



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 66 OF 2015

MICHAEL KIPKEMBOI TARUS APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The appellant was tried and convicted of the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual offences Act No. 3 of 2006**. He was sentenced to life imprisonment.
2. He was dissatisfied with his conviction and sentence. He lodged an appeal to the High Court challenging his conviction and sentence.

On 21st October, 2015, through his advocates *Ms. Kigen & Company Advocates*, the appellant filed a Notice of Motion praying that he be admitted to bond pending the hearing and determination of his appeal.

3. The application is mainly premised on grounds that the appeal has overwhelming chances of success; that the appellant has a medical condition which may jeopardize his health if he continues to remain incarcerated; that he has dependants who are in dire need of his care; that the appeal will be rendered nugatory if successful as by the time it is heard he will have served a substantial part of his sentence and lastly that he was willing to abide by any terms or conditions that may be imposed by the court.
4. The application is also supported by an affidavit sworn by the appellant on 21st October 2015. In his deposition, the appellant re-iterated the grounds anchoring the motion. He contended that he suffers from stomach cancer and ulcers which require specialized medical attention and a special diet which are not available in prison; that if he is not granted bond pending appeal his health is likely to deteriorate.
5. At the hearing of the application on 21st January, 2016, learned counsel *Mr. Kagunza* represented the appellant while learned prosecuting counsel *Ms Oduor* appeared for the Republic. In his submissions, *Mr. Kagunza* urged the court to allow the application on grounds that the appellant's appeal had overwhelming chances of success. In a bid to demonstrate this point, counsel invited the court to note that in the proceedings before the lower court, the language used to read the charges to the appellant had not been disclosed; that though the complainant was a child of tender years, no proper voir dire examination was conducted by the trial court before her evidence was taken and that the evidence adduced by the prosecution during the trial amounted to hearsay. In support of his submissions, counsel relied on the persuasive authority of **Peter Hinga Ngatho V Republic Criminal Appeal No. 2 of 2015 [2015] eKLR**
6. The application is contested by the state. *Ms Odour* in opposing the application submitted that the

prosecution had proved all the ingredients of the charges against the appellant beyond reasonable doubt and that therefore, his appeal had no chances of success; that though the appellant claimed that he was suffering from a health condition, he had not demonstrated that the said condition was one that could not be treated in the prison's health facilities or at the Moi Teaching and Referral Hospital where inmates are taken for further treatment. In her view, the appellant had not proved that special or exceptional circumstances existed in his case to entitle him to the grant of bond pending appeal.

7. I have considered the application, the rival submissions made on behalf of the parties, the grounds of appeal and the authority cited by counsel for the appellant. I find that though under **Section 357** of the **Criminal Procedure Code** the High Court is empowered to admit a convicted person to bond pending appeal on any terms the court deems just, that power and discretion must be exercised judiciously in accordance with the law taking into account the circumstances obtaining in each particular case.
8. The legal principles which guide the court in the exercise of its discretion under **Section 357** of the **Criminal Procedure Code** are now well settled. They have been established in a long line of authorities but it will suffice to cite two of them.

In **Jivraj Shah V Republic (1986) KLR 605**, the Court of Appeal held

as follows;-

“The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the court of Appeal can fairly conclude that it is in the interest of justice to grant bail. 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 urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist. 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 weight and relevance of the points to be argued...”

8. Similarly in **Dominic Karanja V Republic (1986) KLR 612** the Court of Appeal expressed itself as follows;

“The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances. The previous good character of the applicant and the hardships, if any facing his family were not exceptional or unusual factors. His health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners. A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal ...”

9. From the foregoing, it is clear that in order for an appellant to be entitled to bond pending appeal, he must demonstrate the following;
 - (i) That his appeal has overwhelming chances of success.
 - (ii) That there exists exceptional and unusual circumstances in his case which would entitle him to bond pending appeal.
10. In this case, the appellant's application is mainly predicated upon his claim that his appeal has overwhelming chances of success owing to procedural flaws during the trial and the nature of the evidence adduced by the prosecution. I have read the proceedings of the lower court and the judgment of the learned trial magistrate.
11. The proceedings show that on 25th September, 2013 when the appellant took his plea, the charges

were read to him in a language that he understood and though the language used to read the charges was not disclosed, the record reveals that there was translation or interpretation of the English language to either Swahili or Nandi languages. On 8th October, 2014, the record shows that the appellant indicated to the court that he understood the Nandi language.

12. It is important to note that during the hearing of the case, the appellant actively participated in the proceedings. He cross-examined the prosecution witnesses and tendered his defence. In the circumstances, it is my view that whether the non-disclosure on record of the language used by the court on the date the appellant took his plea was an omission which made his plea equivocal as to invalidate the trial is a matter which will have to be determined by the appellate court but prima facie, I am not satisfied that the omission is one which raises a substantial point of law to support the appellant's contention that his appeal has high chances of success.
13. Similarly, the record of proceedings at page 6 and 7 of the copy annexed to the appellant's affidavit show clearly that the learned trial magistrate took time to conduct a detailed *voire dire* examination on the complainant and PW2 before they testified before the court. Again, whether the said examination satisfies the requirements of **Section 19** of the **Oaths and Statutory Declarations Act** is a matter for the appellate court to consider and reach its independent conclusion.
14. I have also read and evaluated the entire evidence that was adduced before the trial court. In view of the pending appeal, it would not be appropriate for me to delve deep into the evidence or comment on its veracity for fear of pre-empting or prejudicing the hearing of the appeal. But I can say with certainty that the evidence did not amount to hearsay as alleged by the appellant. Without making any findings, the record shows that the complainant gave graphic details regarding how the appellant allegedly committed the offence and her evidence appears to find support in the evidence of PW6. The trial court believed the evidence of the complainant. It also considered the appellant's defence and dismissed it as an afterthought. In the premises, it will now be the duty of the appellate court to re-examine the evidence and make its own independent findings but on my part, am not persuaded that a case has been made out that the appeal has overwhelming chances of success.
15. Regarding the claim that the appellant suffers from certain health conditions which cannot be effectively treated in prison, I find that no medical evidence has been availed by the appellant to substantiate the claim that he suffers from any ailment. In the absence of such evidence, it is my opinion that the appellant has failed to establish that exceptional or unusual circumstances exist in his case to entitle him to the grant of bond pending appeal.
16. The appellant had argued that he ought to be granted bail because he was the sole bread winner of his family and that just as he did not abscond bond during his trial, he will not abscond if granted bond pending appeal. As was held in the **Dominic Karanja** case [supra], the hardships facing an appellant's family members are not exceptional or unusual factors and an appellant's pledge that he will not abscond if granted bond is not a sufficient ground for releasing a convicted person on bond pending appeal.
17. In conclusion, I wish to distinguish the authority of ***Peter Hinga Ngatho V Republic*** [supra] cited by the appellant's counsel. Besides the fact that the grounds of appeal in the two appeals are completely different, the appellant in the **Peter Hinga** case succeeded in his application for bond pending appeal mainly because he ably demonstrated to the court that his appeal had overwhelming chances of success which the appellant in the instant appeal has completely failed to do.
18. In view of the foregoing, I have come to the conclusion that the appellant has failed to meet the legal threshold for grant of bond pending appeal.

Consequently, I find no merit in the Notice of Motion dated 21st October 2015. It is hereby dismissed.

It is so ordered.

C. W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at **ELDORET** **this** 11th day of February 2016

In the presence of:

The Appellant

Ms Odour for the State

Mr. Okara G.K holding brief for Mr. Kagunza for the Appellant

Ms Anne court clerk