REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E082 OF 2021

DAVID NOAH OCHIENG.....APPLICANT

-V/S-

REPUBLIC.....RESPONDENT

RULING

Application

1. The application dated 7th September 2021 was brought under Section 357 of the Criminal Procedure Code seeking for orders that the Honourable Court be pleased to make an order to release the Appellant/Applicant and admit him to bail on such terms as the Court may deem just and reasonable.

2. The application is premised on grounds that the Appellant has timelessly appealed, the appeal has overwhelming chances of success, and that due to the Court's current delay the Appeal may take long to dispose off.

3. The application is supported by an affidavit sworn on 7th September 2021 by Jared O. Magolo, the advocate having the conduct of the matter on behalf of the Appellant with such other grounds.

Response

4. The Respondent filed a Replying Affidavit sworn on 14th October 2021 by Edgar Mulamula the prosecution counsel in conduct of the matter in response to the Applicant's Notice of Motion Application filed on 7th September 2021 with the sworn affidavit of Jared O. Magolo.

5. The Respondent states that the application totally lacks merit as the Applicant has not based his application on any ground and that the application does not meet the legal requisite threshold of the orders that it seeks.

6. The Respondent states that the intended appeal has no chance of success whatsoever as the evidence tendered by the prosecution is overwhelming, well corroborated and sufficient t warrant the conviction arrived at by the Honourable Court.

7. The Respondent states that due to the long sentence that the Appellant is facing, his chances of absconding are extremely high. Bail pending appeal is discretional as the Applicant's innocence was compromised upon conviction. The Respondent further states that the Applicant has not demonstrated any peculiar and exceptional circumstances to warrant grant of the orders sought.

8. The Respondent states that the sentence imposed by the court is lenient considering the nature of the offence which the Applicant was charged and convicted. That the Applicant ought to have been sentenced to life imprisonment as provided by Section 3(1) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006. The Respondent prayed that the application be dismissed.

Applicant's Submissions

9. The Applicant submits on success of the appeal that conviction of the Appellant was based on what the learned trial magistrate called medical evidence. According to the trial magistrate, *"PW2 Doctor Nafisa told the court that the Complainant had vaginal abrasions on indication that she physically resisted. The hymen was also broken an indication that the Complainant was sexually assaulted. The fact that there was resistance is a clear indication that the Complainant did not consent to the sexual act."* The Applicant submits that this according to the trial magistrate was sufficient to demonstrate lack of consent. That the trial magistrate closed her eyes to the following glaring issues:-

i) The Complainant's first visit was to a medical facility known as Savani Medical Centre. According to the facility, even the bruises which PW2 later claimed to have seen did not exist. According to the hospital record, what was noted was, 'Normal external genitalia/no bruises or lacerations Speculum-Normal vaginal wall and cervix.' This could only be consistent with sexual activity for which the parties are ready prepared and consenting. One question that also needs to be answered is why the prosecution chose to keep this document away from the court yet they supplied it to the Appellant as an exhibit to be produced. The court did not consider the large time lapse between two medical reports and the fact that the prosecution attempted to conceal the presence and availability of the 1st medical examination document. That the trial magistrate even misunderstood the doctor's testimony. PW2 at page 10 says "The examination of her genitalia the external genitalia was normal. The vagina had abrasions. The hymen was broken with an old scar. The injury was assessed as harm. The patient was given analgesics." An old scar can only refer to a breaking of the hymen at a long past session.

ii) The offence is supposed to have been committed a few metres from Central Police Station and no report was made until the afternoon of the following day.

iii) Although the complainant had her phone, she did not call for help at all even when she was in the salon alone. Neither did she attempt to shout and attack attention of security guards outside.

iv) The Complainant was content to wait to be the last person to leave the salon and even offered to let other customers who came later to be attended before her. The Respondent submits that all the above pointed to a consensual and planned encounter.

10. The Applicant submits that he was out on bond. He attended trial faithfully. He has demonstrated his willingness to obey bond terms. His place of work and abode is known. The Applicant further submits that he is a young person with a family to allow him to be on bond is to prevent other members from hardship and suffering.

11. The Applicant submits that he is serving sentence that will most likely be set aside. The appeal has not yet been argued but the materials available show the overwhelming chances of success. The Applicant urged the court to be released on bond.

Respondent's Submissions

12. The Respondent submits that the evidence produced by the prosecution witnesses was sufficient to prove the offence of rape. This is as stated in the Evidence Act cap 80 of the Laws of Kenya at Section 107 (1) which provides that, *'whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.'*

13. The Respondent submits that the ingredients of the offence of rape therefore include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. In *Republic v Oyier* [1985] KLRR pg 353, the Court of Appeal held as follows:-

1. "The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented.

