



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 36 OF 2019

FMG.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application before this court is made under the provisions of Section 357 of the Criminal Procedure Code; the applicant seeks to be admitted to bail pending the hearing and determination of his appeal; the applicant relied on the grounds on the face of the application and on the Supporting Affidavit dated 5/07/2019 and made by **FMG**;

2. At the hearing hereof the applicant was represented by Learned Counsel Mr. Gacheru who made oral submissions on behalf of the applicant; whereas the State was represented by Prosecuting Counsel Mr. Magoma and made submissions on behalf of the State; hereunder are the submissions made by the respective Counsels;

APPLICANTS SUBMISSIONS

3. The applicant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual offences Act; the particulars of the offence were that on unknown dates of December 2017 at [particulars withheld] Village in Mukuruweini sub-county within Nyeri County the appellant intentionally caused his member to penetrate the private parts of **LWK** a child aged 14 years; the appellant was also charged with an alternative count of Indecent Act with a child contrary to Section 11(1) and the particulars were that on the same dates and at the same place he intentionally touched the private parts of **LWK**;

4. On the 21/05/2019 he was convicted and sentenced to twenty (20) years imprisonment; being aggrieved by the judgment of the Resident Magistrate sitting in Mukuruweini he filed the instant appeal against the conviction and sentence;

5. In his submissions Counsel argued that the appeal raised arguable issues of law; one being that the trial court failed to conduct a '**voire dire**' examination on the minor; that this goes to the root on the admissibility of evidence of **PW1** who was a minor aged below 14 years; that the trial court ought to have made a ruling on her sufficiency of intelligence; and that this ought to have been recorded in writing; and that the trial court had failed to comply with the provisions of Section 124 of the Evidence Act and the Oaths and Statutory Declarations Act;

6. Counsel further submitted that at the hearing the evidence of **PW7** who was the investigating officer stated that there was a boy child that had been borne as a result of the incident; there was therefore need for a DNA examination to be conducted;

7. As for **PW8** who was the examining doctor had failed to give an indication of the approximate date of conception; **PW1** in her evidence gave three instances the first being on 1/08/2017 and another version of unknown dates in the month of December, 2017; another incident is said to have been in January, 2018; the doctors evidence was only on one incident which was that of December, 2017 and he made no other reference to any other incidences;

8. That the months of August and January are not reflected on the Charge Sheet; it only makes reference to unknown dates in December, 2017;

9. There was conflicting evidence on money having changed hands from the appellant to the minor who stated that she received no monies whereas **PW6** and **PW7** stated that the appellant lured the minor with Kshs.300/-;

10. Counsel further submitted that **PW8** was an incompetent witness as he never produced testimonials on his qualifications; his evidence contradicted that of **PW1** in that he stated that there were no injuries;

11. The dates the offence is said to have occurred was in 2017 and yet the P3Form was filled on the 5/07/2018; and the approximate age of the injuries was not indicated on the P3Form; the object that broke the hymen was also not indicated;

12. The evidence on timing was not properly analysed; the evidence of **PW2** who was **PW1's** uncle was that the appellant was his service contractor; the evidence on record was that the appellant came to do the electrical wiring in January 2018; and that it was done when the minor had come from school for half term; and the evidence of **PW2** was that the appellant worked on the new house in August, 2017 and that the house was opened in April, 2018;

13. The registration of the appellant's motor bike that he used to ferry **PW1** was not availed; as for the production of the Birth Certificate the Investigating Officer ought to have been the one to produce it yet this was done by the minor's mother; the cell-phone belonging to the grandmother which **PW1** stated she occasionally borrowed was not produced as evidence; and when asked whom she used to call she had stated that it was her father; there was also no data produced on whether the appellant's number was on the grandmothers' contact;

14. In conclusion it was submitted that the evidence of the minor should be true and Counsel urged the court to allow the application and to admit the appellant to bail;

RESPONDENTS SUBMISSIONS

15. Prosecuting Counsel for the State Mr. Magoma concurred that there were procedural errors in the recording of the minors' testimony; as no **'voire dire'** examination was conducted the trial court could not invoke the provisions of Section 124 of the Evidence Act; the minors evidence was also not consistent and had contradictions and none of it was corroborated; the evidence of the minor cannot stand alone in supporting a conviction;

16. The production of the Birth Certificate was also un-procedural and the totality of the evidence alone was good grounds for the appeal to have overwhelming chances of succeeding; and that there was a likelihood of the appeal being conceded.

17. the applicant was an Assistant Chief and had been granted bail in the lower court; and that he had not breached the terms.

ANALYSIS

18. The facts of the case are that the applicant was tried and convicted before the Mukuruweini Resident Magistrate Hon. E.N.Angima for the offence of defilement; he was convicted and sentenced to a term of twenty (20) years imprisonment and being dissatisfied with this decision he filed the instant appeal; the appellant also filed the instant application for bail pending appeal;

19. The applicant contends that there were procedural errors in the recording of the minors' testimony; and that no **'voire dire'** examination was conducted by the trial court to test the sufficiency of the minors intelligence for her to understand the meaning of an oath and the need to tell the truth; and that therefore the trial court could not invoke the provisions of Section 124 of the Evidence Act; that the minors evidence was also not consistent and had contradictions and that none of it was corroborated;

20. There were also procedural errors in the manner the documentary evidence was produced; in that the Birth Certificate were not produced by the Investigating Officer and were instead produced by the Complainants mother **PW3**;

21. The principles upon which a court may grant applicant bail pending appeal and is cited in the case of **JIVRAJ SHAH vs REPUBLIC [1986] KLR 605** where it was held as follows;

“ If it appears prima facie from the totality the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist”

22. The main consideration for bail pending appeal is whether the applicant has shown that his appeal has overwhelming chances of succeeding;

FINDINGS AND DETERMINATION

23. And from the material placed before this court it is satisfied that the applicant has made out a prima facie case that his appeal is likely to be successful on account of the aforementioned substantial flaws in procedure;

24. Another consideration is that the State did not oppose the application and also gave an indication that it would most likely concede the appeal;

25. For those reasons this court finds that there is no good reason for depriving the applicant of his freedom; this court also finds that this is a suitable case for the exercise of its discretion in favor of the applicant.

26. The application is found to be meritorious and is hereby allowed.

27. The applicant may be released on bond pending the hearing of his appeal upon execution of a bond in the sum of Kshs.500,000/- together with one surety of a similar amount.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 3rd day of October, 2019.

HON.A.MSHILA

JUDGE