



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION NO. 418 OF 2011**

**JOSEPH NYAIRO MIKAE ..... APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

The applicant, **JOSEPH NYAIRO MIKAE**, was convicted for the offence of Defilement **contrary to section 8 (1)** as read with **section 8 (4) of the Sexual Offences Act**. He was then sentenced to 15 years imprisonment.

Being dissatisfied with the conviction and sentence, the applicant has filed an appeal before the High Court.

As he awaits the hearing and determination of his appeal, the applicant has now asked this court to grant him bail.

He points out that when the appeal first came up for hearing on 10<sup>th</sup> February 2011, it could not proceed because he was hospitalized.

The applicant has exhibited medical documents to show that he was due for another medical procedure. However, the documents do not indicate the date of the said procedure.

That notwithstanding, the applicant says that he finds it very hard to attend hospital whilst he was still in prison.

According to Mr. Moriasi, the learned advocate for the applicant, his client has a constitutional right to bail. In that regard, counsel invoked the provisions of **section 49 (1)(h) of the Constitution of Kenya, 2010**.

The applicant also pointed out that the trial court did grant him bail, although the case was thereafter heard and concluded before he was released from custody.

Finally, the applicant submitted that his appeal has a good chance of success. He therefore believes that that should entitle him to bail.

In answer to the application Miss Wang'ele, learned state counsel, submitted that the applicant had failed to demonstrate why he should be granted bail.

It was the respondent's view that the applicant had chosen, freely, to change his plea, to one of "guilty".

And even though the said plea was somewhat qualified, the respondent believes that that alone would not enhance the chances of success of the appeal.

In any event, the respondent holds the view that any procedural irregularity was curable through an order for a retrial. Therefore, this court was informed that when the appeal comes up for hearing, the respondent would, most probably, seek an order for the retrial of the applicant.

The respondent disputed the applicant's contention that the trial court had granted him bail.

Furthermore, the respondent holds the view that the applicant can be accorded all necessary medical attention, even when he was still in prison custody.

Finally, the respondent submitted that as soon as the applicant was convicted, he was thereafter presumed guilty, unless the conviction was overturned.

The record of the proceedings before the trial court shows that the plea was to be taken on 22<sup>nd</sup> December 2009. However, the trial court directed the prosecution to amend the charge, so as to reflect the nature of the genital organ that had been allegedly penetrated.

On 23<sup>rd</sup> December 2009, the applicant pleaded "not guilty" to the charge.

After taking the plea, the court granted a KShs.100,000/- bond to the applicant. The court also directed the applicant to provide one surety for the same amount.

The trial commenced on 19<sup>th</sup> January 2010, when **PW 1** testified. **PW 1** was Dr. Peter Gichonge, a medical officer at the Wajir District Hospital. He testified that the victim was 16 years old.

**PW 1** said that she examined the victim 4 months after the incident that gave rise to the case against the applicant. When **PW 1** examined the girl, he found that she was pregnant.

At that point, the applicant told the trial court that he had "done it".

When the charges were read out to the applicant, afresh, he denied the offence of Child Trafficking. However, he admitted having defiled the girl.

His explanation was that he did not force the girl to have sex. He described her as his wife.

The learned trial magistrate held that it was not a defence that the girl was a wife of the applicant. Consequently, the applicant was convicted on his own plea of 'guilty'.

Having given due consideration to the submissions made by the parties, I have noted that the respondent appears to be conceding that the plea was not unequivocal.

If the respondent intends to ask for a retrial, that must imply that the respondent acknowledges the need to have the conviction set aside. I so find because there cannot be a retrial if the original conviction remained in place.

However, it also appears that the applicant knew exactly what he was doing when he readily admitted having had sex with the victim.

Thus there would arise the question whether or not the alleged marriage, between the applicant and the victim would, of itself, legalise the sexual relations which took place between them.

I refrain from expressing my view on that issue as the same was not canvassed before me.

For now, it appears that the interests of justice would be served by rejecting the application for bail, but simultaneously directing, as I now hereby do, that the applicant's appeal be heard as soon as possible.

Indeed, if the parties are ready to be heard, the Court may proceed to hear the appeal immediately.

**Dated, Signed and Delivered at Nairobi, this 31<sup>st</sup> day of October, 2011.**

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**FRED A. OCHIENG**  
**JUDGE**