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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A114/2023
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

KELVIN OGOH

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MAKUME J:

[1] The Appellant a 34-year-old Nigerian Citizen who lives at Number [...][...], Kempton Park was arrested on the 31 May 2023. The allegations against him being that on or about the 1st May 2023 and at or near Kempton Park he unlawfully and intentionally committed an act of sexual penetration by inserting his penis into the vagina of S[...] N[...] a 26-year-old woman without her consent.

- [2] On the 26th June 2023 the Appellant who was represented by Counsel applied to the Regional Court Magistrate in Kempton Park to be released on bail. That application was refused. He now appeals against that decision refusing him bail.
- [3] The offence for which the Appellant is charged falls within schedule 5 which requires that the onus is on the accused to prove that it will be in the best interest of justice that he be released on bail pending the outcome of the trial.
- [4] In his affidavit in support of his application to be released on bail the Appellant sets out the following:
- 4.1 That he rents a property at [...] M[...] Road (Unit[...]) in Kempton Park for which he pays R3 500.00 per month.
 - 4.2 He is single and is the father to two minor children one aged 7 and the other aged 6 months. He fathered the children with two different women.
 - 4.3 He has no previous convictions nor any pending cases against him.
 - 4.4 That he has a valid Nigerian passport and permit which expires in the year 2025.
 - 4.5 He arrived in South Africa and entered through OR Tambo Airport on 4 August 2016 but has misplaced his old passport number[...].
 - 4.6 He left South Africa after 90 days and re-entered the Country in the year 2018.
 - 4.7 The passport that he used to re-enter South African in 2018 got lost and he reported same at the police station.
 - 4.8 He applied for a work permit for which he paid R1550.00. He has lost the receipt showing that of payment.

4.9 He started business of an internet café and opened a bank account at African Bank. He earns R10 000.00 per month.

4.10 He passed grade 12 in Nigeria in the year 2007.

4.11 That on the 2nd May 2023 at about 18h00 the Complainant visited him at his place. He and the Complainant had been in a relationship since January 2023.

4.12 He and the Complainant had sexual intercourse with her consent and he used a condom.

4.13 The Complainant washed herself and then phoned an Uber to take her home after he had given her R400.00.

4.14 Five days later he went to the Complainants place of employment and Complainant told him to stop calling her as she has opened a case against him.

[5] In opposing bail the State also submitted an affidavit by the Complainant in which she said the following:

5.1 She has known the Accused since February 2023 and they became friends.

5.2 On Monday the 1st May 2023 at about 16h00 she went to the Applicant's place on request of the Applicant who had asked her to draw an amount of R600.00.

5.3 Whilst they were seated in the Appellant's place he offered her wine and snacks which she declined.

5.4 The Appellant stood up and forcefully undressed her and penetrated her sexually without her consent no condom was used.

5.5 After he had ejaculated she stood up and left. Appellant gave her R200.00 for Uber.

- [6] The State submitted an affidavit by the Investigating Officer Sergeant Masango who said that she discovered that the Appellant's passport was not valid. He submitted a Section 212 statement by the Department of Home Affairs.

- [7] According to the records available the Accused is the holder of passport number [...] he was born in Nigeria on 9 August 1989 on checking the records including the movement control system she discovered that the passport was fraudulent and was never issued by the Department of Home Affairs.

- [8] The learned Magistrate refused bail on the basis that the Appellant is illegal in the Country and is accordingly a flight risk. The Section 212 affidavit from the Department of Home Affairs clearly indicates that the Appellant has contravened Section 49 of the Immigration Act and that on conviction he is likely to be sent to prison for many years.

- [9] The version of the Appellant and that of the Complainant are not the same on the following grounds, firstly the Appellant says the incident took place on the 2 May 2023 at about 18h00, whilst the Complainant says it was on Monday the 1st May 2023 at about 16h00. Then the Appellant says that he has known the Complainant since January 2023 whilst the Complainant say they have known each other since February 2023.

