



REPUBLIC OF KENYA

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

**Misc Crim Appli 34 of 2005**

**MARTIN MUNYORI KAMAU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, **MR. MARTIN MUNYORI KAMAU** has moved this court for orders that he should be admitted to bail/bond pending the hearing of the appeal. In the alternative he seeks that his appeal be heard on priority basis. The application is supported by the affidavit of the applicant in which in the main he depones that he is the appellant in Criminal Appeal Number 349 of 2005. That on the basis of the grounds of appeal set out in the petition of appeal, he believes his appeal has overwhelming chances of success. Finally he depones that he is ready to abide by any conditions that may be imposed by this court in admitting him to bond/bail pending the hearing of the appeal.

It is important to note that the appellant was tried and convicted for the offence of rape contrary to Section 140 of the Penal Code. The particulars being that on 20<sup>th</sup> day of October, 2003 at Kanunga in Kiambu District of the Central Province the applicant had carnal knowledge of Ann Nyambura without her consent. Upon conviction the applicant was sentenced to Seven (7) years imprisonment. This was on 15<sup>th</sup> July 2004. On 18<sup>th</sup> July 2005, the applicant lodged an appeal against the said conviction and sentence being Criminal Appeal 349 of 2005. Consequent upon the filing of the appeal, the applicant has now filed the instant application.

In his oral submission in support of the application, the applicant who was unrepresented submitted that he should be released on bail pending appeal as his appeal as filed was arguable.

Mr. Makura, learned state counsel opposed the application. He submitted that the applicant had not demonstrated to the satisfaction of the court that his appeal had overwhelming chances of success. He had also not demonstrated that there existed exceptional and unusual circumstances to warrant his admission to bail. According to the learned state counsel, there was sufficient evidence both direct and circumstantial adduced to convict the applicant. That the applicant did not deny having had carnal knowledge of the complainant. Indeed in his sworn statement of defence, the applicant admitted having had sexual intercourse with the complainant but according to him it was consensual. Learned state counsel pointed out that the prosecution went out of its way to show that the alleged consent was obtained by coercion and therefore rape was proved. On sentence, counsel submitted that the applicant upon conviction was sentenced to 7 years imprisonment. The offence carries a maximum jail term of life imprisonment. The sentence was therefore lawful. It was not excessive. The appeal on both conviction and sentence has no chances of success concluded the learned state counsel.

I have carefully considered the application, the affidavit sworn in support thereof and the submissions of both the applicant and the learned state counsel in support of and in opposition to the application. I have also perused the proceedings and judgment of the subordinate court. The principles upon which this court acts in granting or refusing bail pending appeal are well settled. The most important consideration or criteria is whether the appeal has overwhelming chances of success. The rational being that if the appeal has such overwhelming chances of success, there would be no justification in depriving the applicant of his liberty. Then there is also the other minor consideration as to whether there exists exceptional and unusual circumstances regarding the applicant and or the appeal to warrant and justify his

admission to bail. (SEE DOMINIC KARANJA VS. REPUBLIC [1986] KLR 612.

Having perused the record of the trial court, I note that the issue that may call for determination is whether the carnal knowledge of the complainant by the applicant was consensual. The complainant states that she consented to sex with the applicant through coercion. The applicant thinks otherwise. On that score I would hold that the appeal is arguable as correctly pointed out by the applicant. At this stage however, this court is entitled to grant the application if it is satisfied, at a glance as opposed to minute examination of the proceedings and judgment of the lower court that the chances of the appeal succeeding are overwhelming. I am unable to arrive at such conclusion. The appeal maybe arguable but certainly cannot be said that its chances of success are overwhelming. On this ground alone the applicant fails. This court was not made aware of any unusual and exceptional circumstances in the appeal to warrant this court to grant the applicant bail pending appeal.

Having considered the application carefully, I find that it must fail. Accordingly I dismiss the application.

Dated at Nairobi this 6<sup>th</sup> day of April 2006.

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**MAKHANDIA**

**JUDGE**