



IN THE HIGH COURT OF KENYA AT ELDORET

{Coram: F.A. Ochieng & G.W. Ngenye Macharia JJ.}

CRIMINAL APPEAL NO. 119 OF 2013

TOM DAVID ORWARU NYAKUNDI.....APPELLANT

- VERSUS -

REPUBLIC OF KENYA.....RESPONDENT

[Being an appeal from the judgment of Hon. B. Mosiria, Principal Magistrate dated 20/6/2013 at the Principal Magistrate's Court - Kapsabet in Criminal case No. 1519 of 2012]

RULING

1. The applicant, **TOM DAVID ORWARU NYAKUNDI**, was convicted for the offence of Defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. He was then sentenced to Life Imprisonment.
2. The applicant was dissatisfied with both the Judgement and the Sentence. He therefore lodged an appeal before the High Court.
3. Whilst awaiting the hearing and determination of the appeal, the applicant has asked this court to grant him bail.
4. In his considered opinion, the appeal had overwhelming chances of success.
5. Mr. Momanyi, the learned advocate for the applicant, submitted that neither the complainant nor her mother were witnesses of truth. His reason for so saying was that the applicant was only named after the complainant had been beaten up by her mother.
6. The complainant's mother beat up the young child because she had first named two (2) other persons, as the persons who had allegedly defiled her. But when those two young boys were called the complainant is said to have retracted her story.
7. The applicant further pointed out that the complainant was first beaten up and later enticed with the promise of something good, before she named the applicant.
8. By necessary implication, so submitted the applicant, the decision to give his name as the person who defiled the complainant, was motivated by anything but the desire to state the truth.
9. Had that submission stood alone, I could have concluded that it was simply arguable; but not necessarily in an overwhelming manner.
10. However, I also note that the complainant did tell the doctor that she had been defiled by a young boy named Anthony. Considering that the applicant is neither young nor named Anthony, I find that there is perhaps greater force in the applicant's submissions on the issue regarding the identity of the person who perpetrated the crime.
11. The question regarding proof of the offence was, however, conclusively covered by the clinical officer who examined the complainant.
12. I also find, on a prima facie basis, that there does not appear to be a sound basis for the challenge directed at the proof of the age of the complainant.

13. On the one hand, the evidence appears to prove that the complainant was defiled. And the applicant confirms that the girl was at his house on the material day.
14. On the other hand, the applicant denies the complainant's contention that it is he who defiled the girl.
15. The applicant was not a stranger to the complainant. He was a pastor at the church where the complainant used to go. That implied that this was a case of recognition.
16. But one cannot help but ask why the complainant would then first name one boy and then name another boy, before finally naming the applicant.
17. The point I am making, is that the appeal appears to have, at the very least, an even chance of success.
18. Ordinarily, that may not be sufficient to warrant the grant of bail pending appeal.
19. But one other issue did tilt the scales of justice, in favour of the grant of bail. That issue appertains to the HIV status of the applicant, as compared to the HIV status of the complainant. I say no more, for now, and must leave the issues to be determined by the appellate Judge.
20. For now, I do grant to the applicant a personal Bond of Kshs. 300,000/- with one surety of similar sum.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of July 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mr. Momanyi for the Appellant.

N/a for the Respondent.

Appellant present.