



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA. NO. 85 OF 2019

STEPHEN NGUI KYALO.....APPELLANT/APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The Appellant/ Applicant herein was convicted of the offence of defilement on 15th May, 2019 and sentenced to twenty (20) years imprisonment by Hon. E.M Muiro, the Senior Resident Magistrate Kilungu Court.

2. By the application (Notice of Motion) dated 16th May, 2019 brought under Section 357 (1) Criminal Procedure Code Cap 75 of the Laws of Kenya, the Applicant seeks the following orders:

That this Honourable Court to admit him into bond/bail pending the hearing and determination of his appeal herein.

3. The application is supported by the ground that the appeal has very high and overwhelming chances of success. He cites a few of the instances as follows: -

a. That there was no medical evidence to connect him with the offence charged.

b. That the trial court made a very serious error in criminal jurisprudence when it highly relied on evidence of persons NEVER recorded a statement.

c. That the trial court erred in considering evidence of a person who declined to testify in court although having recorded a statement with the investigating agencies.

d. That he is ready to abide by any terms that the court may impose.

4. He further relies on his supporting affidavit sworn on 16th May, 2019. In his detailed affidavit of 21 paragraphs, he has poked holes into the case of the prosecution. I will not get into the details since the appeal has been filed and will be heard by this court.

5. He has averred that if granted bond he will abide by the terms the court may give. He has also deponed that he is an old man aged 75 years and suffers from diabetes and high blood pressure and has been constantly under medication.

6. In his submissions, Mr. Matata for the Applicant stressed that the appeal herein has very high chances of success. He also contended that the Applicant is quite elderly and the court should consider releasing him on bail as he is not a flight risk.

7. Counsel submitted that the Applicant had been on bond during the trial in in the lower court and had faithfully attended court. He finally referred to the pre-bail report filed by the County Probation Officer, which he said was favourable.

8. The Respondent filed a replying affidavit through learned prosecuting counsel **Monicah A. Owenga**. She opposed the application saying the Applicant had been convicted of a serious offence and sentenced to serve twenty (20) years imprisonment. That the long sentence would cause the Applicant to be tempted to abscond if released on bond.

9. She suggested that instead of granting the Applicant bond the court should admit the appeal and deal with it on merits. She deponed that the Applicant has not demonstrated any compelling reason to warrant his release on bond pending the hearing and determination of his

appeal.

10. In her submissions, she reiterated what she had stated in the replying affidavit. She added that she acknowledges the Applicant's advanced age and that's why she prefers that the appeal be fast tracked.

Determination

11. I have carefully considered the application and the oral submissions by both parties and the County Probation Officer's Report. The only issue arising for determination is whether the Applicant has satisfied this court of the need to be released on bond pending appeal.

12. Section 357(1) Criminal Procedures provides that:

(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:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie

to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in sections 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

13. The principles of granting bail pending appeal were set out in the case of **Jivraj Shah –vs- R (1986) KLR 605**. They are as follows: -

i) The existence of exceptional or unusual circumstances upon which the Court or

ii) 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 argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

iii) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued.

14. On the 1st principle the State has not disputed that the Applicant is of an advanced age of over 70 years. I find this to be an usual circumstance requiring this court's attention. He has been sentenced to serve twenty (20) years imprisonment. I will now move to consider the 2nd and 3rd principles together. The prosecution presented seven (7) witnesses who testified on behalf of the State. None of them was an eye witness to the incident save for the complainant (PW1) alone.

15. The incident is said to have occurred on 6th May, 2017 at 8:00 am. The report was made on 7th June, 2018 when the Applicant was arrested. The clinical officer (PW4) attended to the complainant on 22nd May, 2018 when a P3 form (EXB1) was filled. All these pieces of evidence and more have to be put together to enable the court come to a conclusive determination of this matter.

16. The Appellant made a sworn statement of defence. The prosecution did not for whatever reasons deem it fit to cross examine the Appellant. So his evidence was not challenged. This court will have to examine it against the evidence of the prosecution witnesses.

17. At this point, I would not wish to get into the merits or demerits of the appeal. I am however satisfied that the Applicant has arguable grounds he has raised in this appeal. There is nothing on record to show that the Applicant is a flight risk. There is also no prejudice to be caused to the Respondent if the Applicant is released on bail.

18. The original lower court file plus copies of typed proceedings are already before this court. All that remains is for the registry to prepare the record of appeal for purposes of admitting the appeal.

19. I find the application dated 15th May, 2019 to be merited and I allow it and order that: -

a) The Applicant be released on a bond of Kshs.250,000/= with a surety in similar sum pending the hearing and determination of the appeal herein.

b) Once released, the Appellant will be appearing for mentions on a monthly basis before the Deputy Registrar until the hearing and determination of the appeal.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 12TH DAY OF JUNE, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE