



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPEAL NO. 47 OF 2015**

**ALEXANDER KAINGO KOMBE .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

By a Notice of Motion application dated 14<sup>th</sup> March 2016. And filed on even date, the Applicant seeks to have this court review and set aside its ruling made on 22<sup>nd</sup> December, 2015 and allow prayers made in the Notice of Motion application dated 6<sup>th</sup> October, 2015.

The ground upon which this application is based is that the complainant, who is Pw1 in Kwale Chief Magistrate's Criminal case number 645 of 2012, has now sworn an affidavit confirming the facts relied upon in the Notice of Motion application dated 26<sup>th</sup> October, 2015.

In the Notice of Motion application dated 26<sup>th</sup> October, 2015, the said applicant had sought to have.

- (a) the court admit him to bail with or without sureties or order the execution of the sentence or order appealed against suspended pending the hearing and determination of the appeal herein;
- (b) the court grant him leave to adduce new evidence in this appeal.

The said application was based on the following grounds; that;

1. The appellant is by law entitled to bail pending appeal;
2. The appellant has a meritorious appeal with a high chance of success.
3. The appellant has obtained proof that the complainant was not a child at the trial of the alleged offence;
4. The complainant is ready and willing to attend court and disclose that she was not a child at the time of the offence.

Both applications are supported by affidavits sworn by counsel, Yusuf Abourbakar and Beatrice Mwaka Mwakatiengo respectively.

The application for review is brought under section 354(3) of the Criminal Procedure Code which provides that;

“ The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

(a) In an appeal from a conviction;

(i) Reverse the finding and sentence, and acquit or discharge the accused ,or order him to be tried by a court of competent jurisdiction or;

(ii) alter the findings, maintaining the sentence, or with or without altering the findings, reduce or increase the sentence; or,

(iii) With or without a reduction or increase and with or without altering the findings, reduce or increase the sentence; or

(b) In an appeal against sentence, increase or reduce the sentence or alter the nature of sentence;

During the hearing of the application the applicant’s counsel Mr Aboubakar told court that the court declined to grant the 2<sup>nd</sup> prayer in the application of 26<sup>th</sup> October, 2015 for the reason that they did not explain how they had come across the new evidence particularly the clinical card. He then submitted that the complainant in the case before the subordinate court had, sworn an affidavit explaining how she had given the applicant the said clinical card and written a letter to explain this that Mr Aboubakar explained that in the course of hearing the appeal, they were going to show that the complainant was not a child but was above 18 years of age at the time of the alleged offence.

In response, M/s Mutua, counsel for the state stated that the court has power to review its earlier order but can only do this when new evidence is in line with the law. She said that the new evidence still shows that the appellant was indeed a minor at the time of the alleged incident.

In considering the application by the applicant, I have read through the affidavit of Beatrice Mwaka Mwakatiengo dated 14<sup>th</sup> March, 2016, the arguments by both counsel in respect of the said application together with the relevant provisions of the law.

I find that the applicant claims to have evidence to confirm that the complainant was not a minor at the time of the alleged offence, which, if found tangible, could lead to a different finding.

In the interest of justice, I allow the application by the applicant and allow additional evidence to be adduced during the hearing of their appeal as for the provisions of section 358 (1) of the Criminal Procedure Code.

The said evidence shall be adduced on oath and the state, through the state counsel shall be at liberty to cross examine the witness (s).

**Ruling signed, delivered and dated this 17<sup>th</sup> November 2016.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr Ayondo for the state

Mr. Mayaka holding brief for Mr. Aboubakar

C/clerk- Kiarie