REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

MISC. CRIMINAL APPLICATION NO. 284 OF 2008

DAVID SIMIYU WAKHUNGU..…….APPELLANT/APPLICANT

-VERSUS-

REPUBLIC……..……..……..…RESPONDENT

RULING

The applicant's Chamber Summons dated and filed on 15th May, 2008 carries one substantive application: "That the applicant herein be admitted to bail pending the hearing and determination of his appeal in High Court Criminal Appeal No.173 of 2007"

The general grounds founding the application are as follows:

i. the applicant was convicted on 20th March, 2007 and filed an appeal against the conviction on 30th March, 2007 but the said appeal is yet to be heard;

ii. the applicant's appeal has high chances of success as the said conviction cannot be supported both in law and fact;

iii. the learned Magistrate erred in law and fact by failing to take into account the Applicant's testimony and that of his witnesses;

iv. the applicant attended all the hearings pertaining to his trial in criminal case No. 3950 of 2006 without fail and will attend the hearing of his appeal.

Learned counsel, ***Mr. Stephen Mwaura Muhia*** swore a supporting affidavit to accompany the application. He depones that the applicant had been convicted of the offence of rape by the Principal Magistrate at Kibera Law Courts, in Criminal Case No. 3950 of 2006; and the trial Court had imposed on the applicant a ten-year imprisonment sentence. The deponent avers that the Applicant has appealed against both conviction and sentence, in Crim. App. No. 173 of 2007 now pending in the High Court. It is deponed that the Applicant has already been in prison for more than one year, and his appeal is yet to be listed for hearing; the deponent apprehends that much time will elapse before the appeal is heard and determined. It is deponed that the Applicant, prior to the conviction, had been "a person of sound character" and had attended all hearings pertaining to the trial in Criminal Case No. 3950 of 2006. The deponent avers that the trial Court, in arriving at conviction, "failed to consider the testimony of the

accused person and that of his witnesses". The deponent states that he verily believes that "the said appeal has high chances of success as the said conviction cannot be supported both in fact and law".

Learned counsel ***Mr. Muhia***, in his submissions, urged that there had been insufficient evidence to support the conviction entered by the trial Court; that the Court had failed to take the defence evidence into account and that, in this regard, there had been a failure of natural justice. The stated shortcomings, ***Mr. Muhia*** urged, were "sufficient to unsettle the judgment".

Counsel submitted that that there were "serious discrepancies" in the complaint's evidence: that she had said at one remove, that after the rape incident she was prevented from departing from the *locus in quo,* and at another remove, that the applicant had left the *locus in quo* after the rape incident; and that the complainant had taken as long as three days before reporting the incident to the Police. Counsel urged that the medical evidence given by the Police doctor fell short of the required standard of proof – because the doctor found no evidence of rape: the complainant's genitals were normal; there was no bleeding; there was no discharge; there was no live or dead spermatozoa .

Counsel submitted that this matter had "rare and exceptional circumstances" which justified grant of bail pending appeal.

To support the forgoing proposition, counsel relied on the High Court decision in ***Abdi v. Republic*** [1991] KLR 171 in which it was stated (***Amin, J.*** at p.174):

> "***On the totality of all the facts before the Court this amounts to 'exceptional circumstances' in existence [in] this application both in law and in fact, which justify in the interest of justice [allowing] this application for bail".***

Counsel relied on the Court of Appeal decision in ***Daniel Muhuti Kibera v. Republic*** (1991) 2 KAR 272, on the question of taking into account a defendant's evidence, before coming to a verdict. The relevant passage thus reads (p.273):

> **"[Counsel] next contends that the sworn defence put forward by the applicant was not considered by both courts below and that failure is fatal to the applicant's conviction. There is support for [counsel's] contention that failure to consider the defence of an accused may be fatal to a con*viction. In Joseph Njaramba Karura v. Republic (1987*) 1 KAR 1165 this Court held (at p.1168) that failure by the trial judge to consider the case for the defence constituted a breach of the rules of natural justice and [was] therefore sufficient to unsettle the judgment".**

In ***Daniel Muhuti Kibera v. Republic*** the Court stated a principle, which counsel urged, should guide this Court in the instant matter (at p. 273) –

> ***"Where an appellate court is satisfied that there is a substantial point of law to be argued and that it could result in the conviction being quashed, the court may grant bail pending appeal***".

