



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CRIMINAL APPEAL NO. 54 OF 2015**

**JOHN CHIKAMAI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESEPDENT**

**(BEING AN APPEAL FROM THE RULING DENYING BAIL IN NAROK CRIMINAL CASE  
481/2015-ABDUL Z)**

**RULING**

1. This is an appeal from the Ruling of the Chief Magistrate's court Criminal Case No. 481 of 2015 at Narok by which the court denied bail to the accused person.
2. The original grounds of appeal prepared by the appellant himself restate his personal circumstances but also reiterate the right to bail under Article 49 of the Constitution. The appellant also pledges to attend trial whenever required by the court.
3. Subsequently the appellant instructed Mr. Gichuki to act for him. He filed supplementary grounds of appeal as follows:
  1. **“The First ground of Appeal is simply that the Learned Trial Magistrate erred in Law and in fact in failing to appreciate the fact that the Appellant in the alleged cases that has been preferred against him in the Lower court is supposed to be presumed innocent until proved guilty.**
  2. **The Learned Trial Magistrate erred in Law and fact in finding that the Appellant is likely to re-offend as a compelling reason to deny the Accused Bond without considering the other favourable and compelling grounds that would have required the Appellant to be given bond.**
  3. **The Learned Trial Magistrate erred in Law and facts while denying Appellant Bond without considering that fundamental rights of the Appellant were being curtailed**
  4. **The Learned Trial Magistrate erred in Law and facts in failing to evaluate the grounds raised by prosecution in objecting to Bond and in not finding that the grounds raised by prosecution fell short of the required standards that would have been required to deny Bond to the Appellant.”**
4. Mr. Gichuki filed submissions which he highlighted during the Pre trial of the Appeal on 10/12/15. The ODDP conceded the appeal.
5. The key question raised in this appeal is whether there were compelling reasons for the denial of bail to the appellant.

The denial was primarily based on the objections by the prosecutor in the lower court, on grounds that the appellant had two other matters of similar nature (defilement) namely Cr. 86/15 and Cr. 1613/14 which were pending against him.

6. The main thrust of the Trial Magistrate's ruling endorsed the objection, and backed its reasoning with Authorities (*Nganga v R (1985) KLR 451: and R v Moses Mbaabu & Others Criminal case No. 55 of 2011*).

In the latter Authority it was held that the likelihood of the accused re-offending once released on bail is a "strong compelling" reason to deny bail. Whether such likelihood is a compelling reason to deny bail is in my view sufficient to dispose of this appeal.

7. First of all, Article 49 (1) (h) of the Constitution does not define what amounts to compelling reasons. Most courts appear to have taken the view that what amounts to compelling reasons is an issue of judicial discretion, applied case by case. An Interpretation that enhances the bill of rights is a requirement of Article 20. (See also *R v Ahmad Abolafathi Mohammad & Ano. Cr. Revision No. 373 of 2012*.)

8. There is no agreement as to the manner in which such compelling reasons are to be proved whether orally or by affidavit, but certainly it is important in some cases that that affidavit evidence be tendered, and the deponent be cross-examined by the defence.

9. As observed in *Aboud Rogo Mohamad & Ano. V R (2011) eKLR*, it is essential for the court to take an approach that best enhances the freedoms and rights of individuals. However, public security, safety and the overall interest of the wider public must also be considered. See *R V Muneer Harron Ismail & 4 Others H. C. Criminal Revision No. 51 of 2009*.

9. In the present case the prosecutor in the lower court argued that the appellant was not a person "deserving to enjoy freedom.....on bond pending appeal" in light of the defilement and rape charges he faced in other cases. The right to an accused to be released on bond, where there is fear that he will endanger the lives of others must be balanced against the rights of those others in society, in this case the right of young girls to go about their lives unmolested.

10. As Achode J. observed in the *Ahmad Abolathaji Mohamad* case:

**"The Respondents have a right to enjoy their fundamental rights and freedoms, but it is my humble view that Kenyans..... of good will also have a right to the quiet enjoyment of their rights, and to go about their daily business without threat to life and limbs, and without being placed in harm's way."**

11. It is also true as Mr. Gichuki has argued that the appellant is entitled to the right to presumption of innocence until proven guilty.

12. The primary consideration by the court would be whether an accused will attend trial. Other relevant considerations under this key principle are:

- a. Nature of charges.
- b. Strength of evidence already before the court.
- c. Gravity of penalty attracted by offence
- d. Previous criminal record
- e. Likelihood of interference with witnesses.
- f. Likelihood of further charges being brought.
- g. Need to detain the accused for his own protection.

13. As stated by Mr. Gichuki the presumption of innocence is an important right to be considered whenever objection to bail is raised. More so in this case where all that was laid before the court was the existence of other pending similar cases against the appellant. It is my view that in light of the serious

nature of all the cases cited by the prosecution, affidavit evidence ought to have been tendered by the court detailing the basis of the objection and indicating whether, for instance the appellant would pose a danger to other minors, by virtue of his association with them, the circumstances giving rise to fear the appellant re-offending etc.

14. Because in my opinion, the court, seized of proper evidence that an appellant is a well-known “paedophile” who preys upon children would be cautious and reluctant to release him back into society thereby jeopardizing the safety of children in society. The trial magistrate, correctly took note of the unusual fact that the appellant had several pending cases relating to Sexual Offences. In my view she should have called for a detailed affidavit to shore up the statements by the prosecution in court, and to aid her in determining whether or not there were indeed compelling reasons to deny bail to the appellant. Similarly, the court’s ruling ought to have demonstrated that that the court had taken into account the right to the presumption of innocence to which an accused is entitled until he is proven guilty.

15. In the result, my view is that as presented, the matter raised by the prosecution did not raise compelling reasons sufficient to override the considerations of the appellants right to a presumption of innocence. Indeed Mr. Gichuki has submitted from the bar that the appellant has already been acquitted in one of the cases cited by the prosecutor.

I would add that bail hearings where an objection has been raised should be no different from other proceedings in court and the defence should be given a chance, to rebut any material brought by the prosecution in support of the objection.

16. In view of all the foregoing, I would set aside the trial court’s order denying bail to the appellant and order that he be released on a bond. I hereby direct that the lower court file be placed before Chief Magistrate Narok to determine the amount of recognizance and any conditions as are reasonable to be attached to the appellants bail/bond.

There will be a mention for this purpose on 28<sup>th</sup> April, 2016

Delivered and Signed this 22<sup>nd</sup> day of **April, 2016** at **Naivasha**

**C. MEOLI**

NVI.

In the presence of;

For the Appellant Mr. Gichuki

For the DPP Miss Waweru

Court Clerk Mr. Barasa