REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 110 OF 2011

JEREMIAH MWANGI NGATIA..... APPELLANT/APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

R U L I N G

By a Notice of Motion dated 8th April, 2013 brought under article 51 of the Constitution and section 357 of the Criminal Procedure Code, the applicant seeks orders from this Court that he be released on bail pending the hearing of his appeal against conviction and sentence in Karatina Sexual Offence Case number 2 of 2012 in which the trial court convicted and sentenced him to 15 years imprisonment for the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006.

The application is supported by the affidavit of the applicant sworn the same date as the application. He depones that the he has lodged an appeal against the conviction and sentence and that his appeal has a high probability of success. To demonstrate the chances of success of his appeal, he has attached a copy of the Petition of Appeal containing four grounds namely:

1. THAT the learned trial magistrate erred in law and facts by failing to hold I was never taken for medical examination and that no explanation was ever given by the prosecution to that effect;

2. THAT the learned trial magistrate erred in law and in facts by failing to observe prosecutional work was shoddy and therefore not credible to sustain the said conviction in the eyes of justice;

3. THAT the learned trial magistrate erred in law and facts by failing to hold prosecution evidence on record is contradictory, inconsistent and very shaky to warrant any conviction;

4. THAT the learned trial magistrate erred in law and facts by failing to hold none of the prosecution witnesses was an eye witness.

The applicant has attached for the perusal of the Court the proceedings and judgment of the Court below, which he intends to attack on appeal. In the mean time as stated before he prays that this Court admits him to bail pending the hearing of his appeal.

When the Motion was called up for hearing, Mr. Wa Gathoni appeared for the applicant while Ms Maundu appeared for the State and intimated the State was opposed to the application.

In his submissions before me, Mr. Wa Gathoni while repeating the background to the application as set out above, submitted that unless the appellant was released on bail there was a likelihood that he would have served much of the sentence by the time the appeal would be heard and determined and if the

appellant turns out to be successful the appeal would have been rendered nugatory. According to Counsel the appeal had high chance of success. To demonstrate this he submitted that although PW1 was said to be mentally unsound, he gave clear evidence inconsistent with such a person and the cross-examination by the accused contradicted his evidence. He further submitted that although PW2 said she noticed the complainant had a problem when he arrived at home he could not tell when the offence was committed. Counsel further submitted that there was the issue of identification of the accused which did not come out clear during the trial.

Regarding the medical report, Mr. Wa Gathoni submitted that PW4 who produced the report stated that the alleged offence was committed on 24th February, 2012 and he examined the complainant on 27th April, 2012 and observed cracks on the anal area. These, counsel submitted, may have been caused by anything else apart from penile penetration. Counsel further took issue with the fact that PW4 did not examine the accused. According to Counsel, these contradictions in evidence gave the appeal a high chance of success and hence a good ground for releasing the applicant on bail pending appeal. In conclusion, Counsel invited the court to note that the applicant had been admitted to bail during his trial in the Court below though he was never able to raise the surety but that should not prevent the court from releasing the applicant on bail.

Ms Maundu for the State submitted that the Court found that the complainant though of unstable mental status was able to respond to questions although he took time to do so. According to Counsel his testimony was consistent and had bearing. His mental status was thus not a good ground for a appeal.

Regarding the time of the alleged offence, Counsel submitted that although PW1 did not state the time the alleged offence took place he was able to identify his attackers and further the fact that PW2 noticed something wrong with the complainant at 9.00 pm did not mean the incident took place at night. Regarding the medical report Ms Maundu stated that PW4 examined the complainant two days after the alleged offence and came to the conclusion that he had been raped. According the counsel the appeal had no overwhelming chance of success and that by the time the appeal is heard and determined, the appellant will not have served a significant portion of the sentence.

Ms Maundu submitted that in an application for bail pending appeal, the length of the sentence is a factor since the appellant may where the sentence is severe as is the case here be tempted to abscond.

It ought be observed that the court in considering whether or not to grant bail pending appeal, ought to bear in mind that it involves the proposition that a person who has been found guilty and convicted by a court of competent jurisdiction and whose sentence of imprisonment has not been set aside, must nevertheless be let loose on the community instead of staying in prison to serve sentence which is prima facie deserved. Once a convict sentenced to a prison term is permitted to be at large on grounds of humanity, the court runs the risk of the dilemna of resending such person to prison where his appeal fails. There may be temptation to either reduce the sentence or impose a fine. Should the latter happen, a situation would have been created where fines as punishment in certain cases entitle the rich to buy the right to break the law.

In the Botswana's case of **Laing vs. State 1989 BLR 54 (HC)** the court laid down the conditions for grant of bail pending appeal as:

1. If there is likelihood or reasonable prospect of the appeal succeeding;

2. If there are exceptional or unusual grounds for the application;

3. If having regard to the sentence there is going to be considerable delay either in preparing the record of appeal or because of undue delay resulting in the appellant serving the whole or substantial portion of the sentence and;

4. If it was a case of the nature that it would require the applicant free to confer with his counsel in the preparation of the appeal.

The Supreme Court of Uganda in the case of **Arvind Patel vs Uganda S.C Cr. Appeal No.1 of 2003** has set out the considerations for bail pending appeal as:

1. Whether the applicant is or not a first offender;

2. Whether the offence of which the applicant is convicted involved personal violence;
3. The appeal must not be frivolous and has reasonable chance of success;

4. The possibility of substantial delay in the determination of the appeal and;

5. Whether the applicant complied with bail conditions granted before the applicant's conviction and during the pendency of the appeal.

