



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION NO. 852 OF 2007

GABRIEL SIMON ONDORO ODENYAPPLICANT

-VERSUS-

REPUBLICRESPONDENT

RULING

This was an application for bail pending appeal, brought by way of Chamber Summons dated 5th December, 2007. It was brought by virtue of ss.356 and 357 of the Criminal Procedure Code (Cap.75, Laws of Kenya), and its general grounds were stated, in summarized form, as follows:

- (i) that the applicant, who had been charged with the offence of abduction contrary to s.143 of the Penal Code (Cap. 63, Laws of Kenya), had been sentenced to 15 months' imprisonment without being given an opportunity to elect a language as suited him, for the taking of plea;
- (ii) that, the charge had been read to the applicant in Kiswahili, a language which he does not understand well;
- (iii) that, the particulars of the charge were communicated in Kiswahili, a language which the appellant does not understand well;
- (iv) that, the essence and import of the charge and the particulars were not understood by the applicant;
- (v) that, the appellant is now imprisoned in company with hard-core criminals, and this is likely to harm his character;
- (vi) that, the appellant has an arguable appeal case, with high chances of success;
- (vii) that, during trial, the appellant had been at liberty, on the basis of a Police bond;
- (viii) that, the appellant after his arrest, had not been brought to Court within reasonable time, and this had infringed his rights;
- (ix) that, the interests of justice justify release of the applicant on bond pending appeal.

The evidence in support of the application is set out in the applicant's affidavit, sworn on 5th December, 2007. He depones that he is a resident of Sirembe Village in Gem, Nyanza Province, and that he had pleaded guilty to a charge of abduction contrary to s.143 of the Penal Code (Cap.63) and was, on that basis, convicted and sent to jail. He depones further that the charge and particulars had been read to him in Kiswahili, and he had pleaded in that same language, which he does not understand. He attaches a copy of his Kenya Certificate of Primary Education certificate, showing him to have obtained a poor grade in Kiswahili. The applicant denies that he had abducted the complainant as charged, and avers that she and her family were good friends of his.

In his presentation of the application and the depositions, learned Counsel **Mr. Odhiambo** urged that, since it was shown on the charge sheet that the applicant was Luo by ethnicity, the trial Magistrate should have inquired whether he did understand Kiswahili and could make his plea without interpretation. On the basis that the applicant did not understand Kiswahili, learned counsel submitted that "one can only answer to charges that [one] understands"

Learned State Counsel **Mrs. Obuo** opposed the application. She urged that only two alternative grounds could justify grant of bail pending appeal: (i) that the appeal had overwhelming chances of success; (ii) that there existed exceptional circumstances justifying grant of bail. Counsel noted that the applicant had pleaded guilty, and two languages had been used in Court during plea-taking: English and Kiswahili. **Mrs. Obuo** contested the applicant's claim here ? because, while denying that he understood Kiswahili well, he did not say what language he understands.

Learned Counsel also did not believe the authenticity of the examination certificate introduced in Court by the applicant, to show that his knowledge of Kiswahili was poor: because the name entered on the certificate was not entirely identical to the names under which the applicant had been charged. Counsel also submitted that since the same certificate showed the applicant to have obtained "C" grade in English, he should have understood the plea-taking proceedings well, as English had therein, been used.

Mrs. Obuo submitted that the appeal had no chance of succeeding, and that there would be no exceptional circumstances to favour grant of bond pending appeal.

Did the applicant understand the language in which the charge and the particulars had been read out to him, during plea-taking? This is a point to be canvassed on appeal; but I feel certain that it would be a strong ground of appeal if it were to be shown that he made plea without a proper understanding of the same.

The facts of the case, however, would show a definite instance of abduction. These facts, as recorded, may be set out here, in part:

"On 16th November, 2007 at about 7.00 p.m. **Lilian Aoko Otieno**, aged 15 years [and] in Std. 7 at Old Kibera Primary School, was at home at Katwekera. She went out to pour some dirty water, and met...four men, one of them being the accused. The accused held her and, when she raised alarm, one of the men covered her mouth and threatened to kill her if she went on making noise.

"They took her to Kamukunji grounds. They put her in a white car, and she was driven to Gem in Nyanza where they arrived in the morning, [at] the home of the accused. When **Lilian** asked him why he had removed her from her parents' home, the accused said he was going to marry her. [**Lilian**] said she was still a student; the accused told her that she was his wife from [that moment]".

With the pertinent facts so well-focussed, it cannot be said at this moment, in my opinion, that the pending appeal stands good chances of success. The applicant has not, besides, shown any extraordinary circumstances which mitigate against propriety, in his continued service of sentence even as his appeal pends in Court.

Consequently, I must dismiss the application of 5th December, 2007.

Orders accordingly.

DATED and DELIVERED at Nairobi this 10th day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Applicant: Mr. Odhiambo holding brief for Mr. Oyiembo

For the Respondent: Mrs. Obuo