REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 24 OF 2016

PETERSON KINYUA MURIUKI…..……APPLICANT/APPELLANT

AND

REPUBLIC……..….RESPONDENT

Being an appeal from the judgment of the Principal Magistrate's Court (M. Kivuti), Baricho Criminal Case Number 420 of 2015 delivered on 22nd June, 2016)

RULING

1. **PETERSON KINYUA MURIUKI**, the appellant herein was charged with the offence of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act No. 3 of 2006** vide Baricho Principal Magistrate's Court Criminal Case No. 420 of 2015. Upon trial, the Appellant was found guilty of the offence and convicted and sentenced to serve 20 years imprisonment. He was aggrieved by the trial court and preferred this appeal which is now pending for hearing the same having been admitted to hearing by this Court on 25th July, 2016.

2. The Appellant has now moved this Court vide Notice of Motion dated 27th July, 2016 under **Section 357 (1)** of the **Criminal Procedure Code** for bond/bail pending the hearing and determination of the said appeal. The basis of the application as per the supporting affidavit of the application sworn on 27th July, 2016, is that the appeal does raise substantial questions of law and fact that in his view would likely result either in acquittal or an order of retrial.

3. It is further deposed that the Appellant poses no danger to the safety of any person or community and he is not a flight risk. He has also promised to prosecute his appeal without delay.

4. At the hearing of this application Ikahu Ngangah advocate for the applicant/appellant, submitted orally that the appeal stands high chances of success and that by the time the appeal is heard and determined, the Appellant is likely to have served substantial part of his sentence. He contended that the language used at the trial was not indicated and that the Appellant did not follow the proceedings well as he is only conversant with Kikuyu language. It was also contended that **Section 211** of the **Criminal Procedure Code** was not fully complied with at the close of prosecution case and this in his view raised the chances of success in the appeal given that the cited section is couched in mandatory terms. Mr. Ngangah also attacked the weight of the prosecution case at the trial submitting that the medical report tendered in evidence did not corroborate the offence facing the Appellant pointing out that the pregnancy test conducted on the victim had no bearing to the offence. The Appellant relied on the following authorities in urging this Court to release the Appellant on bail pending his appeal;

(i) Joseph Kioko –Vs- R [2012] eKLR.

(ii) Peterson Chomba –Vs- R (unreported CR. A No. 155/12).

5. The Respondent, through Mr. Sitati learned counsel for the State told this Court that he was not opposed to the application. This court will nonetheless determine the application on its merit. It is important to note that at this stage, this Court has to be careful and guarded in assessing or evaluating the weight of prosecution case at the trial court in order to determine whether or not the appeal stands high chances of success because of danger of making some findings on the merits of the appeal itself and thereby rendering a decision prematurely and before hearing representations from both parties. The Court is therefore called to navigate between a very thin line in order to dispense justice.

6. The provisions of **Section 357 (1)** of the **Criminal Procedure Code** gives this Court a discretion to either admit an appellant to bail pending appeal or decline to grant bail. In exercising this discretion judicially the court is required to take the following into consideration:

(i) Whether the appeal has high chances of success.

(ii) Whether there are exceptional or unusual circumstances to warrant the court's exercise of its discretion in favour of the application.

(iii) Where there is high probability of the sentence being served before the appeal is heard.

In this respect, the Court finds the decision of the case of **JIVRAR SHAH –VS- R (1986) KLR 605** guiding. The principles listed above are also sound and are predicated on the fact that once an accused person has been convicted of an offence by a court of competent jurisdiction, his constitutional right to the presumption of innocence is extinguished and is deemed to have been lawfully convicted until his conviction is overturned on appeal.

