



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 291 of 2011

P. G. N..... APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. Ochieng B.O., PM,

dated on 9th December, 2011 in Kilgoris Criminal case No.203 of 2011)

RULING

1. By his application dated 14th May 2012, the appellant/applicant, P.G. N prays for an order releasing him on bail/bond pending hearing and determination of his appeal. The application is premised on grounds that his appeal has high chances of success; that he is sickly suffering from acute pneumonia and that he is not likely to abscond.
2. The applicant swore an affidavit dated 18th May 2012 to further buttress his prayer to be granted bail/bond pending hearing of his appeal. He contends that by dint of the provision of **Article 49 (1) (f)** of the **Constitution of Kenya 2010**, he is entitled to be released on bail/bond on such terms as this court may determine.
3. In his further affidavit dated 11th April 2013, the applicant avers that the girl he is alleged to have defiled is staying with his parents at his home as his wife and that she gave birth to a baby girl who is being taken care of by the alleged victim, V. K. O. The applicant prays that he be granted bond so that he can go home to take care of his family.
4. The application is opposed. Though the respondent did not file a Replying Affidavit, counsel appearing contended at the hearing of this application that since the applicant is a convict, he is a great flight risk and is likely to flee beyond the jurisdiction of this court. Secondly, counsel submitted that this appeal has no chances of succeeding, and that it would be too early to say with any degree of certainty at this stage that the appeal is likely to succeed. Thirdly, counsel submitted that if the applicant is sick as alleged, he can still access medical attention even if he is in prison so long as he asks the court for an order.
5. The facts of this case are that the applicant herein was arraigned before the Principal Magistrate's Court at Kilgoris on one count of defilement in violation of **section 8 (1)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 27th day of February 2011 at [particulars withheld] in Transmara District within the Narok County did cause his penis to

penetrate the vagina of V. K. O, a girl aged 15 years.

6. In the alternative, the applicant was charged with committing an indecent act with a child contrary to **section 11 (1) of the Sexual Offences Act No.3 of 2006**, the particulars being that on the 27th day of February 2011, in Transmara District within the Narok County, he intentionally touched the vagina of V.K.O a child aged 15 years with his penis. The applicant denied the charge, was tried, found guilty and convicted on the main count of defilement and sentenced to 20 years imprisonment as prescribed under the law.

7. I have read through the entire lower court proceedings, including the judgment of the learned trial magistrate. Although I am not dealing with the appeal at this stage, what was stated before the trial court and the judgment of the trial magistrate has an impact on this court's view of whether or not the applicant's appeal has overwhelming chances of success and the likely consequences of a bond/bail order in favour of the applicant.

8. It is true, as stated by the applicant, that he has a right to be released on bond/bail as provided by **Article 49 (1) (f) of the Constitution** unless there are compelling reasons to the contrary. It is also true that whether or not to grant bond/bail is a matter for the discretion of the court, after considering all the circumstances of the case. Such discretion is to be exercised judiciously and not on the whim of the court, remembering always that there are competing interests in a case of this nature, pitying the interests of the community represented by the victim against the liberty of the applicant.

9. After weighing the two competing interests in this case, I have reached the conclusion that it would not be in the interests of justice to release the applicant on bond. First, it is unlikely that the appellant's appeal will succeed. Secondly, from the appellant's submissions, the main reason why the appellant wants to be released on bond is so that he goes back home to continue with what he alleges is family life with the victim. Thirdly if the applicant is unwell in whatever way, he can get treatment from any of the Government Hospitals within this Republic, and in particular, from Kisii Level 5 Hospital. Fourthly, there is no allegation that the appeal is likely to take a long time before it is heard and determined.

10. For the above reasons, and though the applicant is entitled to bond/bail pending appeal, I am not inclined to grant the prayer for bond. There are enough compelling reasons that dictate against the making of such an order. Accordingly, the Notice of Motion dated 14th May 2012 be and is hereby dismissed.

11. It is so ordered.

Dated and delivered at Kisii this 09th day of May, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mr. Mutai for Minda (present) for Appellant/Applicant

Mr. Majale (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.