



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Criminal Appeal 23 of 2008

NELSON ASEGA KISIA APPELLANT/APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

This is an application for bail/bond under the provisions of Section 357 of the Criminal Procedure Code. The Applicant/Appellant had been charged with the offence of attempted rape contrary to Section 141 of the Penal Code. The particulars as stated in the Charge Sheet are that the Accused person on the morning of 9/7/07 at Mlimani Village, Mwamba Sub-Location, Lumakanda Location in Lumakanda District within Western Province attempted to have carnal knowledge of Hellen Afandi without her consent. In the alternative the accused person was charged with indecent assault on a female contrary to Section 144 (1) of the Penal Code.

After hearing the case, the Honourable Trial Magistrate convicted the Accused and sentenced him to seven (7) years with hard labour on 14-5-2008.

The Accused filed a Petition of Appeal on 21st May, 2008. I have perused the said petition and the proceedings and judgement. I have also considered the submissions by both Counsel.

The Applicant did not annex a copy of the Charge Sheet to the application and affidavit. As a result I am unable to consider any chances of success of the issues specifically challenging the Charge Sheet in the Appeal. The Appellant's Counsel has said that it is not clear at the time the plea was taken what language was used. However, the issue of language is not one of the grounds of appeal. Again, there is no averment on oath by the Applicant that the Charge was read in a language he did not understand.

One of the considerations when determining whether an appellate Court ought to grant bail pending appeal is whether from the record the appeal has overwhelming chances of success.

The appellant has not shown to this Court on the face of it that the appeal has high chances of success. It was his duty to bring out the grounds for such an assertion. It is not for this Court at this stage to go over the proceedings with a tooth-comb to look for the deficiencies in the conviction and sentence. This is for the Court to do at the Appeal stage itself.

The Appellant says that it is not known when the High Court will finally hear the appeal.

In the case of **ABDI –V- REPUBLIC (1991) KLR 171 at 173**, Justice Amin stated:-

“The chances of success or otherwise of the appeal in particular, is to be carefully evaluated. The

time it would take for appeal to be prosecuted and determined in by itself is not a sufficient ground”

I do not agree that generally one of the considerations for the grant of bail pending appeal is the length of time the appeal is likely to take place. This can only be a consideration where the sentence is so short that the Court can on the spot determine that the Appellant is likely to have served the sentence wholly or substantially by the time the appeal is likely to be heard by all measures e.g. where the sentence is say for 3 – 6 months. In such case the Court has discretion to grant the bail or order immediate hearing of the appeal to avoid the same being rendered nugatory.

In the present case, the Accused has been sentenced for 7 years imprisonment. I take note that appeals at Eldoret are heard within a reasonable time and there is no danger of the appeal herein being rendered nugatory due to delay.

In conclusion, I find that the conditions or circumstances to justify the grant of bail pending appeal have not been made out or established.

I therefore do dismiss the application.

DATED AND DELIVERED AT ELDORET ON THIS 12TH DAY OF JUNE, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Omutelema for the State

Mr. Andambi for the Applicant