

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISC. CRIMINAL APPLICATION NO.60 OF 2005

PETER NAKOIDE EMASE APPELLANT
-VERSUS-
REPUBLIC RESPONDENT

RULING

This is a Chamber Summons brought under section 357 of the Criminal Procedure Code (Cap.75) dated 11th March 2005. The application was brought under certificate of urgency. It seeks for two orders: -

(i) That the applicant be released on bail/bond terms pending the hearing and determination of the appeal herein.

(ii) In the alternative and without prejudice to (i) above the applicant's sentence be suspended until the hearing and determination of the appeal.

The grounds of the application are on the face of the Chamber Summons. The application is also supported by an affidavit sworn by John Kirwa Birir advocate on 11th March 2005. The grounds of the application are firstly that the appeal has high chances of success. Secondly, that the plea was defective in that the language used could not be understood by the applicant hence the plea was equivocal. Thirdly, that the court did not have jurisdiction to deliberate on this matter in that the applicant is a minor.

At the hearing of the application, Mr. Birir for the applicant made submissions in support of the application. He submitted that the plea was defective as the language used was not understood by the applicant. He relied on the supporting affidavit in which it was deponed that the languages used were Swahili and English rather than Turkana language which was the only language that the applicant understood. He also submitted that the applicant was a child and therefore he should have been taken for trial in the Children's Court rather than the Chief Magistrate's Court. Therefore, the court which tried the applicant that is the Chief Magistrate's Court did not have jurisdiction in the matter. The learned State Counsel Ms. Oundo submitted that she did not oppose the application. The reasons were that the applicant was a child and therefore he should have been tried by the Children's Court as provided for under the Children's Act 2001. This particular matter was dealt with by the Chief Magistrate's Court at Eldoret which did not have jurisdiction to deal with the matter.

The matters to be considered in an application for bail pending appeal have been dealt with by the courts many times. The most important consideration is whether the appeal has overwhelming chances of success, in which case there would be no justification for depriving the applicant of his liberty (see Dominic Karanja –vs- Republic 1986 KLR 612). This application is based on two contentions. Firstly, that the language used in the trial court was not understood by the applicant. Secondly, that the Chief Magistrate's Court did not have jurisdiction to entertain the matter.

Both the above contentions, if there is evidence to support them, are matters that would, in my view, result in the appeal having overwhelming chances of success. The learned State Counsel conceded to the application on the ground that the applicant was a child and therefore he should have been tried by the Children's Court rather than the Chief Magistrate's Court.

I have perused the Children's Act 2001. It is clear that under section 73 of the Act, the Children's Court is the court which has jurisdiction to try children who are aged up to 18 years, except for charges of murder or a charge in which the child is charged together with a person or persons of or above 18 years. There is a Children's Court in Eldoret. Therefore, assuming that the applicant was below 18 years he should have been tried by the Children's Court for a charge of defilement of a girl or indecent assault. The burden of establishing before this court the grounds relied upon for an application for bail pending appeal, is on the applicant. Unfortunately in this matter I have not been referred to or shown any copy of the proceedings

in which it is alleged that the applicant was tried in Swahili language while he only knew Turkana language. No copy of the typed proceedings or handwritten proceedings was attached. In addition there is no information or indication in all the documents that were filed in the application as to the actual or apparent age of the applicant at the time of trial. Even in submissions, Counsel for the applicant did not indicate or mention the age of the applicant. There is no doctor's report to show that an assessment of age has been done which would indicate the age of the applicant. Therefore I am left to speculate on both the two contentions that the proceedings were conducted in a language that the applicant did not understand, and also the contention that the applicant was a minor at the time of trial before the Chief Magistrate's Court.

The Learned State Counsel was right in conceding to the application assuming that the age of the applicant had been established as being below 18 years of age as at the time of trial. However, that burden of establishing the age was on the applicant. Counsel for the applicant was required to provide the information establishing the age of the applicant as at the time of trial before the Chief Magistrate's Court. Unfortunately that was not done. I have considered this matter anxiously as it is purported to involve a minor, but I am unable to grant the orders sought. The applicant has not provided to this court the unusual circumstances that would give his appeal overwhelming chances of success. In those circumstances, I decline to grant the orders sought.

In the result, I dismiss the application for bail pending appeal. I however, order that urgent steps be taken to have the substantive appeal heard and determined as a matter of priority.

Dated and Delivered at Eldoret this 19th Day of May 2005

George Dulu
Ag. Judge