REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 111 OF 2004

PETERSON MURIITHI NJERU.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein was on 1.10.2004 sentenced to life imprisonment for the offence of rape contrary to Section 140 of the Penal Code. On 15/10/2004 he filed eight (8) very comprehensive Grounds of Appeal and by his Application dated 20.12.2003 he seeks bail pending appeal under section 357 of the Criminal Procedure Code, Cap. 75 Laws of Kenya.

2. Mr. Njage who argued the Application aforesaid submitted that the sole consideration to guide the court on whether to grant bail pending appeal or not is the question whether the appeal has high chances of success. Relying on the (iii) holding in **Somo -vs- Republic [1972] E.A. 476 at 476** he urged that once the appeal has an overwhelming chances of success, then there would be no justification for depriving the Applicant of his freedom and liberty and he ought to be released on bail pending the hearing of his appeal.

3. To demonstrate why, in his view, the appeal herein by the Applicant has high chances of appeal, Mr Njage argued that;

(i) the charge as presented to the lower court did not have the words “unlawful” to depict carnal knowledge without consent and that therefore no offence was disclosed. He relied on the case of **Suleiman Juma –vs- Republic C.A. 181/2002** to fortify the argument that where the charge and particulars therein do not meet the requirements of the Act, then it is rendered fatally defective.

(ii) that the learned trial magistrate purported to frame **“issues for determination” as opposed to “points for determination”** as is required by Section 169 of the Criminal Procedure Code. By doing so, he shifted the burden of proof to the Applicant and in fact convicted him before analyzing the evidence tendered, including the Defence.

(iii) the learned trial magistrate did not specify as is required by S. 169 aforesaid, under what section of the law he convicted and sentenced the Applicant.

(iv) that he took the evidence of PW 3, a child of 12 years without giving directions by way of a **voir dire** examination and thus rendered the witness’s evidence worthless. He relied on the

case of **Kibangeny – vs- Republic [1959] EALR 93** for this proposition.

(v) that generally the evidence of the complainant was untruthful, unreliable and once a witness comes out as less than straight forward, then his evidence cannot be relied upon at all. For this pronouncement, reliance was placed on **Ndung'u Kimanyi –vs- Republic [1979] KLR 282**. Further, because the alleged offence was rape, it was unsafe to convict on contradictory, and false evidence. **(Abasi Kibaso –vs- Uganda [1965] EALR 507)**

4. Mr. Omwega who appeared for the Republic supported the continued incarceration of the Applicant save to concede that the failure to take the evidence of PW 3 who was a minor with care and direction was a misdirection on the part of the learned trial magistrate. To his mind however, that fact alone cannot change the fact that the appeal has no chance of success and no bail should be granted to the Applicant. On the first issue raised, he asked me to look at form No.4 in the 2nd Schedule of the Criminal Procedure Code and see that the charge was correctly drafted. On the second, I was told that it does not matter how and in what ways the learned magistrate misdirected himself as this court on appeal can re-evaluate that evidence and reach its own conclusions on the evidence. On the third, the section under which the Applicant was charged and necessarily therefore, convicted, was set out in the Judgment (at the commencement) and there was no reason to repeat it at the end. Lastly and on the credibility of the complainant, Mr. Omwega argued that all the witnesses who testified especially PW2 and PW4 corroborated her evidence and there were no contradictions whatsoever.

5. The law as stated by Mr.Njage is correct but whether the Application before me meets the requirements of that law and the authorities that he so ably quoted is what I must get to the bottom of.

6. The Applicant according to the charge sheet was confronted with these particulars on the main count;

> **"On the 10th day of April 2004 at Gitiburi village in Mbeere District within Eastern Province had canal (sic) knowledge of EMMA NYAGUTHII NJUGUNA without her consent".**

To my mind these words sufficiently describe the offence, as S.140 of the Penal Code describes rape as having **"unlawful carnal knowledge of a woman or girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind ……".** I am certain that the omission of the word "unlawful" would not alter the effect of the charge. The operative words in the section are **"without consent" and if "with consent"**, where it is obtained by **"force"** or **"intimidation"**. Once proof is given, then those actions by implication and necessarily therefore, become **"unlawful"**. This is also true of the offence of robbery without violence as stated in the case of **Suleiman Juma alias Tom (Supra)** where a charge was held to be defective where it was not stated that a knife was a **"dangerous weapon"** because those operative words define the offence. The holding in that case is clearly distinguishable as those words were missing. I shall therefore decline to agree with Mr. Njage on his first point and I say so guardedly… and only to the extent that it has been raised as an aspect of this Application. The determinate and final finding on the matter will of course be made on appeal.

7. It is also my view that the use of the words **"points for determination"** in S.169 of the Criminal Procedure Code is not in any way different from the choice of the words **"issues for determination"** as used by the trial magistrate. A casual glace at the dictionary meaning of the two words is that "issue" is **"a topic for resolution"** and in the context used herein, a **"point"** is a **"single item or detail in discussion"** (Concise Oxford Dictionary, 10th edition). The use of one or the other would not render a Judgment wholly invalid.

8. Similarly, the failure to state at the end of the Judgment that the conviction is based on a particular section of the law would not render the Judgment a nullity. The learned trial magistrate stated that he convicted the Applicant **"as charged in Count I (main Count) and Count II."** He had elaborately set out at the beginning of his Judgment what constituted Count 1 and Count II and I agree with Mr.Omwega that he need not have to repeat those exact words in the very same Judgment. His words are sufficient to meet the requirements of the Code.

9. It is conceded, and I find it right that it was done, that the learned trial magistrate should have reminded himself of the need to ascertain that PW3 who was 12 years old understood the nature of the oath he was taking, and that he had the necessary intelligence to understand the evidence and the requirement that he must speak the truth **(see Nyasani S/o Bichana –vs- R.,(2) [1958] E.A. 190 and Kibangeny –vs- R [Supra])**

10. I do not wish to go too deeply into the matters to be raised on appeal and if I have it is only because Mr. Njage argued those matters rather too deeply to demonstrate that the appeal is not frivolous and that it has overwhelming chances of success. My comments above on any of the issues should not be taken to be conclusive and should not aid any party when the appeal is argued in extenso.

11. Having so said, and notwithstanding my appreciation of the matters above, I have read the proceedings in the Lower Court and looked at the issues of fact raised therein. Mr. Njage attacked the evidence as being contradictory and that the complainant was a liar. For my part, I am satisfied that the evidence of PW2, Bethi Muthoni and PW 4, Grace Muthoni Njoki who were independent witnesses confirms that there was indeed rape and that the perpetrator was the Applicant. PW 4 confirmed that when the Applicant had finished with the complainant, the latter came back to the house and said that she had been raped.

Her clothes were muddy, and her skirt was torn. Coupled with the injuries she sustained physically which were confirmed by PW 6, Githua Louis, even if there were contradictions in the medical evidence, the offence was still committed. I shall leave the rest to the court on appeal and my comments as I said earlier are not conclusive at all on the appeal itself.

12. From my findings above, it is now clear that I am not satisfied that the appeal is water-tight. Coupled with the sentence meted out, this is not a safe case for release of the Applicant pending appeal.

13. The Application is hereby dismissed but I shall give the Appellant the earliest date possible for hearing of this Appeal.

Orders accordingly.

Read in open Court this 8th Day of February 2005

I. LENAOLA

JUDGE

In the presence of;

Mr. Njage for Applicant

Mr. Omwega for Republic

I. LENAOLA

JUDGE