

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 336 of 2008

JUSTIN MUREITHI KINYUA APPLICANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

This is an application under *section 357* of the Criminal Procedure Code. In the application, **Justin Mureithi Kinyua**, hereinafter referred to as “*the applicant*” seeks that he be admitted to bail pending the hearing and final determination of his appeal.

Apparently, the applicant was on 13th February, 2008 arraigned before **J.N. Onyeigo, (SRM)** in the Principal Magistrate’s Court, at Kerugoya on one count of defilement of a child aged 8 years contrary to *section 8(1) (2)* of the Sexual Offences Act. The particulars of the charge were that “**On the 31st day of January, 2008 , in Kirinyaga District within Central Province, he committed an act which causes penetration with a child namely W.W aged eight years.**” The applicant pleaded not guilty to the charge and he was tried. At the end, he was found guilty, convicted and sentenced to 20 years imprisonment. At this juncture I wish to point out that the sentence imposed as aforesaid was illegal and irregular in that under *section 8(1) (2)* that the applicant was charged the sentence to be imposed upon conviction is life imprisonment. However the applicant was sentenced to 20 years imprisonment. If and when the appeal comes up for hearing, this is a matter which the appellate court will have to revisit. Aggrieved by the conviction and sentence, the appellant lodged an appeal in person but which has since been taken over by **Messrs Gori Ombongi & Co. Advocates**. The said firm then filed the application under consideration.

At the hearing of the application, **Mr Gori** submitted that the appeal as filed had overwhelming chances of success. The evidence on record had a lot inconsistencies and contradictions. The complainant was not sure where she had been defiled. The defence of the applicant was not given adequate consideration.

In response, **Mr. Orinda**, learned Senior Principal State Counsel conceded to the application on the grounds that contradictions as to where the defilement occurred was material. He also submitted that the defence of the appellant was not given due consideration.

I have carefully considered the application, the supporting affidavit and rival oral submissions. In an application of this nature, the applicant must satisfy the court that the appeal as filed has overwhelming chances of success and also minor consideration as to whether there are exceptional and unusual circumstances. **See Dominic Karanja V Republic (1986) KLR 612.** In this case much as Mr. Orinda conceded to the application, I am not however satisfied that the applicant’s appeal has overwhelming chances of success. There may have been contradictions here and there in the evidence of the complainant as to where she was defiled. Contradictions and inconsistencies are bound to occur in criminal proceedings depending on how witnesses perceive certain things. As long as those contradictions are not major and do not go to the route of the prosecution case, they can be tolerated. In the circumstances of this case the complainant was aged 8 years at the time. She cannot be expected to perceive things as a grown up. The alleged contradictions are in my view not major and did not go to the

root of the prosecution case. In any event there was the evidence of PW1, senior clinical officer who examined the complainant soon after the incident and was of the professional opinion that the complainant had been penetrated as she had a laceration wound on her labia majora. No exceptional and or unusual circumstances in the appeal have been brought to my attention as would tilt my hand towards allowing the application. In the end I do not think that the applicant has demonstrated to my satisfaction that his appeal has overwhelming chances of success. Accordingly the application is denied.

Dated and delivered at Nyeri this 30th day of November, 2009.

M.S.A. MAKHANDIA

JUDGE