



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 62 OF 2019

JULIUS KAMITU ALEX.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant herein, **Julius Kamitu Alex**, was charged with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act*, No. 3 of 2006, the particulars being that on the 7th day of June, 2014, in Athi River District caused his male genital organ (penis) to penetrate into the female genital organ (vagina) of **AK**, aged 6 years. He was alternatively charged with committing an indecent act with a child contrary to section 11(1) of the same Act the facts being that on the same date at the same place he intentionally and unlawfully caused his male genital organ (penis) to come into contact with the female organ (vagina) of **AK**, aged 6 years.

2. After the hearing the appellant was found guilty of the said offence and was sentenced to 21 years imprisonment.

3. Aggrieved by the said decision, the appellant has now appealed to this Court based 14 grounds of appeal. One of the grounds raised by the appellant is that the trial court relied on documents which were never produced as exhibits in arriving at its decision. A look at the record reveals that the said ground is not a frivolous one and that all I can say at this stage.

4. The appellant, through his Learned Counsel, **Mr Nthiwa**, now seeks that leave be granted to him to file a petition of appeal against his conviction and that the draft petition of appeal annexed be deemed as duly filed. That limb of the application was never opposed and the same is hereby granted.

5. The second limb seeks that he be granted bail pending the outcome of this appeal.

6. According to the appellant, his appeal had overwhelming chances of success and he is also sickly. He contended that during his trial, he was admitted to bail of Kshs 200,000.00 and that he complied with all the conditions for his release on bond till the determination of the case.

7. The application was not opposed by the Respondent but **Miss Mogoi**, learned counsel for the Respondent urged the court to impose stringent terms for the appellant's release on bail. She, in fact urged the court to release the appellant on condition that the appellant posts a bail of Kshs 1,000,000.00.

8. I have considered the application and the affidavits both in support thereof and in opposition thereto as well as the submissions made.

9. Article 49(1)(h) of the Constitution provides that:-

An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

10. It is however true that a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the *Criminal Procedure Code* provides as follows:

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.

11. It was therefore held in Masrani vs. R [1060] EA 321 that:

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”

12. I therefore agree with the position in Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR where it was held that:

“The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court’s discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R [1966] KLR 605*, the principle considerations for granting bail pending appeal were stated as follows:

(1) Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.

(2) It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued.”

13. This position was restated in Mutua vs. R [1988] KLR 497, the Court of Appeal stated:

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal.”

14. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the Court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

a) Whether the appeal has overwhelming chances of success. See Ademba vs. Republic [1983] KLR 442, Somo vs. R [1972] EA 476, Mutua vs. R [1988] KLR 497;

b) There are exceptional or unusual circumstances to warrant the Court’s exercise of its discretion. See Raghibir Singh Lamba vs. R [1958] EA 37; Jivraj Shah vs. R [1986] eKLR; Somo vs. R (supra); Mutua vs. R (supra);

c) There is a high probability of the sentence being served before the appeal is heard. See Chimabhai vs. R [1971] EA 343.

15. What constitute exceptional circumstances were dealt with in R vs. Kanji [1946] 22 KLR, where De Lestang, Ag.J (as he then was) held that:

“The appellant’s appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admit to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail.”

16. According to Trevelyan, J in Somo vs. R [1972] EA 476:

“...the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance.”

17. Good character alone, however, it was held in the same case:

“can never be enough. There is nothing exceptional or unusual in having such a character.”

18. The rationale for considering the chances of success of the appeal was given in **Somo vs. R** (supra) at page 480 as follows:

“There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word “overwhelming” deliberately for what I believe to be good reason. It seems to me 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 overwhelming probability that it will succeed.”

19. In this case, I have found that the appellant’s appeal is not frivolous.

20. In light of the uncontroverted allegation that the appellant is sickly, I find that that constitutes an exceptional reason for the grant of bail pending appeal.

21. In the premises, the appellant I hereby grant the applicant bond of Kshs 500,000.00 with surety of similar amount. The surety shall be approved by the Deputy Registrar of this Court. The appellant shall, however, be expected to attend court at least once every month.

22. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 13th day of December, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Nthiwa for the appellant

Miss Mogoi for the Respondent

CA Geoffrey