REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPLICATION NO 896 OF 2001

NATHAN BROWNE BIRUNDU……..APPLICANT

VERSUS

REPUBLIC…….RESPONDENT

R U L I N G

The applicant Nathans Browne Birundu was convicted of the offence of Indecent assault on a female c/s 144(1) of the Penal Code and sentenced to 4½ years imprisonment, hard labour and three strokes of the cane.

Being aggrieved by the said conviction and sentence, the applicant lodged an appeal. The said appeal has been admitted to hearing and is pending for directions.

On 17th May, 2001, the applicant filed an application under section 357 of the Criminal procedure Code to be granted bail pending the hearing and determination of his appeal.

The application was heard by my brother Oguk J who on 28th May, 2001 dismissed the same as he was "not satisfied that it had been demonstrated that the pending appeal has overwhelming chances of success.

The learned Judge also found that, there were no unusual or exceptional circumstances to warrant the granting of the order sought.

The present application also seeks the same order that Oguk J. refused to grant for reasons that I have mentioned herein above.

One may be excused if the present application appears to be an abuse of the process of the court as it seeks the same reliefs that have been denied by a court of competent jurisdiction.Even if it were to be said this is not the case, and, fresh evidence has emerged to warrant the court to re-visit the matter, then this should be placed before the same Judge who dealt with it earlier.

I must put it on record that, these are matters that crossed my mind immediately I was seized of the application. I therefore had occasion to mention this to my brother Judge who was of the view that, this being a fresh application and there being no clear provisions of law providing for a review of a court's ruling such as the one the learned Judge delivered, this fresh application could be heard by any other Judge. I, with respect, agree.

Further to the foregoing, there is no limitation as to the number of applications for bail pending hearing and determination of the appeal one may file. They all depend on peculiar circumstances obtaining in each case.

The basic consideration in such an application as Oguk J. rightly observed is whether the appeal has overwhelming chances of success. The other secondary considerations that amount to unusual and exceptional circumstances may be taken into account in determining such an application. In this limb there are, the medical condition of the applicant, the nature of the offence, the sentence imposed, delay in the preparation of the appeal record and hearing of the same, the disappearance of the original record or the entire record etc etc.The bottomline however is that, each case depends on its own merit and peculiar circumstances.

In this application the applicant was represented by Mr. Nyachoti while Mrs Oduor appeared for the Republic. I do not propose to set out the arguments of learned counsel in this ruling save to mention some salient points raised. The reasons are not hard to find. This being the second application by the same party, almost everything that was canvassed before me had been addressed before Oguk J. Further, if I were to do so, it would appear as if I am sitting on appeal from the decision of my brother judge of concurrent jurisdiction.That is not and cannot be the case. Indeed, I have profound respect for my brother judge's appreciation of the law.

Several authorities have been cited by both counsel. Some were also cited before Oguk J in the earlier application. They all relate to the same principles and I do not deem it necessary to make any specific reference thereto.

The learned counsel for the applicant and the Republic are in agreement that the conviction was founded on the evidence of the complainant alone. Such evidence is enough to sustain a conviction, but it is contended on behalf of the applicant that, it did not meet the required standard.

The learned counsel for the applicant took the court through the record pointing out several instances where the complainant's evidence cannot be said to be true, credible and consistent. The evidence of the witnesses at the locus in quo on the date of the alleged offence was also adverse to the prosecution. The offence was allegedly reported after a lapse of a considerable period. The report by Dr. Okonji, the consultant psychiatrist, was prepared ten mouths after the commission of the alleged offence and, in any case, was not conclusive as it did not rule out other causes for the complainant's condition. The applicant had raised an alibi long before the trial which was never dislodged by the prosecution.And, finally, peculiar conditions as shown in the medical reports justified the order sought.

On the other hand, the learned counsel for the Republic submitted that the complainant having given evidence on oath and the court having believed her, the basis for conviction had been established. She (the complainant) never lied to the court and in any case there are instances where it may be necessary to lie.

The learned trial magistrate saw the complainant testify and watched her demeanour. She found her truthful and convicted the applicant.

On the defence of alibi, the learned trial magistrate, it was submitted, correctly directed herself and never shifted the burden of proof. On the ground of ill health, that does not constitute exceptional circumstances.

The medical reports attached to the present application were not availed to Oguk J, during the hearing of the earlier application. The learned Judge said as much. These reports have not been faulted. They give a picture of a man whose life is in extreme danger. They also show the facilities in prison are not adequate to handle his condition. That, in my view, may constitute exceptional circumstances as envisaged by the authorities.

Be that as it may, on my part, I have gone through the entire record before me, the authorities cited and

the submissions of both learned counsel. I bear in mind that, the appeal is yet to be heard and anything said at this stage should not appear to be suggestive or instructive.

I am, however, able to say, after evaluating the said evidence and the approach taken by the learned trial magistrate in her judgment, the applicant does have, not only an arguable appeal, but also one that has overwhelming chances of being successful. I say no more.

Accordingly, this application succeeds. The applicant shall be released on executing a bond of Kshs. 100,000/- (one hundred thousand) only, with one surety of the same amount pending he final determination of his appeal. He shall attend the hearing of the said appeal.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of December, 2001.

A. MBOGHOLI MSAGHA

JUDGE