



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CRIMINAL APPL. 81 OF 2011

FREDERICK MWANIKI KADENGE.....APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The applicant, **FREDRICK KANDEGE MWANIKI**, was convicted for the offences of Defilement contrary to **section 8 (1) (4) of the Sexual Offences Act**; and Unnatural Offence contrary to **section 162 (a) of the Penal Code**.

The learned trial magistrate then sentenced him to imprisonment for 15 years, in relation to the offence of Defilement; and to 10 years imprisonment for the Unnatural Offence. The said sentences were ordered to run consecutively.

Having lodged an appeal to challenge both the convictions and sentences, the applicant now asks this court to grant him bail pending the hearing and determination of his appeal.

The applicant submitted that his appeal has overwhelming chances of success because the trial court failed to comply with the mandatory provisions of **Section 200 of the Criminal Procedure Code**; and also because the medical evidence tendered by the two doctors who examined the complainant, were contradictory.

In answer to the application, the respondent submitted that the provisions of **Article 49 (1) (h) of the Constitution** was only applicable before an accused person is convicted.

The respondent also submitted that the applicant had not proved that there were any exceptional circumstances in his case, to warrant the grant of bail pending appeal.

Even though the applicant was tried when he was out, on bond, the respondent pointed out that following conviction, the applicant's circumstances had changed.

The case of **GACHARA Vs REPUBLIC [2004] 1 KLR 373**, which was cited by the applicant, is not at all helpful to him. That case was one in which the applicant had sought bail pending trial. Kubo J. addressed himself as follows, in his decision;

“In Mazrui Vs Republic [1985] KLR 279, the High Court (Abdullah J., as he then was) held that in principle, generally and because of the presumption of innocence, an accused person should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing, inter alia, that the accused will fail to turn up at his trial or to surrender to custody. I, respectfully, share the same view.”

The applicant herein was already convicted. Therefore he no longer enjoys the presumption of innocence. At this stage, the court can only grant him bail if he demonstrates that his appeal has a reasonable chance of success; and that there are special circumstances such as an illness which cannot be attended to adequately whilst he was in custody; and also if the appeal cannot be heard fairly quickly.

If a person who has been convicted demonstrates that his appeal had a reasonable chance of success, it would be in the interest of justice to grant him bail, because otherwise he would be behind bars, serving a sentence that he should not be enduring. A person who has good appeal

is likely to have his conviction quashed. If that be the case, he should not be serving the sentence whilst awaiting the hearing and determination of his appeal.

In this case, the respondent has not made any attempts to justify the failure of the trial court to comply with **section 200 (3) of the Criminal Procedure Code**. Therefore, it does appear to me that the chances of success, of the applicant's appeal, are good. I do therefore grant him bail pending the hearing and determination of his appeal. He is required to execute a personal bond of KShs.300,000/-, with two sureties of like sum.

Dated, Signed and Delivered at Nairobi, this 17th day of May, 2011.

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FRED A. OCHIENG
JUDGE