



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

Misc Crim Appli 469 of 2006

*(Being an application for bail pending appeal in Criminal Case No. 351 of 2006
of the Resident Magistrate's Court at Kiambu)*

STEPHEN NDUVA MWANZWII.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The Applicant **STEPHEN NDUVA MWANZWII** seeks to be admitted to bail pending the hearing of his appeal by Notice of Motion dated 18th August 2006, filed on his behalf by **KURAUKA & CO. ADVOCATES**. The application is opposed by the State through its Counsel **Mr. Makura**.

The Applicant was sentenced to five years imprisonment for an offence of **ATTEMPTED DEFILEMENT** contrary to **Section 145(2)** of the **Penal Code**. He had been sentenced by Senior Principal Magistrate's Court at Kiambu on the 10th August 2006.

Mr. Kurauka argued the application and in his submission went straight to argue the grounds of appeal contained in the petition of appeal annexed to this application. Counsel argued that the Applicant was not given an opportunity to be represented by counsel despite having one on record, that the Applicant did not understand the language of the court, that the Complainant's evidence, who was minor was not corroborated and that the charge was not proved. None of these grounds were substantiated by Counsel. Counsel then submitted that the Applicant ought to be admitted on bail pending appeal, that he had been on bail during the pendency of the trial in the lower court and that he would abide by the bond terms.

Mr. Makura opposed the application. Counsel submitted that there was overwhelming evidence on record to convict and that the Complainant's evidence demonstrated how the Applicant attempted to defile her. Counsel submitted further that the Complainant's evidence did not require any corroboration as provided under **Section 124** of the **Evidence Act**. Counsel also submitted that the Applicant cross-examined some witnesses and not others and that that was not a basis to argue that he did not understand the proceedings. Counsel also submitted that the learned trial magistrate warned herself of the danger of convicting on evidence of a single witness. **Mr. Makura** urged the Court to find that the Applicant had not demonstrated that the appeal had an overwhelming chance of success and urged court to dismiss the application.

I have carefully considered this application together with the supporting affidavit, annexures thereto and

the submissions by counsels for both parties. Counsel for the Applicant argued grounds which according to him was ground to find that the Applicant deserved to be granted bail pending appeal. Even though he did not state it, Counsel was trying to convince the court to find that the Applicant's appeal had high chances of success. This is the most important ground in an application of this nature. That the appeal filed by the Applicant and pending hearing by the appellate court had high chances of success and therefore there was no justification for depriving the Applicant of his liberty. That ground would however not justify the court hearing the application for bail pending appeal to consider in details the grounds for the appeal to make a determination whether the appellate court would allow the appeal or not. That would be to pre-empt the appeal. Having said so, I have considered the relevant material in this case, I have perused the proceedings and judgment before the trial court and considered these against the grounds of appeal. I am respectfully of the view that at this stage there is not before me anything to justify a finding that the Applicant's pending appeal has an overwhelming chance of success. See **DOMINIC KARANJA vs. REPUBLIC 1986 KLR 612.**

Mr. Kurauka argued that the Applicant was on bond during the trial in the lower court and that he would abide by any terms. The previous good character of the Applicant and a solemn assertion that he will abide by bond terms if released by this court is not sufficient ground for releasing him on bail pending appeal. For this reason I hereby dismiss the application.

Dated at Nairobi this 18th day of October 2006.

LESIIT, J.

JUDGE

Read signed and delivered in the presence of;

Applicant present

Mr. Makura for the State

Mr. Kurauka for the Applicant

Tabitha - CC

LESIIT, J.

JUDGE