Learned respondent's counsel, ***Mrs. Gakobo,*** by contrast, urged that *overwhelming chances of success* to the appeal, were not at all apparent – because conviction had been based on sound evidence.

Counsel contested the Applicant's contention (supported with the High Court (***Mwera, J***.) decision in ***Uvito Kiia v. Republic,*** Machakos High Court Criminal Appeal No. 261 of 1998) that the complainant's testimony at the trial had not been corroborated: for, by s.124 of the Evidence Act (Cap.80, Laws of Kenya), corroboration in sex offences is *not* a requirement; it was enough that the trial Court had found the complainant's evidence *believable;* and the trial Court was the only Court that observed the demeanour of witnesses – concluding that the complainant was truthful. Besides, counsel urged, ***Dr. Kamau*** who treated the complainant, had found that the hymen had lacerations; there was blood in the complainant's urine; and the doctor had formed the opinion that a sexual assault had taken place.

Mrs. Gakobo urged that the conviction entered against the applicant was entirely safe, and was unlikely to be overturned; and that, given the ten-year sentence which had been imposed, it was unlikely that the applicant would have served a substantial portion of the sentence by the time the appeal is heard and determined.

Learned counsel urged that the applicant had shown no exceptional circumstances which would justify grant of bail pending appeal, and that in the circumstances, the application lacked merit and should be dismissed.

The merits of the Applicant's appeal are not yet due for hearing, even though the applicant touched on them fairly intimately, in trying to show that the pending appeal was well-founded.

It is well known that a conviction arrived at in a lower court, after the applicable trial procedures have been duly complied with, is in principle to be held to be *prima facie* valid, and thus, the legal process will ordain that the accused who has been adjudged to be guilty, is to serve sentence straightaway, and to continue serving sentence unless and until his or her appeal has been upheld. This is the principle underlying the consistent denial of bail pending appeal, but for the case where *overwhelming chances of success* to the appeal are shown. There may be, in addition, *very exceptional circumstances* such as the Court could hold to justify grant of bail pending appeal – and generally, such circumstances relate to extreme cases of illness or bodily debility.

Although learned Counsel, ***Mr. Muhia*** introduced the prospect that such special circumstances existed in this instance, he did ***not*** go further to demonstrate the claim; and so that particular point is hereby disallowed.

Mr. Muhia also contended that the trial had been defective, on the ground that the learned Magistrate either denied the applicant an opportunity to put forward a defence, or simply cast away all points of merit which were in the defence case.

Looking at the trial court proceedings, I see that the learned Magistrate, after hearing the full testimonies of six witnesses, had put the applicant to his defence on 15th January, 2007, giving him an opportunity to defend. The applicant thereupon elected to give *sworn defence,* which he did, and even called *two witnesses* apart from *himself.* The learned Magistrate carefully recorded the defence evidence in its entirety, and drew a conclusion as follows:

> **"The evidence of [the] prosecutor is corroborated and convincing. The defence case does not in any way shake the prosecution evidence. I find the prosecution have established their case against the accused person beyond [any] reasonable doubt".**

It is not my finding, in this matter, that the submissions and the authorities presented by ***Mr. Muhia*** have shown a case for the grant of bail pending appeal. I am, on the contrary, in agreement with counsel for the respondent, that the trial Court's judgement was so materially anchored, that it is the basis of *prima facie* validity in the trial process. Such circumstances dictate that the applicant *must* continue to serve sentence, until his appeal is heard and determined.

I will, therefore, *dismiss* the Chamber Summons application of 15th May, 2008.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 1st day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant/Applicant: Mr. Muhia

For the Respondent: Mrs. Gakobo