



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Criminal Misc. 148 of 2008**

**MWANZIA IVATI ..... ACCUSED  
VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant, Mwanzia Ivati was the accused person in **Kangundo SRM'S Court Criminal Case Number 731/2007** where he had been charged with the offence of attempted defilement of a girl aged 14 years contrary to section 9 (1) of the Sexual Offences Act No.3 of 2006. The particulars of offence were that **“on the 20<sup>th</sup> day of April 2007 at K village, Kangundo Location of the Eastern Province, attempted to have carnal knowledge of a girl aged 14 years”**. The alternative count was that of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No.3 of 2006.

2. I have read the record and judgment of the subordinate court and I note that the learned trial magistrate acquitted the Applicant on the main count but found sufficient evidence to convict him on the alternative charge and sentenced him to serve ten (10) years in prison.

3. As I understand it, once a party has lodged an Appeal against conviction and sentence as the Appellant has done in this case, he has the right to seek bail pending appeal. The Applicant has exercised that right and the law on the subject was well captured in the elaborate submissions by Ms Ogot for the Applicant. **In Raghbir Singh Lamba vs R (1958) E.A 337**, Spry Ag. J held that:-

i. **“the principle to be applied is that bail pending appeal should only be granted for exceptional and unusual reasons: *R. v. Leinster (Duke)*, 17 Cr.App. R. 147 and *R.v.A.B. (1926)*, I T.L.R. (R) 118 applied.**

ii. **neither the complexity of the case nor the good character of the applicant, nor the alleged hardship to his dependants justified the grant of bail, but had the court been satisfied that there was an overwhelming probability that the appeal would succeed, the application would have been granted.”**

4. The Court of Appeal in **Jirvaj Shah vs R (1986) KLR 605** put the law in even clearer perspective when it held inter alia that:-

i. The Principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.

ii. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

iii. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.

5. One of the issues raised in this case is that the Applicant is a man of ill health and on that issue Ochieng Ag. J in **Kaguma vs R (2004) I E.A 68 at 74** that:

“Thus whereas ill-health alone may not necessarily constitute exceptional circumstances, I deem the combination of the Applicant’s age and ill-health to be exceptional.”

6. From the above exposition of the law, apart from the issue of ill-health which I will revert to shortly, Ms Ogot forcefully argued that the Appeal had overwhelming chances of success and the Applicant had met the test to warrant his release on bail. I have carefully read the record in this matter and I sadly share that optimism. I say so because prima facie and without pre-empting the arguments on appeal, the judgment under challenge was well reasoned and in acquitting the Appellant of the offence in the main count, the learned magistrate took into account the evidence of PW4, Caroline Mwangi that the victim of the alleged offence had no bruises in her vagina and her hymen was intact. The alleged victim (PW1) on the other hand said that the Applicant actually had sex with her and PW2, MM said that PW1’s private parts were swollen. PW3, EM said that the alleged victim told her that the Applicant had sex with her and put something like mucous in her – meaning spermatozoa. The charge failed and properly so but as regards the alternative charge the learned magistrate stated thus:

**“I find no basis for the girl to fix him.”**

7. I have relooked at the evidence in respect of that count and there is every chance that it may not sustain the charge.

8. I have also seen the medical records of the Applicant who suffers from acute peptic ulcers and high blood pressure. I am persuaded that at 62 years of age, it may be an exceptional consideration and I will allow the Application and will release the Applicant on a personal bond of Kshs.200,000/= with one surety of a like amount.

9. Orders accordingly.

Dated and delivered at Machakos this **24<sup>th</sup>** day of **November** 2008.

ISAAC LENAOLA

JUDGE