



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 197 of 2005

KYALO MUSYIMI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The Applicant herein, Kyalo Musyimi seeks orders under s.357 of the Criminal Procedure Code that pending the hearing and determination of his Appeal he ought to be released on bail.
2. The grounds in support are that:
 - a) The appeal has overwhelming chances of success.
 - b) The Appellant shall abide by any conditions attached to the Bond/Bail.
 - c) The Appellant faithfully observed all the conditions of the bond during the trial in the lower court.
3. It is the argument on his behalf in submissions by his advocate that the trial in the lower court has serious and fatal misdirection's and that the Appeal therefore has overwhelming chances of success. The misdirection's are said to include;
 - a) Non-compliance with s.125 of the Evidence Act as regards whether there was a voire dire examination conducted to determine whether the minor complainant understood the questions put to her.
 - b) The fact that that the trial court relied on the evidence of a child without corroboration contrary to s.124 of the Evidence Act.
 - c) That there were contradictions of substance in the case such as the minor calling her assailant "**Dan**" who is not the Appellant.
4. That these matters necessitate that pending the hearing of that Appeal said to have overwhelming chances of success, the Appellant should be released on bail pending Appeal.

5. It was argued on his behalf also that the sentence was harsh in the circumstances of the case.
6. Learned State Counsel in response argued that in view of Act No. 5/2003 (the Children's Act) there was no longer need for corroboration of a child's evidence in sexual offences and if a court believes the minor then on that evidence alone, a conviction can be sustained. In any event the evidence of P.W.4 who saw interference with the child's genitalia should have been taken as corroboration enough.
7. Counsel argued further that a voire dire examination was conducted as the record shows that the magistrate examined the child before allowing her to testify.
8. The state counsel also urged the point that the Appellant, conscious of his guilt had attempted to settle the matter out of court and in any event the Appeal itself has no chance of success and should be dismissed.
9. Both the last points were contested by counsel for the Applicant on the grounds that the Clinical Officer (P.W.4) could not by his evidence corroborate the evidence of the minor and as regards the alleged settlement of the case, it was the minor's mother who pushed for it to extract money from the Appellant.
10. A party seeking to be released on bail pending appeal must show that the Appeal has overwhelming chances of success. I am alive to the fact that I am not hearing the Appeal and I note from the evidence before the lower court that the Appellant was charged with the offence of defilement and in the alternative of indecently assaulting the minor CK. He was placed on his defence on the charge of indecently assaulting her.
11. I have noted the issues raised in support of the Application and from the record I note at page thereof that the learned trial magistrate said;

Court

Minor is examined and allowed to give evidence”

12. The minor then gave lucid and clear details as to what the Appellant did to her. It cannot be said at this stage and without more, that no voire dire examination was conducted or that the minor did not know what she was doing in the trial court. P.W.2 her mother also detailed out what the minor told her. P.W.3 said that the minor spoke of one “**Dan**” but said nothing more and it is unclear what that name meant. P.W.4 saw that P.W.1 had bruises on her genitalia.
13. My own impression is that I cannot on the basis of the evidence on record and even with the submissions on the matters raised in this Application say with certainty that the Appeal has overwhelming chances of success. There is nothing untoward about the sentence imposed either.
14. On the whole therefore I find no reason to exercise discretion in favour of the Appellant and his Application for bail pending Appeal is hereby dismissed.
15. Orders accordingly.

Dated, signed and delivered in open court at Meru this 4th day of May 2006

ISAAC LENAOLA

JUDGE

Read in the presence of:

N/A Advocate for Appellant/Applicant

Mr. Muteti State Counsel for the State.

ISAAC LENAOLA

JUDGE