



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 111 of 2009**

DAVID NDUMBA APPELLANT

VERSUS

REPUBLIC PROSECUTOR

RULING

The appellant was convicted of the offence of rape contrary to Section 3 (1) (a) (c) as read with Section 7 of the Sexual Offences Act Number 3 of 2006. On 20th August 2008, he was sentenced to 7 years imprisonment. He has now moved this court by Notice of Motion dated 18th May 2010 seeking to be released on bail pending the hearing and determination of this appeal. In his affidavit in support of the said application, he deponed that his appeal has high chances of success. He further deponed that there is a likelihood of him serving his sentence before the hearing of this appeal. He has already been in custody for 2 years. The learned counsel for the appellant submitted referring to the evidence adduced before the lower court with a view to showing that there were inconsistencies and that the appellant's appeal has overwhelming chances of success. The application was opposed by the learned state counsel Mr. Kimathi. He denied that there were any speculations in the evidence in the lower court. He then proceeded to take the court through the evidence which showed that the appellant was found by PW3 in the act of raping the complainant. I have considered the evidence of the lower court and have also considered the submissions made by counsels. The principle of granting bail was well set out in the case **Dominic Karanja Vs. Republic** [1986] KLR where it was stated thus:-

“The most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances.

The previous good character of the applicant and the hardships, if any, facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners.

A solemn assertion by an applicant that they will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal.”

The appellant's application is found to have no merit. For having re-examined the lower court evidence on a *prima facie* basis, I find that the appellant's appeal does not have overwhelming chances of success.

Dated and delivered at Meru this 2nd day of July 2010.

MARY KASANGO

JUDGE