The court however cautioned that not all these considerations should be present before the applicant could be admitted to bail. A combination of two or more could be sufficient.

In the Kenyan case of **Jivraj Shah vs. Republic [1986] KLR 605 at pp 606-607** the Court observed that:

"...If it appears prima facie from the totality of circumstance that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or substantial part will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in **Somo v. Republic [1972] E.A 476** which was referred to by this court with approval in **Criminal Application No. Nai 14 of 1986, Daniel Karanja V. 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..."

The High Court in the case of **John Bosco Saria v. Republic Nbi High Court. Misc. Criminal Application No. 702 of 2007** has succinctly set out the principles as follows:

"... The main consideration of the principle to determine whether to grant bail pending appeal is clearly stated in **Somo v. Republic**. It is that a trial which to all outward appearances has been properly conducted, results in valid determination of the standing of the accused in the criminal proceedings, and where such a trial ends in a committal of the accused to jail, it may be considered the right position in law, unless and until the judgment is set aside on appeal. Therefore the applicant ought to be in a position to persuade the Court that his or her appeal is so strong, so meritorious, that at the end, the probabilities will favour acquital. The applicant, to discharge that burden, will need to raise some critical issue of law, or an issue as to the mode of application of evidence. Although it is in the Court's mind, the basic consideration remains: whether or not the appeal stands clear chances of success..."

The Court of Appeal in the case of **Issack Tulicha Guyo vs Republic Criminal Application No. 16 of 2010** has observed that in deciding an application for bail pending appeal, the court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by the Constitution and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong. It is not, therefore surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances.

I have attempted to undertake a quick panoramic view of caselaw both within our jurisdiction and comparative regional jurisdictions, and the common strand in the jurisprudence around bail pending appeal is that the applicant must of paramount importance demonstrate an overwhelming chance of success and that there must be a real risk of the whole sentence or a significant portion thereof being served by the time the appeal is heard and determined. Once these considerations are met, the only question the court siezed of the application appear to be left to deal with is the setting of the bail terms and conditions. However, the other considerations though complimentary, are important as well in

helping the court reach a fair conclusion. They serve as some sort of independent or control variables to the principle of overwhelming chance of success and fear of service of the whole or significant portion of sentence. This control function becomes clearer especially in the overwhelmingness test since in the exercise the Judge runs the risk at this interlocutory stage, of delving into the merits of an appeal without the benefit of substantial arguments.

Although the principles laid down in *Somo's* case over forty years ago, are still sound to this day, it is important to acknowledge that law is an evolving discipline. New considerations and circumstances emerge as society develops. As observed earlier in this ruling new considerations in the determination of a bail pending appeal application have since emerged which are equally significant. In this context, a court confronted with an application for bail pending appeal need not feel strait-jacketed by the principles set out in *Somo's* case if to do so would shut equally compelling considerations to the extent that injustice will be occasioned to the applicant.

The applicant in his petition of appeal takes issue with the fact that he was never taken for any medical examination nor any reason given by the prosecution why he was not. His counsel in urging this ground to support this application submitted that although the complainant was examined by PW4 and found to have cracks around the anal area nothing was available to say that these cracks could only be caused by penile penetration and not any other cause.

Without going to the merit of the grounds of appeal and after careful examination of these grounds vis-a-vis the evidence recorded I am persuaded that the appeal has an overwhelming chance of success and admit the applicant to bail on this ground alone without considering the other aspect on whether he may have served the whole or substantial part of the sentence by the time the appeal is heard and determined.

The next question for me to decide is the terms of such bail. As observed earlier, in dealing with an application for bail pending appeal, the court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by the Constitution. Further, the court needs to note that such an application involves the proposition that a person who has been found guilty and convicted by a court of competent jurisdiction and whose sentence of imprisonment has not been set aside, must nevertheless be let loose on the community instead of staying in prison to serve sentence which is prima facie deserved.

The applicant was convicted of the serious offence of gang rape contrary to section 10 of Sexual Offences Act No. 3 of 2006 and sentenced to the minimum sentence of 15 years. He is no longer a beneficiary of the presumption of innocence recognised by the Constitution and principles of criminal law generally. He is as it were a convict. While appreciating his right of appeal and possible prospects of success of such an appeal, the court must not lose sight of the fact that the bail terms ought to be stringent enough to secure his presence during the pendency and disposal of his appeal including the possible eventuality of dismissal of the appeal and his return to prison to serve the sentence meted out.

The accused at the trial stage was admitted to bail of Kshs. 100,000/- with a surety of a similar amount which for reasons not brought to the court's attention he could not raise. His Counsel however urged me not to take into account this fact since circumstances have now changed and the applicant would be able to meet the bail conditions set by the court.

Taking the foregoing into account, the Court orders the release of the applicant on bail in the sum of Kshs. 300,000/- with a surety of a similar amount to be executed before the Deputy Registrar of this Court. The applicant is further directed to report to the said Registrar once every 30 days after such release until the hearing and determination of his appeal or further orders of the court.

Dated and delivered at Nyeri this 2nd day of July, 2013

J. N. ABUODHA

JUDGE

Delivered in open Court in the presence of Kiminda holding brief for Wa Gathoni for the Appellant/Applicant and Kitoto for the Republic.

J. N. ABUODHA

JUDGE