



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**MISCELLANEOUS CRIMINA APPLICATION NO. 01 OF 2015**

**LUCAS MASAHURA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant, Lucas Masahura, was charged before the Senior Resident Magistrate's court at Kehancha with 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 an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual offences Act and escaping from lawful custody contrary to section 123 as read with section 36 of the penal Code on 20 May, 2014 in criminal case No. 329 of 2014.
2. The case was transferred to Rongo law Courts where he was tried by the acting Senior Resident magistrate and convicted of the offences of defilement and escaping from lawful custody and sentenced to serve 15 years imprisonment on the first count and to a fine of kshs. 10,000 in default to serve three months on the second count. He was convicted on 9<sup>th</sup> January, 2015.
3. The said applicant by his application, by notice of motion, dated 20<sup>th</sup> January, 2015 now applies to this court to be released on bail pending the hearing ad determination of his appeal from the original conviction and sentence in Criminal Case No. 329 of 2014 in the Senior Resident magistrate's court at Rongo.
4. He has duly filed his petition of appeal dated 20<sup>th</sup> January, 2015 and filed the same in Migori High Court. In that appeal he has put forward eleven (11) grounds he intends to rely on in prosecuting his said appeal of which the pertinent ones for this application are:
  1. *That the trial magistrate erred in law and fact when he found and held that the appellant "was positively identified as the perpetrator" yet there was no evidence of proper identification parade, save for the unreliable dock identification.*
  2. *That the trial magistrate erred in law and fact in basing on evidence of the PW6 which evidence talked of hymen breaking but not penetrative sex, a vital ingredient in the offence of sex as envisaged by section 8 of the Sexual offences Act No. 3 of 2006. The findings contradicted the evidence of PW8 and PW6.*
  3. *That the trial magistrate erred in law and fact in find and holding the complainant was a minor aged 16 years when the evidence on record regarding the age was very inconsistent and unreliable, varying between born 1995, 1998 12 years, 13 years and 16 years, without subjecting the complainant's age to medical assessment and confirmation.*
  4. *That trial magistrate erred in law and fact in finding and holding that the appellant had escaped from lawful custody when there was no evidence that the appellant has been arrested or had been placed in lawful custody in the first place.*

5. The appellant in his application, under notice of motion, brings his application under section 357 of criminal procedure act, Cap 75 together with his supporting affidavit with various documents attached. His application seeks the for order:

1. *To be granted bail pending appeal on the grounds that.*
2. *His appeal has overwhelming chances of success*
3. *And unless the application is released on bail pending appeal, he will lose his public office as an elected member of Migori County Assembly, MCA representing Busirege East ward in Kuria East District and that the likely success of his appeal will come when he will have suffered irreparable damage and his life ruined. The success of his appeal will thus be rendered nugatory.*

6. **The Respondent's Case:**

He oppose the appellant's application. He seeks, in consequence thereof, to have this application dismissed on several grounds, which are:

*That the application is defective for want of procedure as provided under section 357 of the Criminal Procedure Code as the same is not duly signed as required of such application.*

*That the appellant's application sands no chance of success due to the presence (of) overwhelming evidence against him as was adduced during the trial in the subordinate court.*

*That having been convicted of the offence for which he was charged the applicant ceases to enjoy the rights enshrined in the Constitution under Article 49[(1)(h)] thereof as there are compelling reasons for denial of bond.*

*That having been convicted and in light of the severity of the sentence imposed by the subordinate court as well as him having tested the harsh prison life, the applicant is now considered a flight risk to the state since he is likely to abscond court attendances.*

7. **The applicant's submissions are:**

1. *The applicant's appeal has a good appeal with prospect of success.*
2. *There are exceptional circumstances, to release the applicant even though he is a convict.*
3. *The applicant gave a defence of alibi, gave sworn statement, called two witnesses who confirmed that the applicant-appellant was far from the scene of crime. He had visitors that day.*

*The trial magistrate dismissed that defence. It is for the prosecution to dislodge this defence, not the defence, two cases are relevant 1). Kiarie v. Republic and Osiwa vs. Republic.*

