



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 26 OF 2015

SHEIKH ELEMAAPPELLANT/APPLICANT

V E R S U S

REPUBLIC RESPONDENT

(From original conviction and sentence and Criminal Case No. 278 of 2014 of the Senior Principal Magistrate's Court at Hola).

RULING

When this application for bail pending appeal dated 21st May 2015 came up for hearing on 2/7/2015 the Prosecuting Counsel raised an objection to the affidavit sworn by I A J in support of the application. For the record, the application was supported by two affidavits, one by Sheikh Elema the applicant/appellant and the other by I A J described as the father of the complainant, who was said to have been defiled.

The learned prosecuting counsel attacked the affidavit of I A J on many grounds. Mainly counsel argued that the father of the complainant should have been on the prosecution side and not the defence side. Secondly, that the affidavit did not annex any document in support of its contents. Thirdly, that the defence wants to use the affidavit to bring further evidence on appeal through

the back door. Counsel urged the court to expunge the said affidavit of I A J.

Counsel for the applicant strongly opposed the request for expungement of the affidavit. Counsel argued that the State should have filed an affidavit in response to this affidavit, if they wanted to contest the affidavit. Counsel also complained of strong language used by the Prosecuting Counsel in his submissions.

I have considered the request for expungement of the affidavit of I A J and the opposition thereto.

In my view there is nothing irregular in a parent of a complainant being on the defence side. The prosecution may call a parent as a witness. The defence may also call the parent as a witness. In the present case however none of the parties called I A J as a witness in the case. Therefore the issue of which side I A J should be does not arise.

The grounds on which an affidavit can be expunged from the record have to do with competence of the deponent, and whether the contents are hearsay or false or that it was not properly attested. Oaths and affidavits are governed by the Provisions of the Oaths and Statutory Declaration Act.

In my view all the grounds raised by the prosecuting counsel for the request to expunge the affidavit

of I A J do not satisfy the requirements

of expungement of an affidavit.

In my view, the fact that the prosecuting counsel disagrees with the contents of the said affidavit does not make the said affidavit fatally defective. It is merely a contestable affidavit. Though the state need not necessarily file a replying affidavit in a criminal bail application, they can still in submission challenge the contents or adequacy of the contents of any affidavit filed in support of the application for bail. It is noteworthy that the said affidavit was filed in addition to the affidavit of the applicant and as such it is merely complimentary and seeks to support the averments of the. See generally law of affidavits 2nd Edition Butterworth's by PM Bakshi, as well as the Oath and Declarations Act.

This being an application for bail/pending appeal, the parameters to be considered by the court are well settled. The court has to critically look at the contents of the proceedings and judgment bearing in mind that the main consideration is whether there are overwhelming chances of success, based on the record. Arguments by both parties should address the court on those parameters for the court's decision. I must emphasize that new evidence in an appeal is not admitted through an application for bail pending appeal, but has to be brought in the appeal itself as provided for by law. Therefore the contents of the affidavits in this application cannot per se be used as evidence in the appeal.

Otherwise, in my view, the affidavit contested is not fatally defective or irrelevant and cannot be expunged from the record. It can however be attacked

on its contents, origin, motives and for any other relevant reasons.

I thus decline to strike out the affidavit of I A J.

Dated at Garissa this 16th July 2015.

GEORGE DULU

JUDGE