



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPEAL NO. 161 OF 2016**

**DENNIS DENA MWARINGA .....APPLICANT /APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

Vide a Notice of Motion application dated 24<sup>th</sup> January, 2017, the applicant/appellant has sought orders that this court admit or grants him release on bail/ bond under sections 356 (1) and 357 (1) of the Criminal Procedure code pending the hearing and determination of his appeal against his conviction and sentence in Mombasa Chief Magistrate's Criminal case No 2340 of 2012, REPUBLIC VRS DENNIS DENA MWARINGA.

The application is premised on the grounds cited on the face of the said application and supporting affidavit of ANDREW ISSAC HAYANGA, counsel for the Applicant/appellant. The said grounds are as follows that;

- (a) the applicant /appellant was charged with the offences of rape contrary to section 3 (1) (a) as read with section 3 (3) of the Sexual Offences Act and an alternative charge of indecent act with an adult contrary to section 11(4) of the Sexual Offences Act;
- (b) after a full trial, the Applicant/appellant was convicted for the offence of rape contrary to section 3 (1) (c) as read with section 3 (3) of the Sexual Offences Act and sentenced to serve 10 years imprisonment;
- (c) that throughout the duration of the trial, before the subordinate court, he applicant/appellant was out on bond/bail of ksh 80,000/= and he fully complied with the bond terms until the trial was finalized.
- (d) the applicant /appellant has filed an appeal being Mombasa High court Criminal Appeal No 161 of 2016, DENNIS DENA MWARINGA VRS REPUBLIC;
- (e) the appellant/applicant's appeal raises substantial legal issues, with overwhelming likelihood of success.
- (f) the applicant/appellant is a mason at Mikindani within Mombasa county where he also has a well known homestead where he has resided all his life, hence he is not a flight –risk.
- (g) the applicant/appellant is a 35 years old man with a wife and children ( all under the age of 10 years) for who he is their only bread winner and care- giver;

(h) the applicant/appellant is a pastor as Jesus Healing church Mikindani and has always been a person of good character.

(i) the applicant/appellant is ready and willing to abide by any terms as to the security that the Honourable court may impose for his release on bail/bond.

The respondent did not file a replying affidavit.

At the hearing of the application, the learned counsel for the applicant/appellant, Mr Hayanga, strongly argued that the Applicant has demonstrated reasonable chances of success in his appeal and pointed the flaws and weaknesses in the proceedings and judgment of the trial court.

He submitted that there was medical evidence that the complainant was demented but there was no medical evidence to confirm that she was a person who could not appreciate the circumstances of rape.

He also submitted that the learned magistrate found that the doctor said that the hymen was not intact but there was no evidence of penetration counsel then wondered what offence the trial magistrate convicted for.

He then submitted that the trial magistrate failed to find or consider the element of consent as described under sections 43 and 44 of the Sexual Offences Act.

He further submitted that the complainant said that the last time the accused went, she made noise and neighbours came but none of the neighbours were called as witnesses to confirm this. The only one who came but he never heard of anything from this house

Finally, the learned counsel submitted that the magistrate made a find of defilement and another finding on rape which clearly portrays the judgment as defective because it is not possible to convict on two charges that are different in elements such as defilement and rape.

He referred court to several authorities being;

(i) ABDI VRS REPUBLIC (1991) KLR 171

(ii) MUTICHAND VRS REPUBLIC (1972)E.A 299

(iii) MWITA VRS REUBLIC (2009)E.A 304

(iv) KEMUNYA VRS REPUBLIC (2009) E.A 181

He then urged the court to admit the applicant/appellant to bail pending the hearing and determination of his appeal.

The respondent, through M/s Ocholla, counsel for the state, opposed the application by the applicant to be released on bond/bail pending the hearing and determination of his appeal arguing that the appellant has not demonstrated:-

(i) that his appeal has a high chance of success since bail at his stage is not a constitutional right.

(ii) exceptional or unusual circumstances exist to warrant his release on bail pending the hearing and determination of his appeal.

She submitted that factors such as he appellant having been not on bond during his trial before the lower court, being a breadwinner and a church minister are immaterial when it comes to considering bail pending the hearing and determination of an appeal.

On the issue of whether the prosecution adduced evidence to prove penetration, M/s Ocholla submitted that the trial magistrate relied on evidence of the doctor.

She also submitted that the state was able to prove the act was done under coercive circumstances as demonstrated at page 2 of judgment and that the applicant threatened to harm the complainant in order to continue with his actions.

She further submitted that the prosecution was able to prove that the complainant was incapable of appreciating the nature of the act that was committed against her through the medical report that was produced.

And that by the magistrate's finding of defilement when the applicant had been charged with the offence of rape, M/s Ocholla submitted that this did not prejudice him in any way.

She said that the dates for appeal are available and believe the appeal will be heard before the applicant who was sentenced to serve 10 years, completes his sentence.

Section 356 (1) of the Criminal Procedure Code provides for admission to bail and stay of execution pending the entering of an appeal as follows;

“The High court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non performance of any act or the suffering of any punishment ordered by or in the sentence or order as may be seen reasonable to the High court or the subordinate court”.

Section 357 (1) of the Criminal Procedure Code on the other hand provides for admission to bail or suspension of sentence pending appeal as follows;

“After the entry 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 executor of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”

In consideration of the applicant's application to be released on bail pending the hearing and determination of his appeal, the court has evaluated the evidence and findings of the trial court with regard to the grounds of appeal, the law and cited authorities;

The main consideration for bail pending an appeal is that the applicant must show over whelming chances of his appeal succeeding.

In an Article by professor Kivutha Kibwana (1992) “Law and the Administration of Justice in Kenya”, International, Commission of jurists General Printers Limited, Kenya this principle has been expressed as follows;

“it must be remembered that a person has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside. It is not wise to interfere either from the point of view of the welfare of the appellant or the state, unless there is a real reason why the court should hold that he should not be deprived of his liberty. The best part for that consideration is whether the appellant can show an over whelming chances of establishing his right to be set at liberty. If he does not do so, the law should take its ordinary course.”

From his counsel's submissions, it is clear that the applicant/appellant intends to attack his conviction on the grounds of the quality of evidence which was adduced before the trial court, the flaws in the proceedings and failure by the trial magistrate to appreciate the law vis a vis the evidence.

Having examined the grounds of appeal with regard to the evidence that was presented before the trial court, I am of the opinion, without delving into the merits or other wise of the appeal, that the applicant has an arguable case with a likelihood of success.

The applicant, it has not been disputed, is a Kenyan citizen with an occupation and residence within Mombasa County and is therefore unlikely to abscond if released on bail /bond.

Accordingly, it is hereby ordered that;

1. The applicant /Appellant be admitted to bail in the sum of Ksh 400,000/= with one surety of a similar amount.
2. In the alternative, the applicant/appellant may be released upon payment of Ksh 200,000 with one surety of Ksh 200,000.
3. The surety to be approved by the Deputy Registrar of this court
4. The applicant/Appellant to report to the said Registrar every once a month during the pendency of this appeal and must be present at the hearing of his appeal unless such attendance is dispensed with by this court.

Orders accordingly.

**Ruling read, signed and dated this 21<sup>st</sup> day of March 2017.**

**D.O CHEPKWONY**

**JUDGE**

In the presence of;

M/s Ocholla for the state

Mr (Rtd Justice) Hayanga for the Appellant

C/Clerk – Kiarie