7. I have checked at the proceedings in the lower court in regard to language used at the trial and noted that they were conducted in English/Kiswahili all through to the time the judgment was pronounced. The charges were read to the Appellant in Kiswahili and he denied the charge and a plea of not guilty was entered. Thereafter the trial commenced and he was represented by counsel all the way to the close of prosecution case. He conducted his own defence when he gave unsworn defence in Kiswahili. I have looked at the proceedings of 29th April, 2015, 21st October, 2015 and 1st April, 2016 and noted some active participation by the Appellant which clearly negates the ground on language used at the trial as a strong point of exceptional character pointing to high chances in the appeal. This ground in my view is an arguable one that requires further interrogation at the hearing of this appeal. See the decision in **Mwendwa Kilonzo & Anor –Vs- R [2013] eKLR.**

8. The Applicant has pointed out **Section 211** of the **Criminal Procedure Code** was not complied with. **Section 211** of the **Criminal Procedure Code** provides as follows:-

> **"(1) At the close of the evidence in support of the charge and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination or to make a statement not on oath from the dock and shall ask him whether he has witnesses to examine or other evidence to adduce in his defence and the court shall then hear the accused and his witnesses and other evidence (if any).**
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> **(2) If the accused person states that he has witnesses to call but they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel the attendance of the witnesses."**

I have looked at the proceedings from the trial court and noted that the learned trial magistrate did not specifically indicate on record that he had complied with at the trial. **Section 211** of the **Criminal Procedure Code** as what is reflected is as follows:

> **"I have considered the evidence adduced by the prosecution and submissions by both counsels for the accused and prosecution. I am satisfied that a prima facie case has been made out against the accused to warrant him to be put on his defence."**

The appellant duly represented at that stage, requested a date for defence hearing by which date they would have decided the mode of defence to adopt. At the hearing date, the appellant turned up in person and told the trial court that he wished to proceed in person and had decided to give unworn defence.

Now the big question is was the provisions of Section 211 not explained to him even if the same appears not to have been specifically recorded? This is a question which in my view can better be addressed at the hearing of the appeal because it does appear from past decisions (See e.g. **BENSON KAMAU MWANGI -VS- R [2010] eKLR** that the fact that a trial court does not specifically record that **Section 211** of **Criminal Procedure Code** has been complied with is not necessarily fatal so long as the record shows that there was compliance with that section. It does appear that the irregularity is curable under **Section 382** of the **Criminal Procedure Code** if no prejudice was suffered or if the irregularity did not occasion a failure of justice. I have considered the decision cited by the applicant in the case of **Peter Simon Chomba –Vs- R (CR. A. 155/12** at this court) and with due respect to that decision, the Court of Appeal decision in **Mwendwa Kilonzo & Anor –Vs- R [2013] eKLR** does show that that ground to say the least does not elicit much optimism unless more is still in store for the appellant and if that is the case, the same can be canvassed at the hearing of the appeal itself.

9. On the weight of the prosecution case at the trial, I have gone through the evidence presented by the prosecution at the trial and the defence put forward. And from the totality of the evidence to say the least for obvious reasons is that guided by the provisions of Section 124 of the Evidence Act in regard to the offence upon which the Appellant was convicted, I am unable to see at this stage exceptional or special circumstances obtaining from the evidence tendered to justify the Appellant being admitted to bail pending trial.

10. This appeal has been admitted to hearing and is just waiting for directions from this Court on how the same shall be disposed of as the record is now complete and ready for disposal. All the exhibits were forwarded to this Court together with the original file. This Court does not find any merit on the claim by the Applicant that the hearing and determination of the appeal is bound to take long because that is not true. This appeal depending on directions to be taken will not take more than 2 months from now.

In the premises and in light of the above reasons, this Court finds no merit in the Notice of Motion dated 27th July, 2016. Not withstanding the concession by the Respondent, the same is disallowed. The appellant is given liberty to take directions on his appeal and proceed since he has expressed desire that he wishes to expeditiously prosecute it.

Dated and delivered at Kerugoya this 4th day of October, 2016.

R. K. LIMO

JUDGE

4.10.2016

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Omayo

Court Assistant Naomi Murage

Appellant present

Interpretation English/Kikuyu

Omayo for State present

Miano for Ngangah for applicant

COURT: Ruling signed, dated and delivered in presence of Miano holding brief for Ngangah for the applicant and Omayo for the Respondent.

R. K. LIMO

JUDGE

4.10.2016

Later:

Ngangah for the Appellant present

Ngangah: I pray that we be allowed to proceed by way of written submissions.

COURT: This appeal shall proceed by way of written submissions. The appellant has 14 days to file and serve the Respondent with the submissions who shall have 14 days upon service to respond.

Mention on 2nd November, 2016 for further orders.

R. K. LIMO

JUDGE

4.10.2016