



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

Misc Crim Appli 411 of 2006

JUSTUS MWANGANGI NZIOKA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

(CORAM: LESIIT, J.)

R U L I N G

The application before the court is a Chamber Summons dated 1st August 2006 in which the Applicant seeks bail pending appeal. There are four grounds upon which the application was based as follows;

- (i) There are likely and high chances of success of the main appeal.
- (ii) The entire judgment and actions that were not of his conduct and creation.
- (iii) That natural justice demands that justice must not only be done but it must be seen to be done.
- (iv) That from the proceedings and judgment of the Magistrate's Court no offence was proved under Section 140, 144 and 146 of the Penal Code as the said Magistrate relied on hearsay evidence to sustain and sympathetic emotions to convict the Appellant herein.

I find difficulty understanding grounds (ii) and (iii).

Mr. Osolika Advocate acted for the Applicant while **Mrs. Kagiri** Learned State Counsel represented the State.

Mr. Osolika submitted that from the judgment of the lower court, learned trial magistrate relied on hearsay evidence and contradictory evidence to convict the Applicant. The Advocate submitted that the evidence of PW2 and PW3 was hearsay and that those who reported the matter were not called as witnesses. The Advocate further submitted that since the victim was an imbecile there was need to call an independent witness to corroborate evidence adduced. That further the medical evidence adduced did not support the charge.

Mrs. Kagiri opposed the application and submitted that the evidence on record was direct evidence and was strong and consistent. Counsel submitted that even though the Complainant was unable to express herself due to her condition, the learned trial magistrate relied on direct evidence to convict. Learned State Counsel did not agree that the evidence of PW3 consisted of hearsay and submitted that rather PW3 gave direct evidence which was fortified by the evidence of PW2 and PW4. Learned Counsel submitted

that the learned trial magistrate had assessed the demeanour of the prosecution witnesses and had found them to be honest. **Mrs. Kagiri** urged the court to dismiss the application.

The Applicant was charged with a sexual offence but inadvertently the charge sheet was not annexed to this application. What was annexed were the proceedings and the judgment of the court. From the judgment the Applicant faced the charge of **ATTEMPTED RAPE OF AN IMBECILE** contrary to **Section 146** as read with **Section 389** of the **Penal Code** and was convicted for it and sentenced to 10 years imprisonment.

The Applicant's Advocate relied on the case of **CHILA & ANOTHER VS. REPUBLIC [1967] EA 722**. Unfortunately, that case does not apply to the application under consideration but deals with the issue of uncorroborated evidence and the direction a judge should give to assessors in such a case. The cited case therefore does not assist the Applicant at all.

An application for bail pending appeal would succeed if it is demonstrated that the appeal filed has high chances of success. Alternatively if it shown that there is some exceptional or unusual circumstances that would warrant the court to grant it. See **ADEMBA vs. REPUBLIC [1983] KLR 442**.

In the instant application, **Mr. Osolika** for the Applicant has argued only one ground, that the appeal has a high chance of success. **Mrs. Kagiri** for the State did not agree with **Mr. Osolika's** submissions and stated that in fact the evidence against the Applicant was both direct and strong.

I have perused the record of the proceedings of the trial court. In order not to pre-empt the appeal I do not wish to go into much detail. However, I do find from the evidence recorded that there was direct evidence against the Applicant which implicated him with the offence charged. The Doctor's evidence was also in tandem with the prosecution evidence. The case against the Applicant on the face of it is quite strong and I do not find that the appeal has high chances of success.

I decline to grant the application sought. The application is dismissed in its entirety.

Dated at Nairobi this 2nd day of May 2007.

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LESIT, J.

JUDGE

Ruling read and delivered in presence of:

Applicant present

Mr. Osolika for the Applicant

Mrs. Kagiri for State

Eric CC

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JUDGE