



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 653 of 2006

JOE MWANGI NJIRU.....APPLICANT

VERSUS

REPUBLICRESPONDENT

(CORAM: LESIIT, J.)

R U L I N G

The Applicant JOE MWANGI NJIRU seeks bail pending the hearing and disposal of his appeal against conviction and sentence for an INDECENT ASSAULT charge. The basis his application on the fact that the appeal has high chances of success.

Mr. Mboha, who argued the application on the Applicant's behalf relied heavily on the case of ISAAC OMAMBIA vs. REPUBLIC CA No. 47 of 1995 which I have extensively familiarized myself with.

Mr. Mboha submitted that due to the inconsistency between the charge and the Complainant's evidence, the appeal had a high chance of success. **Mr. Mboha** illustrated the inconsistency as being the failure by the Complainant to even remotely imply that the Appellant had touched her "private parts" as the charge provided. Counsel also submitted that no prejudice would be suffered by the prosecution if the Appellant were released on bail.

Miss Gateru for the State opposed the application on rather administrative reasons. It was the Learned State Counsel's submissions that the Applicant had only served 2 months of the 10 years sentence and that he would not have served a substantive part by the time the appeal was heard, going by the rate of disposal of appeals in this court. Counsel submitted further that the evidence adduced supported the main charge of **RAPE** contrary to **Section 140** of the **Penal Code** and that the reason why the learned trial magistrate did not convict on it was because the words "unlawful" had been omitted in the particulars of the charge. Learned State Counsel urged the court to consider the totality of the evidence adduced and dismiss the Application.

I have carefully considered this application. The reasons advanced by the Applicant's Counsel have to do with the inconsistency and insufficiency of the evidence adduced in court and the mishandling of the evidence by the trial magistrate when deciding the charge for which the Applicant could be convicted. These arguments, with due respect to the Applicant's Advocate are drawing the court into the arena open only to the appellate court. The appellate court will have the task of evaluating the entire evidence to determine whether the charge was proved, whether conviction was proper or whether, as Learned State Counsel suggested, the conviction should be substituted or in the alternative a retrial be ordered.

At this stage of the case, all the Applicant needed to demonstrate was that there was overwhelming chance that the appeal lodged by him would succeed. What the Applicant's Advocate argued is that the alternative count for which the Applicant was convicted could not be sustained due to lack of proof of the particulars of the offence as framed. I do not quite agree with the Advocate. The evidence before court was that the Appellant forcefully had sex with the Complainant. There is no higher indecency than a man penetrating an unwilling woman's private parts with his male organ. As learned State Counsel submitted, the evidence adduced supported the main charge of **RAPE** but was only substituted due to an omission of the term "unlawful" in its particulars.

I do not find, as the Applicant's Advocate submitted, that there is an overwhelming chance that the Applicant will succeed in his appeal. It may as well be that the appellate court will consider the option of a retrial. On the cited case of **OMAMBIA vs. REPUBLIC**, Supra, the facts of the case are quite different from the instant case and therefore the case cannot quite be applicable to the instant one. In the cited case, it was a second appeal and the Appellant had been charged and subsequently convicted for indecent assault which, the Court of Appeal held, was in accordance to the report received from the Complainant.

In the instant case, the report made to the police was that the Applicant had raped the Complainant. The Court only fell back to the alternative count of indecent assault due to the insufficiency of the particulars of the rape charge purely a technical ground.

The appellate court has to grapple with the issue whether the conviction could be based on a lesser charge merely on the basis that the particulars of the main charge were insufficient.

I have no doubt that the appeal is arguable. However, I am not satisfied, as I should before granting the prayer sought, that it has high chances of success. See **DOMINIC vs. REPUBLIC 1986 KLR 612**

The application lacks in merit and is dismissed accordingly.

Dated at Nairobi this 14th day of March 2007.

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LESIIT, J.

JUDGE

Read, signed and delivered in presence of:

Applicant absent

Mr. Mboha for the Applicant

Mrs. Kagiri holding brief for Miss Gateru for State

Tabitha CC

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LESIIT, J.

JUDGE