4. *The trial magistrate found that applicant" as positively identified as the perpetrator". Yet the evidence of identification was merely dock identification by both the complainant and the arresting officer. The dock identification is worthless if not proceeded a freely organized identification parade. This is an issue of law.*
5. *That the DNA of both the complainant ad the applicant was taken but the said DNA report did not connect the applicant with the alleged defilement, see page 47 of the proceedings.*
6. *The trial magistrate found that the complainant was penetrated despite PW6 evidence to the contrary. This is a serious point of law, see Mwangi v. Republic P.7 thereof.*
7. *The age factor was not unequivocal. The complainant said one was born in 1995(19 years, P. 29 of the proceedings. The charge sheet, however, says she was 13 years. Her own mother says, one was 12 years. But the trial magistrate says it is 16 years. What was her criterion? The trial magistrate did no subject the factor of age to medical assessment for an objective assessment of age. This is a serious issue of law.*
8. *The alleged offence was committed at night. The police who went to the scene says it was at 8p.m. in the night. The complainant says it was 7.30 at night. The O.B. entered as 8.30, see P.41 of the proceedings. The police says it was dark he would not see the guest house.*

9. *The complainant did not know the appellant-applicant. She says she was with him for three(3) minutes, P.32.*

*And yet the police saw no need to conduct the identification parade for the complainant to positively identify her attacker. The used dock identification. The law condemns dock identification as worthless.*

10. *There was no sufficient evidence to show that the complainant was actually defiled.*
11. *The appellant attended court regularly when he was out on bond in the lower court, without failure until conviction. Therefore I submit he is not a flight risk as an Member of County Assembly.*

8. In Civil appeal No. 50 of 2013 the court held “if the appeal has reasonable success” he granted bond. Lady Justice Lessit also granted bond in case 51 of 2014. The applicant urge the court to hold and find that if there is an important points of law, as I have demonstrated, the appeal has reasonable chance of success and this bond be granted.

9. **The respondent’s submissions are:**

1. *That the application is unsigned and therefore irregular.*
2. *The burden is with the applicant to demonstrate that the applicant has over whelming of success ad that there are exceptional circumstances to warrant the grant of the orders sought. The onus has to be discharged without delving into the matters of the pending appeal.*
3. *It is my humble submission that this has not been discharged b the applicant.*
4. *In overwhelming chance of success arises as follows:*

There are no special evidential matters of possible errors of law that were made in the trial court which have been raised which give rise to overwhelming chance of success in this appeal. Thus this appeal has no overwhelming chance of success of either conviction or sentence.

The respondent referred to the proceedings a great deal.

10. On the issue of alibi and age of the complainant was explained by the respondent as having been considered adequately by the trial magistrate. As to the DNA, he submitted that it was not a basis for conviction.
11. He further submitted that there are exceptional circumstances, being on bond during the trial and faithful attendances does not give the applicant exceptional circumstances, neither is being a Member of County Assembly.
12. Therefore should bail/bond be granted, the applicant is likely to abscond. I therefore oppose this application. I urge this court to find that the established principles governing bond pending appeal have not been established to warrant favourable discretion in favour of the applicant. I urge you to dismiss the application.

13. **The law and legal principles applicable.**

1. *Article 159 (2)(d) of the Constitution.*
2. *Article 259 of the Constitution.*
3. *If there is overwhelming chance the appeal will succeed;*
4. *If there are exceptional or unusual circumstances, this is grounded in the decision of Somo vs. Republic 1972 E.A. 476*
5. *In criminal appeal No. 50 of 2013, in consideration for bail pending appeal were to include.*

14. If there is likelihood or reasonable prospect of appeal succeeding, as one such ground. The judge here referred to the case of Laing vs. State 1989 BLR 54(AC).

15. **The analysis of the proceedings and judgment thereof**

1. *The lack of identification parade in this case, goes to the foundation of this case, it vitiates its outcome and raises a serious point of law.*

2. *The inconsistencies in age of the complainant without obtaining an objective medical assessment, is legally wanting.*
3. *In any sexual offence, the issue of penetration is critical. It is not clear that there was penetration, although the hymen is alleged to have broken PW6 does not confirm penetration.*

*This raises a serious issue of law.*

## **16. Conclusion**

Accordingly, for reasons above stated, I find that there is a reasonable prospect of the appeal succeeding. Thus the application dated 20<sup>th</sup> January, 2015 be and is hereby allowed. The applicant, Lucas Masahura is given a personal bond of kshs. 1,500,000 plus two sureties of similar amount, the same to be approved by the Deputy Registrar of Migori High Court. In addition the applicant to deposit a cash bail of kshs. 100,000.

The applicant is further directed to report to the said Deputy Registrar once every 30 days upon his release until the hearing and determination of his appeal or further orders of this court.

Dated and delivered at **MIGORI** this 20<sup>th</sup> day of February, 2015

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:-**

Ochwangi holding brief for Amuga for the applicant

Otieno for the respondent

Edwin Mongare Court Clerk.