HIGH COURT OF KENYA AT MURANGA

CRIMINAL APPEAL NO E024 OF 2021

BEDAN KANGETHE KAMAU .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No 3 of 2006 and sentenced to serve fifteen (15) years imprisonment.

2. Being dissatisfied with the said conviction and sentence, he lodged this appeal on the grounds that the age of the complainant was not proved and that the charge sheet thereon was defective.

3. By a notice of motion under certificate of urgency dated 7th October 2021, he sought to be released on Bail pending appeal on the ground that the sentence was unjustified and inimical and that there were exceptional or unusual circumstances that warranted the courts exercise of its discretion and that the appeal had overwhelming chances of success. He contended that there was high probability of him serving the sentence before the appeal was heard.

4. The application was supported by his affidavit in which he contended that the prosecution witnesses gave contradictory evidence and that penetration was never proved, thereby making the appeal one with high probability of success.

5. It was deposed further that the psychological and physical damage he was likely to suffer while incarcerated may never be undone even after a successful appeal as he was likely to serve the sentence before the appeal was heard.

6. The appeal was opposed by the state through a replying affidavit sworn by WINNIE ATIENO OTIENO a Prosecuting Counsel in which she stated that having been convicted by the lower court, the appellant's rights under Article 29 of the constitution were automatically curtailed until such a time that this court shall have set aside the conviction and sentence.

7. It was contended that the appellant had not demonstrated that his appeal had overwhelming chances of success and that the same had not demonstrated the exceptional or unusual circumstances to warrant the courts exercise of jurisdiction noting that there was possibility of the appellant absconding court attendance due to the long custodial sentence meted to the same.

8. When the application came up for hearing before me, I advised the appellant Advocate on record, one Mr. Irumba to set the appeal down for hearing in place of the application herein as the record of appeal was as at that time before the court and that would have saved judicial time, but the same insisted that it was the appellants right to have his application heard and determined.

9. In submission, the appellant contended that there were high chances of the appeal succeeding as the case before the lower court was not proved as victim had no injuries and that there were no spermatozoa seen in the victim's private parts.

10. The stated relied on the replying affidavit.

DETERMINATION

11. The fact that the appellant was convicted by a court of competent jurisdiction is not in dispute and therefore the principles to be considered by the court on appeal for grant of bail pending appeal is not the same as those of bail pending trial as set out in Article 49 of the constitution.

The principles were settled by Justice Odunga in the case of JOSHUA KIARIE NJUGUNA vs R [2021] e KLR *7. Article 49(1)(h) of the Constitution provides that: -*

An accused person has the right …

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

8. However, a different test applies where the matter before the Court is an application for release on bail pending the hearing of the appeal. Section 357(1) of the ***Criminal Procedure Code*** *provides as follows:*

After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.

9. It was therefore held in ***Masrani vs. R [1060] EA 321*** *that:*

"Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction."

10. I therefore agree with the position in ***Charles Owanga Aluoch vs. Director of Public Prosecutions [2015] eKLR*** *where 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. Existence of exceptional or unusual circumstances upon which the court can fairly conclude that it is in the interest of justice to grant bail.

2. It appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of a 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, then, a condition of granting bail will exist.

Main criteria is that there is no difference between overwhelming chances of success and set of circumstances which disclose substantial merit in the appeal – being allowed, the particular circumstances and weight and relevance of the points to be argued."

11. This position was restated in ***Mutua vs. R [1988] KLR 497****, in which the Court of Appeal stated:*

"It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal."

*12. In **Jivraj Shah vs. Republic [1986] KLR 605; [1986] eKLR**, the Court of Appeal held that:*

"There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it, 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 Dominic 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."

13. It is therefore clear that a different test from that applied in bail pending trial is applied in bail pending appeal. When considering an application for bail pending appeal, the Court has discretion in the matter which must be exercised judicially taking into consideration various factors as follows:

*a. Whether the appeal has overwhelming chances of success. See **Ademba vs. Republic [1983] KLR 442**, **Somo vs. R [1972] EA 476**, **Mutua vs. R [1988] KLR 497**;*

*b. There are exceptional or unusual circumstances to warrant the Court's exercise of its discretion. See **Raghbir Singh Lamba vs. R [1958] EA 37**; **Jivraj Shah vs. R [1986] eKLR**; **Somo vs. R (supra)**; **Mutua vs. R (supra)**;*

*c. There is a high probability of the sentence being served before the appeal is heard. See **Chimabhai vs. R [1971] EA 343**.*

*14. What constitute exceptional circumstances were dealt with in **R vs. Kanji [1946] 22 KLR**, where **De Lestang, Ag.J** (as he then was) held that:*

"The appellant's appeal is not likely to be heard before the end of March or beginning of April by which time I am informed he shall have served one fourth to one-third of his sentence. The mere fact of delay in hearing an appeal is not of itself an exceptional circumstance, but it may become an exceptional circumstance when coupled with other factors. The good character of the appellant may, for example, together with the delay in hearing the appeal constitute an exceptional circumstance. The appellant in this case is a first offender and his appeal has been admit to hearing showing thereby that it is not frivolous. In addition to that there is the fact that his co-accused, who is in no respect in different position from him as regards bail, has been admitted to bail."

*15. According to **Trevelyan, J** in **Somo vs. R [1972] EA 476:***

"…the single fact of having been two identical applications with one being allowed and the other being refused was, of itself, an unusual and exceptional circumstance."

16. Good character alone, however, it was held in the same case:

"can never be enough. There is nothing exceptional or unusual in having such a character."

*17. The rationale for considering the chances of success of the appeal was given in **Somo vs. R** (supra) 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."

12. I agree with what the good Judge has stated and have nothing more to add and will therefore apply them to this matter and to see if the appellant has placed before the court any material to support his application herein.

13. From the affidavit in support, the only exceptional or unusual circumstances is that the applicant has been sentenced to serve a period of fifteen years. It is clear to my mind that this appeal shall be heard before the applicant serve a substantive part of the same and the sentence having been passed by a court of competent jurisdiction upon hearing the applicant is a lawful sentence and therefore find that the same is not unusual.

14. On the appeal having overwhelming chances of success, whereas this court is not hearing the full appeal, the only issues raised by the appellant is that there were conflicting evidence on the age of the victim and that the victim had no injuries or spermatozoa seen at the time of examination, which issues in themselves does not show that the appeal has an overwhelming chances of success taking into account the fact that the applicant was convicted based upon the analysis of the evidence on record and a casual look at the judgement of the trial court shows that the age was proved through the production of her birth certificate and that the absence of injuries did not discount the proof of penetration.

15. I am therefore satisfied and hold that the appellant has failed to show that there are circumstances which warrant grant of orders sought and therefore find no merit on the application dated 6th October 2021 which I hereby dismiss.

SIGNED DATED AND DELIVERED AT MURANGA THIS 2ND DAY OF MARCH, 2022

J. WAKIAGA

JUDGE