



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.46 OF 2011**

**BETWEEN**

**RICHARD MAINA KIMITI .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in criminal case No.789 OF 2012*

*in Nanyuki SRM's Court dated 11th June, 2014, Hon. V.K. Kiptoon, SRM)*

**RULING**

The appellant was charged with the offence of attempted defilement contrary to **Section 9 (2)** of the **Sexual Offences Act No.3 of 2006** the particulars of which was that on the 22nd day of July 2012 at about 7.30 a.m. at Laikipia County in the Republic of Kenya intentionally and unlawfully attempted to cause his penis to penetrate the vagina of C.W.M. A child aged 8 years.

He faced an alternative charge of committing an Indecent Act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No.3 of 2006**, the particulars of which were that on 23rd day of July 2012 at about 7.30 a.m. in Laikipia County intentionally caused his penis touch the vagina of C.W.M.

He pleaded not guilty to the two charges, was tried, convicted and sentenced to ten years on the count of attempted defilement. Being dissatisfied by the said conviction and sentence he filed this appeal.

By a Notice of Motion dated 23rd June 2014, the appellant moved the court to be released on bail pending hearing and final determination of the appeal herein on the basis that the appeal has overwhelming chances of success and there is no justification for depriving him his liberty.

In support of the application, the appellant swore an affidavit where he deposed that the trial court did not give consideration to the inconsistencies and contradictions by the prosecution witnesses and that the evidence before the court was not sufficient for any conviction.

Mr. Kiget for the appellant submitted that based upon the authorities of **Ali Mcheni Ali alias Shee Lako - vs- Republic Mombasa High Court Miscellaneous Criminal Application No.7 of 2011** and **Jeffrey Kitwake Wabuge & another -vs- R. Mombasa High Court Miscellaneous Application NO.257 of 2006**, the appellant should be released on bond.

Miss Kitoto for the State opposed the application and submitted that the case was proved beyond reasonable doubt based upon the evidence of PW1 who testified that the appellant met her on the way to

school and promised to give her a pencil, took her to his house and removed her clothes and put his penis in her vagina but before he could defile her PW2 knocked the door.

At this stage the court is not hearing the main appeal. The conditions upon which bond pending appeal may be granted are as follows:-

- a. *There are exceptional or unusual circumstances.*
- b. *There is an overwhelming chance of the appeal succeeding.*

It must however be noted that the appellant has already been convicted and this court ought not to take the role of the court that shall finally determine the appeal while determining the issue as to whether the appeal has chances of success. I have perused the proceedings herein and in particular the evidence of PW1 who testified that the appellant took her to his house, removed her pant and his trouser, oiled his penis and put it in her vagina, she did not feel pain as he inserted his penis in her vagina when her mother called her. She met her mother at the door and was told to go to school.

She further testified that at school she informed Mrs. Kiama who called her mother to the school. This evidence was supported by PW2 Doreen Kathure who stated that she was called by PW4 and informed that PW1 was seen going towards the appellant's house and taking into account the fact that the appellant was charged and convicted of the offence of attempted defilement, I find no merit on the application herein and would therefore dismiss the same noting that the appellant has not produced any special circumstances which might warrant his being released on bond pending appeal.

**Signed and dated this                      day of                      2014**

**J. WAKIAGA**

**JUDGE.**

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this              25th              day of  
November              2014

**J. NGAAH**

**JUDGE.**

In the presence of:

----- for Appellant

----- for State