



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL 98 OF 2007

BONFACE LUCHITIO LIKOBELI APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

The application before me is for bail pending the hearing and determination of the applicant's appeal.

The applicant, **BONFACE LUCHITIO LIKOBELI**, was first charged with the offence of defilement of a girl under the age of 14 years contrary to **section 145** of the Penal Code. From the record of the proceedings before the trial court, the charges were read out to the applicant on 16/7/2007.

After three prosecution witnesses had testified, the prosecutor sought leave of the court to amend the charge sheet, and to substitute it with a new one. The advocate for the applicant (who was then the accused person), did not object to the proposed substitution.

Having given consideration to the application, the learned trial magistrate allowed the substitution of the original charge sheet. That order was made on 12/10/2006, whereupon the new charge was read out to the applicant and he was then asked to plead to it. The new charge was in the following terms:-

“Defilement of a girl contrary to section 8 (1) as read with 8 (3) of the Sexual Offenders Act No. 3 of 2006.”

Alongside that main charge there was an alternative charge which was worded as follows:-

“Indecent act with a child contrary to section 11 (1) as read with section 11 (4) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya.”

After the original charge sheet was substituted the prosecution called one more witness.

Thereafter, when the applicant was put on his defence he gave sworn testimony. However, he did not call any other witness.

Ultimately, the learned trial magistrate delivered his judgement, in which he convicted the applicant for the offence of defilement under **section 145 (1)** of the Penal Code.

As the charge sheet based on the Penal Code had been substituted the applicant believes that the trial court was wrong to have convicted him under that statute.

On its part, the state expressed support for the views submitted by the applicant.

Having given consideration to the application I find that it is more likely than not that the conviction was founded on shaky ground. In other words, on a prima facie basis, the applicant's appeal appears to have a better than even chance of success. That being the position, as I perceive it, it would not be right to continue to hold the applicant in custody pending the hearing and determination of his appeal. He shall be required to deposit Kshs.20,000/= cash as bail. Alternatively, he may execute a personal bond of Kshs.10,000/= with one surety of like sum.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 6th day of May, 2008.

FRED A. OCHIENG

J U D G E