



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 49 OF 2007

JACKSON WAMITI MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

R U L I N G

The applicant, **Jackson Wamiti Mwangi** was tried and convicted for the offence of defilement of a girl contrary to section 145 (1) of the penal code by, **P.C. Tororey**, Ag Principal Magistrate at Karatina, Senior Resident Magistrate's Court. He was upon conviction sentenced to serve 20 years imprisonment. Being aggrieved by the conviction and sentence, the applicant has lodged an appeal to this court being criminal appeal number 49 of 2007. He now seeks to be admitted to bail pending the hearing and determination of the said appeal. The application is made pursuant to the provisions of section 357 of the Criminal procedure code.

The application is grounded on the fact that one, the appeal as filed is arguable and has overwhelming chances of success, two, that whilst

undergoing trial in the subordinate court, the applicant was on bond and never breached the bond terms imposed upon him by the trial court.

The application was further supported by the affidavit of **P.M. Kahiga**, learned counsel for the applicant. In the supporting affidavit counsel merely repeats and expounds on the grounds in support of the application aforesaid. In brief the applicant depones that the applicant has been sentenced to 20 years imprisonment on account of defilement, that the appeal is meritorious with over whelming chances of success, that the applicant had been on bond during his trial and that if he was granted bail pending appeal he is prepared to abide by all the conditions that may be imposed by this court.

In support of the application, **Mr. Kahiga** orally submitted that since the applicant's appeal had overwhelming chances of success, the applicant should not continue to be incarcerated. Counsel drew the attention of the court to the following authorities in support of the application:-

1. **Somo V R (1972) EA. 476**
2. **Phabious Muriithi Kariga V Republic, CR.APP. NO.369 of 2006 (unreported)**

In abid to show that the appeal had overwhelming chances of success counsel pointed out that there was no proper charge laid before the trial magistrate as the particulars of the charge failed to disclose that the act complained of was unlawful. The charge sheet also failed to disclose the year when the offence was allegedly committed. There were various contradictions

in the evidence of the prosecution which contradictions ought to have been resolved in favour of the applicant. Finally counsel pointed out that the applicant was not given a chance to object to the production of P3 form by a witness who was not the maker.

The application was opposed. **Mr. Mugwe**, learned State Counsel submitted that the appeal had remote chances of success.

The prosecution had proved its case during the trial to the required standard. On the issue of failure by whoever prepared the charge sheet to include the word “**unlawful**” in the particulars of the charge sheet, Counsel submitted that the failure did not prejudice the applicant’s case as defilement is patently unlawful.

Principles which guide courts in applications of these nature have long been settled. In the case of **Somo V R (supra)** the principles were therein stated interlia:

“.....the question is whether there are exceptional or unusual circumstances that the appellant is of good character, that the appeal has been admitted for hearing, that the offence did not involve personal violence are not exceptional or unusual circumstances.... The most important ground is that the appeal has overwhelming chance of being successful; in that case there is no justification for depriving the applicant of his freedom....”

These principles were reiterated recently in the celebrated case of **Dominic Karanja V Republic (1986) KLR 612.** In this case **Nyarangi, platt and Gachuhi JJA** delivered themselves thus:

“.....The most important issue here is if the appeal has such overwhelming chances of success then there is no justification for depriving the applicant of his liberty. The minor relevant consideration would be whether there are exceptional or unusual circumstances.....”

From the foregoing it is clear that for an applicant to succeed in an application of this nature he must demonstrate to the satisfaction of the court that the appeal as filed has overwhelming chances of success and secondly that there are exceptional or unusual circumstances pertaining to the appeal. These considerations are disjunctive and not conjunctive. How do these principles apply to the circumstances of this case. I have glanced through the proceedings and the judgment of the subordinate court. I have also perused the grounds of appeal advanced in the petition of appeal and I must say that they raise serious and weighty matters of law. There is the question whether it was mandatory to state in the particulars of the charge sheet not only that the appellant had carnal knowledge of the complainant but also the fact that such carnal knowledge was unlawful. That is to say that the prosecution should have included the word **“unlawfully”** had carnal knowledge of the complainant in the particulars of the charge. There is also the issue of failure by the prosecution to indicate in the particulars of the charge sheet the year in which the offence was committed. Whether or not these omissions were fatal to the prosecution case is not for me to say at this stage. That will be for the appellate judge who will eventually hear and decide the appeal on the merits. Suffice to say that these authorities

which seem to suggest that such omissions are fatal to the prosecution case. Yet again there are authorities that hold a contrary view and proclaim that such omissions are curable under section 382 of the Criminal Procedure Code.

There is also an allegation that the applicant was not given a chance to object to the production of P3 form by a witness who did not make it. This is a question of admissibility of evidence pursuant to section 77 of the **Evidence Act** and peripherally section 33 of the same Act. Once again I do not wish to commit myself on the issue as I do not wish tie the hands of the judge who might eventually hear the appeal. However what needs to be pointed out is that there are broad guidelines as to how sections 77 and 33 of the **Evidence Act** may be invoked.

Finally as I perused the proceedings, I noted that the complainant was a child of tender years. There is therefore the issue as to whether *voire dire examination* of the complainant was conducted before she was allowed to testify and of it was done whether it was properly and procedurally done.

Arising from the foregoing, I am in the main satisfied that the applicant's appeal has overwhelming and or good chances of success. I find merit in the application and accordingly allow it. The applicant shall be released from prison custody upon his execution of a personal bond of Ksh.300,000/= plus one surety of like sum to be approved by the Deputy Registrar. On release the applicant shall be attending the mention of his appeal before the

Deputy Registrar every after sixty (60) days until the appeal is heard and determined. The first of such mention shall be on 28th September, 2007.

Orders accordingly.

Dated and delivered at Nyeri this 29th June 2007.

**M.S.A. MAKHANDIA
JUDGE**