



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI LAW COURTS

Misc Crim Appli 468 of 2006

*(Being an application for bail pending appeal in Criminal Case No. 10707 of 2003  
of the Senior Resident Magistrate's Court at Thika (S.M. Mokuu)*

WICKLIFFE OMONDI MADINDOU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**R U L I N G**

The Applicant **WICKLIFFE OMONDI MADINDOU** has by Notice of Motion dated 4<sup>th</sup> September 2006 applied to be admitted to bail pending the hearing of his appeal. Six grounds for the application are cited on the face of the Notice of Motion which are that the Applicant is serving 10 years imprisonment sentence for an offence of **RAPE** contrary to **Section 144(1)** of the **Penal Code**, that the Applicant has an arguable appeal, that the Applicant had been released on bail in the trial court, that the Applicant had been denied the opportunity to be represented by Counsel and that if bail was not granted the Applicant's appeal would be rendered nugatory.

The application was argued by **Mr. Kurauka** on behalf of the Applicant while **Mr. Makura**, State Counsel, represented the Respondent. The Application was opposed.

**Mr. Kurauka** submitted that several constitutional breaches were committed by the lower court in that although the Applicant was represented by counsel during plea, his advocate was absent during the trial. Counsel submitted that even though the conviction was based on the evidence of the prosecution, PW2 the Doctor did not in his evidence link the Applicant with the offence and that it was fatal to the prosecution case. That the evidence of the Complainant was not corroborated and the court did not warn itself before convicting on that evidence. Counsel also submitted that the Applicant's defence was not considered. Counsel submitted that the Applicant was a TB patient who needed constant medical care and that he stood to lose his job if bail was not granted.

**Mr. Makura** submitted that the Application had not been brought under **Section 357** of the **Criminal Procedure Code** but under **Section 123** of the **Criminal Procedure Code**. Learned State Counsel submitted further that the Applicant had not demonstrated that his appeal had high chances of success which Counsel submitted, was the basic requirement for this kind of an application. Counsel submitted that no unusual or special circumstances were demonstrated. Counsel submitted further that there was sufficient evidence to prove that the Applicant had carnal knowledge of the Complainant and that PW2

corroborated that evidence. Counsel also submitted that at the time the offence was committed, corroboration was not required in law. Concerning the Applicant's medical condition, **Mr. Makura** submitted that there were facilities in Kamiti Prison. Counsel urged the court to dismiss the Application.

I have considered the application, the supporting affidavit, the annexures thereto, the submissions of both counsels and have perused the proceedings and judgment of the trial court. As **Mr. Makura** correctly submitted, this application was premised on **section 123** of the **Criminal Procedure Code**.

**Section 123 (1)** of the **Criminal Procedure Code** provides as follows: -

*“123(1) When a person, other than a person accused of murder, treason, robbery with violence or attempted robbery with violence is arrested and detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail. That person may be admitted to bail.”*

**Section 123** of the **Criminal Procedure Code** deals with admission to bail of persons arrested for certain bailable offences and held in the police station or who are brought before the court. The section does not deal with admission to bail of convicted persons. The Applicant based his application only on that section of the **Criminal Procedure Code** and clearly that section does not apply. This court's jurisdiction to grant prayer sought has not been invoked and for that reason alone the application should fail.

I will however consider the merits of this application that notwithstanding. The most important ground in an application of this nature is that the appeal has overwhelming chances of success. The Applicant's advocate has argued that since the Complainant's evidence was not corroborated and since the Doctor's evidence did not link the Applicant to the offence then the conviction could not stand. These submissions are not a good basis to justify the granting of bail pending appeal to a convicted person. The law does not require corroboration of a Complainant's evidence in a charge of **RAPE**. Neither is there a requirement that the Doctor's evidence must link an accused person to the offence. Whether or not, from the evidence adduced a conviction was justified is a matter for the appellate court to decide. I do not find that there are overwhelming chances that the appeal will succeed to justify a finding that there are no grounds to deprive the Applicant of his liberty at this stage. See **DOMINIC KARANJA vs. REPUBLIC 1986 KLR 612.**

**Mr. Kurauka** also argued that the Applicant had bail during the pendency of his trial in the lower court and that he stood to lose his job if bail pending the appeal was not granted. The fact that the Applicant abided by the terms of his bond in the lower court and the fact that he has given a solemn assertion that he will not abscond if released is not sufficient ground to release him on bail pending appeal. Unlike the assumption of innocence the court would invoke under **Section 123** of the **Criminal Procedure code**, the Applicant has been convicted by a competent court and that conviction will stand until the appellate court finds otherwise. The Application is not merited on that ground either. As for ill health, that standing on its own would not constitute an exceptional circumstance to grant the bail sought especially where medical facilities are available for his treatment while in prison. **Mr. Makura** submitted that such facilities are available in prison and that submission has not been challenged. Having considered this application I find that it lacks in merit and therefore dismiss it.

Dated at Nairobi this 18<sup>th</sup> day of October 2006.

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**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

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**LESIT, J.**

**JUDGE**