

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Misc Crimi Appli 517 of 2005

**(Intended appeal from conviction(s) and sentence(s) of the Senior Principal Magistrate's
Court at Kikuyu in Criminal Case No. 479 of 2005)**

MICHAEL ALOO NGIELA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

MICHAEL ALOO NGIELA seeks bail pending the appeal against conviction and sentence in **Kikuyu Criminal Case No. 71 of 2005**. He was convicted of **INDECENT ASSAULT ON A GIRL AGED 9 YEARS OF AGE** and sentenced to 5 years imprisonment.

In the Applicant's chamber summons dated 14th October 2005, he cites three grounds in support of his appeal

- 1) The Applicant's appeal has an overwhelming chance of success.**
- 2) That if appeal was successful it would be rendered nugatory unless he is released on bail pending appeal**
- 3) The Applicant is sick and already ailing.**

MR. AMUGA argued the Application on behalf of the Applicant. He submitted that the Complainant, the child of 9 years, was not clear in her evidence as to which private part was touched. That the Complainant had, uninvitedly entered the Applicant's house and a neighbour, who was PW2 in the case, followed the Complainant and took her out. Learned counsel submitted that in those circumstances the chances of a frame up could not be overruled. Learned counsel also submitted that the Complainant contradicted herself and that on appeal, the Applicant would submit that the evidence was insufficient to prove the charge.

MISS OKUMU, learned counsel for the State opposed the Application. Learned counsel submitted that the Application had not demonstrated that the appeal had overwhelming chance of success. Learned counsel further submitted that there was no contradiction in the prosecution case, that the Complainant's evidence had been corroborated by PW2 and that the Applicant had the opportunity to commit the offence. Counsel also submitted that the Complainant in the case was PW1, that the child had no reason to frame the Applicant. On those grounds, counsel submitted that the appeal had no overwhelming chances of success.

I have considered this application. The principles applicable when determining a case of this nature are now well settled. The likelihood of success of the appeal is one of the most important factors taken into consideration in such an Application. See **SOMO vs. REPUBLIC 1972 EA 476**. Bail pending appeal may be granted if there are exceptional or unusual circumstances. See **ADEMBA vs. REPUBLIC 1983 KLR 442, REX vs. KANJIA [1946] 22 (1) KLR 17**.

I have perused the record of the proceedings of the lower court and I find that there was direct evidence implicating the Applicant with the offence in question. Learned counsel for the Applicant has

urged me to find that PW2, a key witness in the case, was not trustworthy or credible and that her evidence as motivated by malice. I am not ready to rule on the credibility of the witness. I believe that such a ruling cannot be made except following a minute examination of the evidence adduced before the lower court. Such minute examination should be left to the appellate court as that is the court whose onerous duty will include re-evaluation and analyzing the entire evidence adduced before the Court.

The other ground argued is that the Applicant is sick and ailing. That ground was not substantiated. More importantly however, is that the fact that an Applicant may be ailing is not an exceptional or unusual or special circumstance and that ground standing on its own would not be sufficient demonstration to entitle the Applicant to be admitted to bail. Having taken all the relevant factors, and cumulative circumstances into consideration, I find and hold that the Applicant has not demonstrated any exceptional or unusual circumstances or that his appeal has a high chance of success to entitle him being released on bail. The Application is therefore dismissed.

Dated at Nairobi this 20th day of December 2005.

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LESIIT

JUDGE

Read signed and delivered in the presence of;

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LESIIT

JUDGE