REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.474 OF 2014

JOHN KIMANI NJOROGE…..…….…….....
…….APPLICANT

VERSUS

REPUBLIC…….....RESPONDENT

RULING

The Applicant, John Kimani Njoroge was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 13th July 2013 at Ndemi Road, Dagoretti in Nairobi County, the Applicant ***"intentionally and unlawfully kissed the mouth and held the waist of M G M a child aged 13 years with yours hands".*** When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Applicant was convicted as charged. He was sentenced to serve ten (10) years imprisonment. The Applicant was aggrieved by the conviction and sentence. He has filed an appeal to this court.

Pending the hearing and determination of the appeal, the Applicant made an application to this court to be released on bail pending appeal. The grounds in support of his application were that the Applicant was of the view that the appeal that he had lodged had overwhelming chances of success because it raised substantial and weighty issues of the law. The Applicant further stated that there were exceptional circumstances which militate against the Applicant's conviction and sentence. During the hearing of the application, Mr. Muriuki for the Applicant elaborated the said grounds of appeal. He submitted that the Applicant was convicted on the basis of particulars that did not support the charge. In particular, he stated that **Section 2** of the **Sexual Offences Act** defines what constitutes an indecent act. Kissing and holding the waist of a complainant does not constitute indecent assault. He therefore submitted that there was no legal basis upon which the Applicant was charged and convicted. Mr. Mureithi for the State opposed the application. He submitted that although kissing was specifically mentioned in **Section 2** of the **Sexual Offences Act**, nevertheless, it constituted an indecent act within the meaning of **Section 11(1)** of the **Sexual Offences Act**. In essence, Mr. Mureithi was saying that the court should give a common sense interpretation of what constitutes an indecent act, and if it did so, it would reach the determination that the intended appeal did not have an overwhelming chance of success.

This court has carefully evaluated the rival submission made in this application. The issue for determination is straight forward: has the Applicant established a case for this court to release him on bail pending appeal? The principles to be considered by this court in determining whether or not to release the Applicant on bail pending appeal are no longer a matter of dispute. In **Jivraj Shah –vs- Republic [1986] KLR 605** at page 606 the Court of Appeal held thus:

> ***"There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court 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 a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is Somo –vs-***

***Republic [1972] EA 476* which was referred to by this court with approval in *Criminal Application No. NAI 14 of 1986*, *Daniel Dominic Karanja –vs- Republic* where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal pleading Evidence and Practice, 41st Edition page 783, paragraph 7 -86."**

In the present application, the Applicant has argued that he was convicted on the basis of particulars that did not support the charge of committing an indecent act. The Applicant relied on the definition of **"indecent act"** under **Section 2(1)** of the **Sexual Offences Act**. That section defines **"indecent act"** as:

"an unlawful intentional act which causes –

a. ***any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
b. ***exposure or display of any phonographic material to any person against his or her will."***

The Applicant argued that kissing and holding the waist of the complainant in this case did not constitute an indecent act in accordance with the definition ascribed to an indecent act in **Section 2(1)** of the **Sexual Offences Act**. Mr. Mureithi for the State was of the view that the particulars indeed established that the Applicant had committed an indecent act in the ordinary meaning and sense of what constitutes an indecent act. This court is yet to hear the appeal lodged by the Applicant. The issue before this court at this stage of the proceedings is whether indeed the Applicant's appeal has an overwhelming chance of success. This court cannot peremptorily dismiss the argument advanced by the Applicant in regard to the question whether kissing and touching the waist of a complainant constitutes an indecent act within the strict meaning ascribed to what constitutes **"an indecent act"** under **Section 2** of the **Sexual Offences Act.** Mr. Mureithi may well be right that the court may at the appropriate time ascribe a common sense or dictionary meaning to what constitutes an indecent act. At this stage of the proceedings, the issue raised by the Applicant constitutes an arguable point which may well succeed during the hearing of the appeal. This court therefore holds that the Applicant has established that his appeal, on the face of it, has a chance of success. It is not necessary for this court to consider whether the Applicant placed on record the existence of exceptional circumstances to persuade this court to grant him bail pending appeal. It suffices that he has established that his appeal has at least more than fifty per cent chance of success.

In the premises therefore, the Applicant's application to be released on bail pending appeal has merit and is hereby allowed. The Applicant shall be released on bail pending appeal on condition that he executes a bond of Kshs.500,000/- with one surety of the same amount or cash bail of Kshs.200,000/-. The Applicant is ordered to prepare, file and serve the record of appeal within thirty (30) days from today's date so that the court may admit the appeal to hearing. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF JULY 2015

L. KIMARU

JUDGE