REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Crim Application 711 of 2004

DANIEL MUNGAI WAIRIMU……..……..….APPLICANT

VERSUS

REPUBLIC…….RESPONDENT

RULING

The applicant, **DANIEL MUNGAI WAIRIMU**, is seeking bail pending appeal. At the hearing of his application, he was represented by Mr. Kirimi Mbogo advocate, while the respondent was represented by the learned State Counsel, Ms Nyamosi.

It was the contention of the applicant that his appeal has extremely high chances of success. In view of that fact, as perceived by the applicant, if he was not granted bail, he might serve the entire sentence before his appeal was heard. If that were to happen, the applicant's appeal would have been rendered nugatory.

The applicant was charged with the offence of **INDECENT ASSAULT** contrary to Section 144(1) of the Penal Code. Following his trial, he was convicted as charged, and was thereafter sentenced to three (3) years imprisonment. He has now lodged an appeal against both conviction and sentence.

It was pointed out by the applicant that the offence was first reported some six (6) months after it allegedly occurred. He said that the court ought to take note of the fact that he had been a tutor, providing private tuition, to the complainant for a period of four (4) years, prior to the date of the alleged offence. As far as the applicant is concerned, those circumstances indicate that the offence did not occur.

The applicant also pointed out that he did present himself to the police, and that that was conduct which was commensurate with his innocence rather than guilt.

Furthermore, the applicant contended that the trial court failed to give due consideration to the medical evidence which was adduced in evidence by the prosecution. He said that the medical evidence clearly proved that the complainant had had an itch in her private parts. But, as far as the applicant was concerned, the said itch was consistent with the complainant's medical history of allergy, rather than proof of the offence.

The learned trial Magistrate was faulted, by the applicant, for failing to note that when the doctor (PW4) interviewed the complainant, the latter did not complain about having been indecently assaulted.

Finally, the applicant said that the conviction was founded on uncorroborated evidence. Whilst conceding that conviction can now be sustained even in cases wherein the evidence of a child witness was not corroborated, the applicant nonetheless argued that such evidence should be examined very carefully by the trial court. In this case, the trial court is accused of not having given due consideration to the

evidence of the complainant, especially in the light of the fact that the doctor's evidence contradicted that of the complainant.

In response to the application, learned State Counsel, Ms Nyamosi, said that the applicant's appeal has no overwhelming chances of success. It was the respondent's view that the trial court did give keen consideration to all the evidence adduced by both the prosecution and the defence. The learned trial Magistrate is also said to have cited the relevant law, before arriving at the right conclusion in law.

It was the respondent's submission that even though the offence was committed once, that could not imply probability that it was not committed at all. Such probability was dispelled by the evidence of PW1, which the court believed after observing the demeanour of the young girl, said the respondent.

It was further submitted that the applicant had every opportunity to commit the offence. That fact is conceded by the applicant, but he also says that if his guilt was to be presumed on the issue of availability of opportunity, that would be wrong. He says so because, as far as he was concerned, such opportunity had been available to him for the period of 4 years, when he provided private tuition to the complainant.

In that regard, the applicant appears to have a valid argument. Indeed, it is perfectly clear that in law, someone cannot be guilty of committing an offence, simply because he had an opportunity to do so.

The respondent pointed out that the complainant's parents and the applicant were on very good terms. Therefore, as far as the respondent was concerned, the applicant could not have been framed by his said good friends. The fact that the applicant was a good friend to the complainant's parents is common ground. The applicant himself testified to that fact. That would therefore put paid to the applicant's assertion, in his Petition of Appeal, that the charge was malicious or that he was framed.

As regards the duration for which PW1 had been going to the applicant, for tuition, PW1 said that it was for two years, not four years, as stated by the applicant. However, apart from that clarification, I do not think that anything more turns on that fact.

Although the applicant submitted that he went to the police station, the evidence on record shows the applicant as complainant that PW2 tricked him into going to the police station.

Having given a preliminary consideration to the evidence on record, the judgment, and the Petition of Appeal I have come to the conclusion that there is nothing which leads me to believe that the appeal has overwhelming chances of success.

The applicant himself has submitted that corroboration was not essential to found a conviction. That effectively leaves the evidence of the complainant on the one hand, and the defence of the applicant on the other hand. One has testified about facts which the trial court found to be proof of indecent assault; the other denies the said "**facts**". I believe that it is now upto the appellate court to adjudicate on the matter. If I were to purport to do so, at this stage, I would have usurped the function of the appellate court. That, I decline to do.

Meanwhile, I am anxious that the applicant should not serve his sentence before his appeal is heard and determined. Although from my experience, with the pace at which the appeals are being disposed of, I doubt that the applicant will serve the sentence before his appeal is heard.

I nonetheless feel obliged to direct that the appeal No. 450/04 be heard on a priority basis.

In the meantime, I decline to grant bail to the applicant.

It is so ordered.

Dated at Nairobi this 2nd day of February 2005

FRED A. OCHIENG

AG. JUDGE

Delivered in the presence of

Ms. Nyamosi for State

Kirimi Mbogo for Applicant

Mr. Odero – Court Clerk