



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 138 of 2008

GEORGE BIRIRI MUTURI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This is a chamber Summons application dated 3/3/2008 made under section 357 of the Criminal Procedure Code seeking that the appellant be granted bail pending determination of Criminal Appeal 350 of 2007.

The application is premised on the grounds that-

- (a) *the applicant's appeal has a high chance of success.***
- (b) *applicant would abide by any condition set once bail is granted.***

In the affidavit in support of the application, the applicant states that he was convicted in Criminal 186 of 2007 and sentenced to ten (**10 years**) imprisonment without the option of a fine. From the attached proceedings, and marked GMM 1, the charge sheet shows applicant was charged with attempted defilement Contrary to Section 9 (1) of the Sexual Offences Act 2006 that on 30/01/2007, he attempted to commit an act of defilement of a girl aged seven years namely Ann Wangui Mwaura by attempting to penetrate into a genital organs.

He had an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual offences Act 2006, that on the same date, he committed an act of indecent assault with a girl aged seven years, namely Ann Wangui Mwaura by viewing her genital organs. After hearing of the case, the appellant was convicted. It is the applicant's contention that his appeal has good chances of success as per his petition of appeal.

His counsel Mr. Ndegwa submitted that from the proceedings and the Judgment, the sentence does not specifically state on what charge the appellant was convicted on for ten years. This application is contested by the State and the learned State Counsel Miss Gateru submitted that the evidence on record clearly shows that the applicant was convicted for indecently assaulting the complainant which offence he was convicted on.

I have perused the proceedings and especially the judgment and the learned trial magistrate clearly

indicated as follows-

“I found that the prosecution evidence was credible, which evidence did demonstrate that accused person did commit the offence as charged in the alternate count.”

How much more specific should the learned trial magistrate have been? I think that limb of learned counsel’s argument, with all due respect, has no leg on which to stand.

Mr. Ndegwa further submits that the chances of success in the appeal, are overwhelming because in the charge sheet, the defilement is not disclosed in the particulars, only that he attempted to penetrate.

The learned state counsel’s response to this is that the applicant was convicted on the alternative charge of incident assault – I agree and so that limb of the submission is a non-starter.

The applicant’s counsel also argues on the charge of indecent assault saying the child’s evidence was not corroborated and the person who was first informed about the incident, was never called as a witness.

I don’t think at this stage I can delve deeper into the contents of the appeal save to say that I have perused the amended petition of appeal.

The main principle to be considered was stated in the decision of **Somo -Vs- Republic 1972 E.A 476** and this involves taking into consideration whether the trial has been properly conducted and the appeal is merited with probabilities of an acquittal.

I have carefully considered the facts of this case and the evidence in support as well as submissions by the applicant’s counsel. Does the applicant have even one point to take up on appeal, in order to determine whether there is justification for putting the running sentence on hold by granting bail pending appeal.?

The applicant has not persuaded me that the appeal is likely to have a successful outcome.

The other issue to consider is whether there are special or exceptional circumstances that would be considered by the Court. None has been presented to this Court and indeed the applicant’s counsel concedes that no such circumstances exist. The upshot then is that the application is not merited and is dismissed.

Delivered, signed and dated at Nairobi this 25th day of April 2008.

H.A. Omondi

Judge