2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

3. *Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will, nor is it any excuse that she consented after the fact."*

14. The Respondent submits PW1 in her testimony stated that on the material day while at the Applicant's salon, the Applicant informed her that the door to the salon was locked and became harsh upon her insistence that he opens the door. She also stated that the Applicant refused to open the said door, caressed her breasts and threatened to attack her. The Applicant then proceeded to rape her as she resisted though unsuccessful. The Respondent submits that this testimony is corroborated by PW2 (Doctor Nafisa) who stated that the Complainant's hymen was broken and there was a scar that was healing. This indicated that she was sexually assaulted. There was also signs of struggle from PW1 because the vagina also had abrasions. The Respondent therefore submits that there was sufficient evidence tendered to prove unlawful and intentional penetration by the Applicant. The circumstances of the case also point to the fact that PW1 had not consented to the act.

15. The Respondent submits that bail pending appeal is discretional as the Applicant's innocence was compromised upon conviction. In the Bond and Bail policy, the burden lies with the applicant to establish that the appeal has high chances of success or that he is likely to serve a substantial part of the sentence before the appeal is heard. The Applicant in his application has merely asserted that his appeal has high chances of success without specifically stating the grounds on which he relies on. The Applicant only states that the appeal may take long to dispose. This does not establish any exceptional chances of succeeding. The rationale for considering the chances of success of the appeal was given in *Somo v R* at page 480 as follows:-

"There is little if any point in granting the application if the appeal is not thought to have an overwhelming chance of being successful, at least to the extent that the sentence will be interfered with so that the applicant will be granted his liberty by the appeal court. I have used the word 'overwhelming' deliberately for what I believe to be good reason. It seems to me that when these applications are considered it must never be forgotten that the presumption is that when the applicant was convicted, he was properly convicted. That is why, where he is undergoing a custodial sentence, he must demonstrate, if he wishes to anticipate the result of his appeal and secure his liberty forthwith, that there are exceptional or unusual circumstances in the case. That is why, when he relies on the ground that his appeal will prove successful, he must show that there is overwhelming probability that it will succeed."

16. The Respondent submits that the application lacks merit as nothing on record stands out as one that is very likely to succeed even before the same is argued based on the state of the record. The Respondent submits that the sentence meted out to the Applicant is lenient as the offence attracts a maximum of life imprisonment. This is provided for by Section 3 (1) as read with Section 3 (3) of the Sexual Offences Act No. 3 of 2006. The Applicant therefore has a high chance of absconding due to the gravity of the offence. The Respondent therefore asks that the application be dismissed.

Analysis and Determination

17. This court has considered the Notice of Motion application dated 7th September 2021, the Replying Affidavit sworn on 14th October 2021, Supplementary Affidavit sworn on 6th October 2021, and submissions by both parties. Issues for determination are whether the appeal has overwhelming chances of success, whether the Appellant has shown that he will attend court as and when required, and whether special circumstances exist.

18. In the case of ***Charles Owanga Aluoch v Director of Public Prosecutions*** **[2015] Eklr,** it was held that:-

"The right to bail is provided under Article 49(1) of the Constitution but is at the discretion of the court, and is not absolute. Bail is a constitutional right where one is awaiting trial. After conviction that right is at the court's discretion and upon considering the circumstances of the application. The courts have over the years formulated several principles and guidelines upon which bail pending appeal is anchored. In the case of *Jiv Raji Shah vs. R [1966] KLR 605*, the principle considerations for granting bail pending appeal were stated as follows:

"(1) The principal consideration in an application for bond pending appeal is the existence of exceptional or unusual

circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.

(2) If it appears prima face from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

(3) The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued."

19. It is pleaded that the appeal has overwhelming chances of success and that due to the court's current delay, the appeal may take long to dispose off. In submitting, the Applicant stated that he was out on bond, attended trial faithfully, demonstrated his willingness to obey bond terms, his place of work and abode is known, he is a young person with a young family, and allowing him to be on bond is to prevent other members from hardship and suffering.

20. In conclusion, having considered the prosecution's case, evidence of the Complainant against the Appellant's word, this court finds merit in the application. Applicant to be released on bond of Kshs. 100,000 with surety of a similar amount and the appeal to be prosecuted expeditiously.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 13TH DAY OF JANUARY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Kambaga holding brief for Mr. Mulamula for Respondent

No appearance for Mr. Magolo for Applicant

Mention on 10.2.2022 for Record of Appeal to be supplied and for directions

HON. LADY JUSTICE A. ONG'INJO

JUDGE