



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 174 OF 2015

NICHOLAS KURGAT APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The appellant was charged with the offence of defilement contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act*. He also faced an alternative charge of committing an indecent act with a child contrary to *Section 11(1)* of the same Act.

2. After a full trial, he was convicted of the offence charged in the alternative count. He was sentenced to ten years imprisonment.

3. Aggrieved by his conviction and sentence, the appellant lodged an appeal to this court vide a petition of appeal filed on 17th December, 2015.

On 14th September, 2016, the appellant through his advocates *Ms Gicheru & Company Advocates* presented a Notice of Motion seeking that he be admitted to bond pending the hearing and determination of his appeal.

4. The application is supported by grounds stated on its face and an affidavit sworn by the appellant. He contends that his appeal has high chances of success and that if he is not admitted to bond as prayed, he will be prejudiced as he is likely to serve a substantial part of his sentence before the appeal is heard. He also urged the court to allow the application on grounds that he is not a flight risk having honoured the terms of bond granted to him during the trial.

5. At the hearing, the application was urged by learned counsel *Mr. Mathai* while learned prosecuting counsel *Ms Oduor* represented the state.

In his submissions, *Ms Mathai* in a bid to demonstrate that the appeal has high chances of success invited the court to note that the clinical officer in his evidence did not say that the tiny perforation noted in the complainant's hymen occurred as a result of her contact with any person; and, that the appellant was arrested after four months.

6. The application is opposed by the state. *Ms Oduor* contended that the appeal does not have any chance of success as the prosecution proved all elements of the offence beyond any reasonable doubt; that the appellant had not demonstrated that there were exceptional or unusual circumstances to entitle him to bond pending appeal and that as he was sentenced on 7th December, 2015, there is no possibility that the

appellant will have served a substantial part of his sentence before the appeal was heard.

7. I have considered the application, the grounds of appeal, the evidence on record and the rival submissions made on behalf of the state and the appellant. I have also read the judgment of the learned trial magistrate.

8. I wish to start by observing that under *Section 357* of the *Criminal Procedure Code*, this court has wide discretion in deciding whether or not to admit an appellant to bond or to suspend his sentence pending appeal.

9. The legal parameters for applications of this nature are now well settled. In order for the court to exercise its discretion in the appellant's favour, he must demonstrate that his appeal has high chances of success or that there are unusual or exceptional circumstances that would entitle him to the grant of bail pending appeal – See **Somo V Republic (1972) EA 476; Dominic Karanja vs Republic (1986) KLR 612.**

10. The above principles are predicated on the presumption that an appellant who has been convicted by a competent court is deemed to have been properly convicted and that he is serving sentence on a punishment for an offence that he has committed; that his conviction is valid until overturned on appeal – See: **Mutua V Republic (1988) KLR 497** case.

11. In this case, the appellant's application is mainly premised on the contention that his appeal has high chances of success. I am alive to the fact that at this stage, this court cannot consider the merits or demerits of the pending appeal as doing so would amount to prejudging the same.

Its duty is to evaluate the evidence on record and form an opinion regarding the chances of its success.

12. Having analysed the evidence presented to the trial court, though I cannot comment on the veracity of the prosecution case for fear of prejudging the hearing of the pending appeal, I have noted that out of the seven witnesses who testified in support of the prosecution case, only one witness, the complainant who was a child aged 6 years gave direct and material evidence linking the appellant to the commission of the offence.

13. But given the provision of *Section 124* of the *Evidence Act* which the trial magistrate relied on in convicting the appellant, I find that it would be the true province of the appellate court to re-evaluate the evidence tendered by the complainant and other witnesses and arrive at its own independent conclusion on whether it was credible and sufficient to prove beyond any reasonable doubt that the appellant had committed the offence in respect of which he was convicted. On my part, I can safely say at this stage that though from the record it is clear that the appellant does have an arguable appeal, I am not satisfied that the appeal is one that has overwhelming chances of success.

14. Another ground relied upon by the appellant was that he should be admitted to bond pending appeal since by not absconding during the trial, he had demonstrated that he was not a flight risk. That may be so but circumstances have now changed. He is now a convict and the presumption of innocence no longer applies to him. The presumption was automatically extinguished by the fact of his conviction. An appellant's pledge that he will not abscond if granted bond is not a sufficient ground for grant of bond pending appeal.

15. The record shows that the appellant was convicted and sentenced to ten years imprisonment on 7th December, 2015. In the circumstances, I find no merit in his claim that if the application was not allowed, he was likely to serve a substantial part of his sentence before the appeal was heard.

16. For all the foregoing reasons, it is my finding that the appellant has failed to meet the legal threshold for the grant of bail pending appeal. I am thus satisfied that the application dated 9th September, 2016 is not merited and the same is accordingly dismissed.

It is so ordered.

C. W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 3rd day of November, 2016

In the presence of:

The appellant

Mr. Kiboi holding brief for Mr. Mathai for the appellant

Ms Oduor for the state

Ms. Naomi Chonde court clerk