

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.133 OF 2014

(An Appeal arising out of the conviction and sentence of E.K. NYUTU – Ag.PM delivered on 22nd September 2014 in Makadara CMC. CR. Case No.1251 of 2010)

GODFREY WAWIRE NGERO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant, Godfrey Wawire Ngero was charged with the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on 10th February 2010, at *[particulars withheld]* Estate within Nairobi County, the Appellant intentionally and unlawfully had carnal knowledge of N W K (the complainant), a child aged 16 years. He was alternatively charged with the offence of **indecent assault of a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant committed an indecent act with the complainant, a girl age 16 years by touching her vagina. The Appellant pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged on the main count. He was sentenced to serve seventeen (17) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has sought to file an appeal to this court.

Although the appeal herein has been registered, the appeal itself was filed out of time. The Appellant has by notice of motion made pursuant to **Sections 349** and **356(1)** of the **Criminal Procedure Code** sought two (2) reliefs from the court: the first relief is for extension of time to file appeal out of time. This aspect of the application was not opposed by the State. In the premises therefore, the Appellant's application to be allowed to appeal out of time is hereby allowed. Since the Appellant has already filed the appeal, the appeal herein is deemed to be properly filed.

The second relief that the Appellant sought is to be released on bail pending the hearing of the appeal. The Appellant stated that his appeal had an overwhelming chance of success. He explained in detail why in his opinion the evidence adduced by the prosecution witnesses could not sustain his conviction. He took issue with the fact that the complainant had given contradictory evidence regarding her age. It was the Appellant's case that the medical evidence did not support the charge, especially the evidence of the complainant that she had been strangled before the Appellant allegedly sexually assaulted her. The Appellant stated that crucial evidence was not produced in court including the complainant's clothing and undergarment. The prosecution had alleged that these items of clothing were bloodstained and tainted with spermatozoa. In the absence of production in evidence of these items of clothing, it was the Appellant's case that the prosecution had failed to establish the charge that he had defiled the complainant to the required standard of proof beyond reasonable doubt. It was for these reasons that the Appellant is of the view that his appeal has an overwhelming chance of success and therefore he should be released on bail pending appeal.

On their part, the prosecution was emphatic that it had established its case on the charge of defilement to the required standard of proof. According to the prosecution, it had adduced evidence which established that the Appellant had defiled the complainant when she went to answer a call of nature in a communal toilet in the plot that the complainant's family and the Appellant resided. It was the prosecution's case that immediately after the sexual assault, a neighbour and the parents of the complainant examined and saw spermatozoa oozing out of the vagina of the complainant. The complainant was rushed to hospital where the doctor, upon examining her, confirmed that the complainant's hymen had been freshly perforated. This was proof that there had been penetration. The prosecution further adduced evidence which established that the complainant was well known to the Appellant at the time of the alleged defilement. It was on these facts that the prosecution was of the view that the appeal lodged by the Appellant had no chance of success. In the circumstance therefore, the prosecution argued that the Appellant should not to be released on bail pending appeal.

Having carefully considered the rival submission made on behalf of the Appellant and on behalf of the prosecution, this court takes the following view of the matter: for the Appellant to be released on bail pending appeal, he must establish that his appeal has an overwhelming chance of success. He must also establish the existence of exceptional or unusual circumstances that will persuade the court to exercise its discretion in his favour. What constitutes exceptional or unusual circumstances has not been given legal definition. However, from past court decisions it includes where the Appellant is ailing and requires medical attention which cannot be provided while he is in prison, where the Appellant is a person of old age, where the Appellant and the complainant have since reconciled and compensation paid or where the Appellant is a student attending school or college. These circumstances are not exhaustive. What this court can say is that each application will be decided depending on the facts and circumstances of each case.

In the present application, it was clear that the Appellant did not persuade this court, prima facie, that he has an appeal with overwhelming chance of success. Without delving into the merits of the appeal, the prosecution established that the Appellant used force to have sexual intercourse with the complainant, a child of less than eighteen (18) years. The court that will hear the appeal may, for the purposes of sentence, determine whether the complainant was fifteen (15), sixteen (16) or seventeen (17) years at the time the sexual assault is alleged to have occurred. For the purpose of this application, nothing turns on this aspect of the case. The other contradictions in the case will be resolved by the court that will hear the appeal upon re-evaluating the evidence. Suffice for this court to say that the Appellant failed to establish that his appeal has an overwhelming chance of success. The Appellant did not establish the existence of any exceptional or unusual circumstances that will persuade this court to exercise its discretion in his favour.

It is clear from the above reasons that the Appellant's application to be released on bail pending appeal cannot be allowed. It lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF DECEMBER 2014

L. KIMARU

JUDGE