



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPLICATION NO. 652 OF 2004**

SARAH WAITHERA WAWERU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This is an application for bail pending appeal.

Mr. Maina advocate for the Applicant has submitted that his client has not only an arguable appeal, but one with overwhelming chances of success. He said that the conviction was against the weight of evidence.

If anything, the applicant believes that the conviction was founded on nothing more than assumptions and suppositions. The reasons for so saying are that none of the witnesses adduced evidence that the offence of attempted abortion was committed.

Having heard the submissions of the applicant, Miss Nyamosi, learned State Counsel informed the court that she would not oppose the application. She said that she was in agreement with the applicant's counsel, as the only evidence on record was hearsay evidence.

I have carefully considered this application. First, I noted that the applicant was charged with **ATTEMPT TO PROCURE AN ABORTION**, contrary to section 158 of the Penal Code.

From the records, it is clear that the person upon whom the offence was supposedly committed was Hannah Gathoni Mwangi (PW2). In her testimony, PW2 said that she was not pregnant, as at the date when the offence is said to have been committed. Yet according to Elizabeth K. Aweka (PW1), the Lady whom she examined, believing her to be Pw2, was 6 months pregnant. The said examination and subsequent admission, to the institution, where the "victim" was treated for a number of days, was said to have been at Kikuyu Nursing Home.

But when PW2 was asked about having been examined, admitted or treated at that medical facility, she completely denied.

Furthermore, PW2 categorically denied all suggestions that she had had anything at all to do with the offence, or with the applicant. Her said denials prompted the prosecution to successfully apply to have PW2 declared a hostile witness.

Bearing in mind the fact that this is an application for bail pending appeal, this court must be careful to restrain itself from making any statements which might be construed as making any final findings of law or fact, that might then have a bearing on the outcome of the appeal.

In **MERALI V REPUBLIC [1972] EA 47**, this court held that one of the factors to be taken into consideration in any application for bail pending appeal was that the appeal should not be frivolous, but one with a reasonable possibility of success.

When it is borne in mind that the person upon whom the offence was committed did categorically deny it, I believe that the appeal cannot be deemed as frivolous. If anything, it does appear to me that the said appeal has a reasonable possibility of success.

Then again, in **MOTICHAND V REPUBLIC [1972] EA 359** Muli J., (as then was) held that for an applicant to be granted bail, pending the hearing and determination of his said appeal, it would be sufficient if the appellant demonstrated a probability of success on appeal, rather than an overwhelming probability of success.

To my mind, once the appellant was able to satisfy the court that the appeal had a probability of success he/she would have earned the right to be admitted to bail.

In this case, I am satisfied that the applicant's appeal is not only arguable but also has a reasonable possibility of success. For that reason, I hold that the applicant is entitled to, and should therefore be admitted to bail pending appeal. However, before she can gain her admission to bail, the applicant is required to fulfill the following terms:

- 1) Applicant is to execute a personal Bond of Kshs 10,000/=
- (2) Applicant is to procure one Kenyan surety for a sum of Kshs 10,000/=. The said surety will be subject to approval by the Deputy Registrar in the normal manner.

It is so ordered.

Dated at Nairobi this 29th day of November 2004

FRED A. OCHIENG

AG. JUDGE

Delivered in the presence of

Miss Nyamosi for State

Mr. Maina for Applicant

Mr. Odero Court Clerk