



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLICATION NO.205 OF 2015

KENNETH MWANIKI NJOROGE.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant prays to be admitted to bail pending the hearing and determination of his appeal. He was charged with an offence of sexual assault contrary to Section 5(1)(a)(ii) and (2) of the Sexual Offences Act for which he was acquitted. He was convicted on the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 15 years imprisonment.

The application is brought by way of Notice of Motion dated 4th June 2015 brought under Articles 3, 22, 23, 25, 48, 50 & 51 of the Constitution of Kenya 2010 and Section 357 of the Criminal Procedure Code Cap. 75 of the Laws of Kenya.

It is premised on grounds that the offence with which the applicant was charged is not known as the main charge of sexual assault was not substantiated, thus the alternative charge could not stand; the applicant was not in custody and attended all sessions throughout the trial in the lower court; the applicant stands to suffer irreparable loss owing to the long sentence passed and that the applicant has a medical condition that may jeopardize his health if there is continued confinement in prison where he might not be able to access the requisite medical facilities.

The application is supported by the affidavit of Jane Wanjiku Irungu, the wife of the applicant sworn on 4th June 2015. She deponed that the applicant demonstrated good faith and compliance with the bail/bond terms in the trial court and that he will abide by the terms that shall be imposed by this honourable court. She deponed that the applicant was convicted of a non-existing offence and therefore his imprisonment is a gross miscarriage of justice. She further deponed that the applicant's appeal had good prospects of success.

I have gone through the record of proceedings. I have also had the opportunity to peruse through the judgment delivered. The learned trial magistrate acquitted the applicant on the main charge. From the judgment it is stated at page 11, “ **It is thus for this particular reason that I am of the considered view that the prosecution have failed to prove the 1st main count against the accused person I do hereby acquit him accordingly under the provisions of Section 215 of the CPC.**”

The appellant was however convicted for the alternative charge; and, reading from the charge sheet, it was alleged that the appellant, on the 3rd day of April, 2012 at **[particulars withheld]** Primary School in Nairobi within Nairobi Area Province unlawfully and intentionally touched the vagina of A W N a child aged 10 years.

Whether or not the conviction should stand is the duty of the appellate court. However, this court's duty is to mind itself of the conditions that must exist before deciding whether to deny or grant bail pending hearing and determination of the appeal.

The conditions were spelt out in **Dominic Karanja Vs Republic (1986) KLR 612**, where the Court of Appeal held, inter alia that;

- a. **The most important issue was that if the appeal had such overwhelming chances of success. There is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances**
- b. **The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors....**
- c. **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.**

From the submissions before this court, it is argued by counsel for the applicant that the particulars that were given for the offence of indecent act do not tally with the definition in Section 2 the Sexual Offences Act. He submitted that since the applicant is alleged to have used his finger, fingers are not a component under the definition given in Section 2 of the Act. He submitted that since there was an acquittal from the main charge, there was no evidence to sustain the alternative charge. While quoting Article 50 and 49 of the Constitution, he submitted that there was no lawful basis to convict the applicant. Counsel finally submitted that the applicant was on bond in the Magistrate's Court case and did not abscond but will avail himself for the appeal.

Miss Aluda appearing for the respondent opposed the application. She submitted that the offence of indecent act was proved. She submitted that PW1 narrated what transpired between her and the teacher in class, that she reported to the house help that fingers were inserted in her vagina. She submitted that the definition is specific and that the main element is contact of which the appellant had with his fingers. She submitted that at page 10 of the proceedings, the applicant was willing to pay Ksh. 200,000/= to the complainant to withdraw the case. She stated that the appeal has no chance of succeeding.

In his further submissions, counsel for the applicant responded to the submissions of the respondent's counsel stating that the contact which is alleged to have taken place does not satisfy the ingredients as defined by the law. He submitted that there was no evidence that the applicant paid kshs.200,000/= to the complainant and that even if such evidence existed, it cannot add value to the requirements for the proof of the offence.

From the grounds submitted by the applicant's counsel, the only ground which can move this court to grant the application in favour of the applicant is if there is a high chance that the appeal will succeed.

A look at section 2 of the Sexual Offences Act No. 3 of 2006 defines indecent act as any unlawful intentional act which causes:

- a. **Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.**
- b. **Exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration.**

Hence, the use of fingers does not fall under the above definition which is the object that is alleged to have been used to indecently assault complainant. I will however leave it to the appeal court to make a more comprehensive interpretation of the said section.

Notwithstanding the above observation, the evaluation of the entire evidence of the prosecution witnesses clearly demonstrates that an offence under section 5(1)(a)(i) of the Sexual Offences Act was committed. The fact that the charge sheet was drafted under Section 5(1)(a)(ii) did not make the trial a nullity. On that ground alone it is my view that the appeal has slim chances of succeeding. Accordingly, the application is dismissed with no orders as to costs.

DATED and **DELIVERED** this 8th day of October, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Ms. Ngunju h/b for Kibe for the applicant
2. Mr. Muriithi for the respondent.