REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CRIMINAL APPL. 784 OF 2010

PETER MACHARIA WANJAMA.....……..……. APPELLANT

VERSUS

REPUBLIC …….....……. RESPONDENT

R U L I N G

The applicant, **PETER MACHARIA WANJAMA**, was convicted for the offence of Indecent Act with a girl contrary to **section 11 (1) of the Sexual Offences Act.** He was then sentenced to 10 years imprisonment.

The applicant has lodged an appeal, to challenge both his conviction and the sentence.

Secondly, he has now asked this court to grant him bail pending the hearing and determination of the appeal.

It is his submission that the conviction was not supported by any evidence. His said submission arises from the fact that the main charge that the applicant faced before the trial court was for defilement. The offence of Indecent Assault with a girl, was in the alternative count.

As far as the applicant was concerned, the prosecution witnesses only led evidence to try and demonstrate that he had defiled the complainant.

The applicant's view was that the prosecution did not lead any evidence to try and establish that he had committed the offence of Indecent Act with a girl. Therefore, he believes that the trial court erred by convicting him for an offence in respect to which no evidence had been adduced.
Consequently, the applicant holds the view, that his chances of success in the appeal were high.

And because he had made 26 court appearances before the trial court, whilst he was out on bail, the applicant asks this court to allow him to prosecute his pending appeal whilst he was outside prison. He emphasizes that he was not a flight-risk.

In answer to the application, Mr. Mulati, Learned state counsel submitted that the applicant's appeal did not have overwhelming chances of success. Secondly, the respondent submitted that the applicant had not demonstrated any exceptional circumstances that could persuade the court to grant him bail.

In determining this application, I note that the sentence that was handed down to the applicant is imprisonment for 10 years. Therefore, it is most unlikely that the applicant would finish serving that sentence or will have served a substantial portion thereof before his appeal is heard and determined.

Secondly, if a trial court is convinced that the evidence adduced did not prove all the ingredients of the offence with which the accused was charged, the law allows the court to nonetheless convict the

accused for a minor and cognate offence.

Section 179 of the Criminal Procedure Code makes that position explicitly clear, in the following words;

"(1) When a person is charged with an offence constituting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and the facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

In this instance, the applicant was not just convicted for an offence that he was not charged with. His conviction was for the alternative count which was expressly spelt out in the charge sheet.

However, that still begs the question whether or not the prosecution led some evidence to prove the said alternative charge.

Of course, the prosecution had set out to prove that the complainant was defiled. However, the evidence tendered was insufficient to prove the offence of defilement.

The insufficiency was partly attributable to the decision by the trial court to reject the prosecution's application for an adjournment. Having been denied the adjournment, the prosecution failed to make available the medical records and reports from the medical establishments at which the complainant was examined and treated.

Had that been the only issue, it is possible that it was the only basis for holding that the offence of defilement was not proved. But, in this instance, there was some other medical evidence, which was put forward by Dr. Kamau.

Dr. Kamau examined the complainant about 5 days after she had been allegedly defiled. He ascertained that her genitalia were normal. The vulva and the vagina had no injuries. The hymen was present, and there was no history of vaginal bleeding.

Therefore, the doctor testified that there was no evidence of penetration. That was the basis upon which the learned trial magistrate held that the offence of defilement had not been proved.

Considering that the complainant had emphasized that the assailant had;

"completely inserted his penis in my vagina.....";

yet that contention appears to have been discounted by the only medical evidence that was made available, the appellate court will have to ask itself if there was any other reliable evidence to support the offence of Indecent Act with a girl.

In other words, there appears to be a reasonable chance that the appeal would be allowed.

In the circumstances, I hold the considered view that the applicant is deserving of bail pending appeal. I therefore allow the application and order that the applicant should be released upon either a cash bail of KShs.100,000/- or upon his personal Bond of KShs.200,000/- with two sureties in like sum.

Dated, Signed and Delivered at Nairobi, this 11th day of May, 2011

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FRED A. OCHIENG

JUDGE