

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 6 OF 2014

EVANS OMBUI OGACHIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 412 of 2010 in the Chief Magistrate's Court at Makadara - Before E.W. Oketch on 18th December, 2013)

RULING

The applicant Evans Obui Ogachi was charged with the offence of rape contrary to Section 3 (1) (a) as read with sub section (3) of the Sexual Offences Act No. 3 of 2006. In the alternative he was charged with the offence of indecent act contrary to Section 6 of the same Act. After the full trial he was acquitted of the offence of rape but convicted of the offence of indecent Act and sentenced to five years imprisonment.

He has appealed against the said conviction and now asks this court to release him on bail pending the hearing of the said appeal. The application was argued by way of written submission. The learned counsel for the Republic has conceded the application on the ground that Section 200 of the Criminal Procedure Code was not complied with and that the appeal is likely to succeed but the State will be applying for a retrial.

I have gone through the record before me. The case was first heard by Hon. D. Kinaro, SRM who recorded evidence from 4 witnesses. The record shows further that he was transferred and the case taken over by Hon. W Oketch, R.M. When Hon. Oketch took over the matter he did not comply with Section 200 (3) of the Criminal Procedure Code and proceeded to record the evidence of the remaining witnesses, the defence of the applicant and finally delivered the judgment now appealed from.

The learned trial magistrate was required to inform the accused person of the right to demand that any witness be resummoned and reheard. Any omission in that regard is fatal. With respect, I agree that there are overwhelming chances of success in this appeal on that ground alone.

Accordingly this application is allowed. The applicant shall be released on posting cash bail of Kshs. 10,000/= or on executing a personal bond of Kshs. 10,000/= with one surety of equal sum. He must attend the hearing of his appeal.

Orders accordingly.

SIGNED DATED and DELIVERED in court this 17th day of April, 2014.

A.MBOGHOLI MSAGHA

JUDGE