



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISC. CRIMINAL APPLICATION NO. 38 OF 2013**

**D O O ..... APPLICANT**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

The application dated 20.11.2013 seeks to revise the decision of the trial magistrate in Busia Criminal Case No. 1924 of 2013 whereby the applicant was charged with a criminal offence and denied bail. The application is supported by the affidavit of Mr. Marisio Luchivia, counsel for the applicant.

Mr. Luchivia submitted that the offence the accused is facing is bailable. The trial court declined to release the accused on bail on the allegation that the accused is a flight risk. No other reason was given to the court. Counsel submitted that bail is Constitutional right and the accused is willing to comply with the bail conditions. Mr. Obiri, State counsel, opposed the application. Counsel submitted that the accused went underground and was only arrested when he went to do his KCPE exams. There is risk of the accused absconding. Counsel relied on the affidavit filed before the trial court in relation to the issue of bond.

I have gone through the pleadings herein. The accused is charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. I have read the statement of Corporal Benedict Nyakundi. Although what is stated in the statement appears to be an issue of defilement the accused is charged with causing grievous harm. Some of the witnesses like Rashid Omony indicate that the complainant accidentally fell into an unused toilet. It is also clear from the statement of the clinical officer John Alfayo who attended to the complainant that the complaint did not relate to defilement. The patient complained of having fallen into a pit latrine. The State objected to the accused being released on bond and the reason being given is that the accused is a student of ***[particulars withheld]*** Primary School and disappeared from his village from 10.10.2013 only to resurface on 12.11.2013. He managed to evade police arrest and he is likely to abscond.

I have read the witness statements and it is clear that the parents of the accused and the complainant were involved in discussions. Initially the issue was highlighted in the media to the effect that the complainant had been raped and the suspects were released by the police. Since the accused was arrested and is willing to abide by bond terms, I do find that the apprehension by the State that the accused is likely to abscond is misplaced. The accused is a young boy who has just sat for his KCPE exam. It will not be fair to have him remanded for being a suspect of a case of causing grievous harm. The accused shall be released on a bond of KShs.50,000/= with one surety of similar amount. In the

alternative, the accused can be released on a cash bail of KShs.15,000/=. The case before the trial court to proceed to full hearing.

*Delivered, dated and signed at Kakamega this 18<sup>th</sup> day of December 2013*

**SAID J. CHITEMBWE**

**J U D G E**



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