was enjoined to establish in proof of its case. Therefore, prima facie, I find that the appeal has little chances of succeeding. This is not however to say that the Appellant does not have an arguable appeal. The fact is that he has not met the threshold for granting bail pending appeal.

11. On whether the Applicant is likely to serve a substantial part of his sentence by the time the appeal is heard and determined, the answer is in the negative. This is because the Applicant was only convicted on 13th November, 2018. He was sentenced to serve the minimum penalty under the law of ten years imprisonment. The appeal is of the current year and the court is hearing appeals of 2018. This means that he may be heard before the end of next year. Hence, there is no likelihood that he will have served his sentence or a substantial part of it by the time the appeal is heard and determined.

12. On the whole, I find that the application is unmerited. It has failed to meet the threshold for grant of bail pending appeal. The same is dismissed with no orders of costs.

DATED and DELIVERED 7TH DAY OF MAY, 2019.

G.W. NGENYE-MACHARIA

JUDGE

1. Mr. Mathenge h/b for Mr. Olado for the Appellant/Applicant.

2. M/s Akunja for the Respondent.