



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

Criminal Appeal 51 of 2009

JAMES NYAMOSI APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The Applicant **James Nyamosi** was on 4/3/09 convicted by the Resident Magistrate, Kehancha of attempted rape contrary to **section 4 of the Sexual Offences Act of 2006** and assault causing actual bodily harm contrary to **section 251 of the Penal Code**, and sentenced to 14 years imprisonment and 3 years imprisonment, respectively. The particulars in count 1 were that on 3/8/08 at Ngisiru sub location in Kuria District within Nyanza Province he willfully and unlawfully attempted to have carnal knowledge of **MM** without her consent. He faced the alternative charge of indecent assault contrary to **section 11(6) Sexual Offences Act 2006**, that he unlawfully and indecently assaulted **MM** by touching her private parts (breasts). In count 2 it was alleged that during the incident above he unlawfully assaulted **MM** thereby occasioning her actual bodily harm.

The conviction followed trial in which the prosecution called four witnesses. The Applicant gave unsworn testimony in defence and called three witnesses. He has filed an appeal to challenge the conviction and sentence. In this application, he seeks to be released on bail pending the hearing and determination of that appeal. He is represented by Mr. **G. J. M. Masese**. The state opposes the Application. It is represented by Mr. **Kemo**. The application was brought under **section 357 of the Criminal Procedure Code**. It is on the grounds that:

- a) the appeal has overwhelming chances of success,
- b) the evidence on record was insufficient to sustain the conviction,
- c) the case was most probably a frame up, and
- d) the sentence imposed was manifestly excessive.

Mr. Masese swore an affidavit to support the application. The only thing he added was that the Applicant was a person of fixed abode who would abide by whatever terms and conditions that the court may impose upon his release on bail. That alone would not be reason for bail at this stage.

During the hearing of the application **Mr. Masese** reiterated what was stated in the grounds and in the affidavit. He submitted that the evidence of the complainant had not been corroborated and that the medical report contained in P3 in respect of the complainant was illegally admitted in evidence. The P3 report was produced by a police officer and yet it had been completed by Medical Officer of Health, Kehancha who had examined the lady. The Doctor was not called to testify. **Mr. Masese** complained that basis for the production of medical evidence by the police officer had not been made, and there was no effort to explain why the Doctor had not been availed.

Mr. Kemo submitted that the Applicant had been convicted on overwhelming evidence. His contention was that medical evidence had been correctly admitted and that, in any case, the Applicant had not raised objection to the production under **section 77 of the Evidence Act, Cap. 80 of the Laws of Kenya**. Regarding corroboration, **Mr. Kemo's** position was that evidence of the complainant had been corroborated by the P3.

I note that in passing sentence for attempted rape, the trial court observed that the minimum sentence for the offence was 14 years imprisonment. However, under section 4 of the **Sexual Offences Act 2006** the minimum sentence is 5 years.

When a person is awaiting trial he is presumed to be innocent and is therefore entitled to bail. Following conviction and sentence, he is not entitled to bail. It is presumed that he has been properly convicted and sentenced (**Mundia v Republic [1986] KLR 623**). This is why such a person can only be released on bail if he can show that the appeal he has preferred has overwhelming chances of success and that the circumstances presented in his application are exceptional and unusual (**Somo v Republic [1972] EA 476**).

I know that the appeal will eventually come for hearing and that, at this stage, nothing should be said that may prejudice any party to the appeal or embarrass the court that will deal with it. At the same time, however, the court must take a provisional view on the appeal to be able to say the Applicant has demonstrated it has overwhelming chances of success. It is in this spirit that I point out that **section 77** of the **Evidence Act** deals with reports of government analyst and geologists, and not medical reports. Even then, a basis has to be laid before admitting a medical report without calling its maker.

I have considered the evidence upon which the Applicant was convicted and the sentence that was imposed. I have also considered the submissions by counsel. Applying the principles of law above, I have come to the conclusion that justice can only be done by granting bail to the Applicant. He will sign bond of Kshs.200,000/= and provide a surety in similar amount.

Dated and Delivered at Kisii this 17th day of June, 2009

A. O. MUCHELULE

JUDGE

17/6/09

A. O. Muchelule J.

c/c Mongare

Mr. Kemo for State.

Appellant present.

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE.