



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 158 of 2005

KENNEDY OKUMU WAMITHAAPPELLANT

VERSUS

REPUBLICPOSECUTOR

RULING

The Applicant was charged with an offence of attempted defilement of girl M.A.O under the age of 16 years contrary to Section 145(2) Penal Code.

On 25/4/05 the applicant was produced before Principal Magistrate, Hon. H. Ndung'u for plea. Interpretation was recorded as English/Swahili. The charge was read to him and explained. He pleaded not guilty. Trial commenced on 11/7/05 before S.R.M. Hon. Mwangi. The prosecution called 4 witnesses.

In the middle of the evidence in Chief of the 4th witness the applicant interrupted the court proceedings. He said he wanted to change his plea.

The Trial Magistrate then read the charge to the accused and explained it. The applicant then said, "It is true".

The court entered plea of guilty against him. The facts were read out to him. What the facts show is that the Government analyst examined specimens from 4 men and it was found that the person who had committed the offence was the applicant. On the facts the applicant said, "Facts are correct" whereupon the Trial Magistrate proceeded to convict on plea of guilty and after considering investigation sentenced the accused to seven (7) years imprisonment.

The applicant has now filed a petition of Appeal alleging that the Trial Magistrate conducted the trial in a language that he could not understand and that the plea did not amount to unequivocal plea. And the sentence of 7 years is excessive.

He now applies for bail pending appeal and pleads that the appeal has over-whelming chances of success and that there is likely to be delay in hearing the appeal thus causing irreparable loss to the applicant.

The Counsel for the Applicant has cited several authorities. In the case of Somo V.R [1972] E.A. 476 the court held that:

1. the question is whether there are exceptional or unusual circumstances

2. that the appellant is of good character, that appeal has been admitted to hearing and the offence does not involve personal violence are not exceptional cases or of unusual circumstances.

3. the most important ground is that the appeal has an overwhelming chance of being successful. In that case there is no justification for depriving the applicant of his freedom.

These are the principles laid down and relied upon by the State Counsel.

Again in the Court of Appeal decision in *Jivraj v. Republic* [1986] KLR at 605 the court held “(2) if it appears prima facie from the totality of the circumstances that the appeal is likely to succeed on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard conditions of granting bail exists.

“3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued”

This case was in relation to section 5(2) (a) Rules of Court of Appeal where the court found the point to be argued to be substantial.

The applicant is furthermore relying on the decision of court of Appeal in *Kiyato V. R* [1986] KLR 418. The facts in that case were that the appellant requested for a Boran interpreter but the court provided only a Somali one. The appellant maintained that he did not follow the proceedings at the trial and this occasioned him a serious miscarriage of justice.

In this case the court of Appeal allowed his appeal and ordered a retrial. In the case of *Abdalla V. Republic* [1989] KLR 450 the conviction was on a plea of guilty. However, he appealed on the grounds that his plea was unequivocal and he did not understand the proceedings and no interpreter was provided. The recorded of the court did not show the presence of any clerk to interpret the proceedings. However, in the case of *Njuki V. R* [1990] KLR 334, the High Court held that a plea “It is true” is unequivocal.

In the record here on the first day in court the record shows that there was a court clerk and the language used was English/Swahili. On the first day of Trial a court clerk was present.

On that day and subsequently the clerk was present but there was no record that there was any interpretation. There was no record either that the applicant made any complains that he was unable to understand proceedings.

Also the recorded plea is “It is true”

After conviction the applicant in mitigation stated “I pray for forgiveness I was misled by the devil”

Taking the circumstances of the whole proceedings, I am of the opinion that the appeal has no overwhelming chances of success.

Furthermore there are no unusual circumstances, which would warrant granting bail. Also the sentence is not likely to be served before the appeal is heard. Most importantly I do not find that the complaints raised could be said to have caused injustice to the applicant especially in view of the analyst report exhibited.

I therefore dismiss this application.

Delivered and dated at Mombasa High Court on 22nd August 2005

J. KHAMINWA

J U D G E