



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 136 OF 2013

NICHOLAS KABIRA WANGAI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicant was charged with two counts of attempted defilement of a girl contrary to section 9(1) (2) of Sexual Offences Act. He was tried convicted and sentenced on both counts. From the proceedings and the judgment the court is unable to confirm the sentence given.
2. Being dissatisfied the appellant has filed this appeal and by an application dated 12th December 2013 moved this court to be released on bond pending appeal.
3. It was submitted by Mr. Gori for the appellant that the appeal has a very high chances of success since the appellant was only convicted on the ground that he had unzipped his trousers. He submitted that there was no evidence that he wanted to defile the complainant. He submitted that the appellant did not get into contact with the complainant.
4. Mr. Gori further submitted that the applicant had a mental case which was confirmed by the doctor whereas the court made an observation that the appellant was normal.
5. Miss Kitoto for the state submitted that any act towards defilement has been considered as an attempted defilement and that the doctor confirmed that he had mental illness but not at the time of commission of the offence.
6. Mr. Njue on behalf of Mr. Kitoto submitted authorities to support their submission that an attempt begins at the moment when the defendant upon the crime proper. Among the authorities submitted was MERU CRIMINAL APPEAL NO. 55 OF 2010 wherein Justice Musyoka had this to say:

“An attempt to commit an offence is punishable although the accused person has not achieved his objective and the actus reus of completed offence is not committed. The offence is defined in section 388 of the Penal code. A person is said to intend to commit an offence when he begins to put his intention into execution by means adapted to its fulfillment and manifests his intention by some overt act, but does not succeed in fulfilling his intention to such an extent as to commit the offence...”

7. At this stage it must be pointed out that the application is for bond pending appeal and in granting an

application of this nature the court must satisfy itself that the following have been fulfilled.

a) *the appeal has overwhelming chances of success.*

b) *There are special or exceptional circumstances.*

8. The submission by Mr. Gori raises fundamental issues as to whether the prosecution was able to prove the offence of an attempted defilement or indecent exposure and therefore find that the appeal is arguable with overwhelming chances of success too.

9. There is also the issue of the appellant's mental capacity taking into account the defence evidence and in particular evidence of D.W.3 against the trial courts finding that the act of unzipping and asking the young girls to remove their clothes clearly meant that he wanted to defile them.

10. I will grant the application herein and admit the appellant to bond of Ksh. 1,000,000/- with one surety of such amount and to attend mention before the Deputy Registrar of this court once after every 30 days at a date to be set by the said Deputy Registrar until final determination of the appeal.

Dated, signed and delivered at Nyeri this 15th day of October 2014.

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of Mr. Ombongi for the accused and Mr. Njue for the state.

J. WAKIAGA

JUDGE