- [10] There is agreement that it was not the first time that the Complainant had visited the Appellant and on those occasions nothing happened. The Appellant himself does not allege that he and the Complainant had sex previous to the day in question. If that is the case, then why would the Complainant go to open a case of rape it means as she has indicated the Appellant surprised her on that day and acted out of turn.

[11] The Appellant has referred this Court to the decision in **S v Barber 1979 (4) SA 218 (D)** in support of his contention that the Magistrate exercised his discretion wrongly by refusing him bail. The facts in Barber are on point with the facts in this matter in that the Accused was a British Citizen whose passport had expired and was thus illegal in the Country. He had an ailing business and no family in South Africa.

[12] The learned Hefer J in dismissing the Appeal to be released on bail concluded as follows:

“In the present case the Magistrate had but scant evidence before him. As he says he had evidence which created no more than a suspicion of tampering with state witnesses. But as I understand his reasons, he had regard to all various factors placed before him, namely that there is no reason to keep the Appellant here apart from his financially unsound business, that he has no family that he has no valid travel documents and that there is the suspicion that he may temper with witnesses. Without saying that the Magistrate’s view was actually the correct one, I have not been persuaded to decide that it is the wrong one. Accordingly, I am of the view that this appeal cannot succeed. It is dismissed.”

[13] The Appellant in this matter has no track record how he entered the Country as there are no records available. There is evidence that the present passport that he has handed over to the Police is a fraudulent one. He is illegal in the country and has no family. He is not married to any of the women who are the mothers of his two children.

[14] The Appellant has also referred this Court to the decision in **S v Acheson 1991 (2) SA 805 (N)**. This is a Namibian decision involving the murder of Adv A Lubowski. The Appellant in that matter was an Irish Citizen with no family roots in Namibia. He was refused bail in the Magistrate Court which decision was upheld by the Supreme Court. It was only when the State applied for a long postponement in order to secure a reluctant witness in South Africa that Mahomed J granted bail to Mr Archerson and he opined that it is because of

the weakened prospects of success of the State case in view of the possibility that the witness that the state wishes to call may not be available.

- [15] In **S v Porthen and Others 2004 (2) SACR 242 (C)** Binns-Ward AJ as he was at paragraph 4 dealt with the appeal courts right to interfere with the discretion of the Court of first instance in refusing bail when he held as follows:

“when a discretion is exercised by the Court a quo, an Appellate Court will give due deference and appropriate weight to the fact that the Court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the Court or tribunal of first instance was wrong.”

- [16] Despite being confronted with evidence by the State regarding his illegal entry in the country also that the present passport that is in the hands of the Police is fraudulent the Appellant did not adduce any evidence to contradict or gainsay that evidence. He had an opportunity to do so but did not. All that Counsel for the Appellant argued is that the Section 212 Affidavit by the Department of Home Affairs was a fill-in-document by hand and not printed. He could not submit authority to invalidate the affidavit.

- [17] Bozalek J in **S v Ross 2013 (1) SACR 77 at page 79 paragraph 9** held as follows:

“Section 212 provides for the proof of a wide range of facts primarily within the domain of expert evidence by way of affidavit or certificates. Although the provisions of Section 212 do not relieve the state of the burden of proving its cases (**S v Vumba 1964(1) SA 642 (N)**) when the requirements of Section 212 are met, the affidavits or certificates are received upon their production, as prima facie proof of their content.”

- [18] The Court a quo found that the Appellant had not rebutted such prima facie evidence as a result his illegal presence in the country has been established this making him a flight risk.

[19] The Appellant relied heavily on the fact that he has a business at Kempton Park and is the father of two minor children. These factors are neutral and do not support his contention that he will not flee the country. He has not presented any evidence from the mother of the two children. He lives alone and can abandon the business at any time and leave the country in the same way that he entered.

[20] The Magistrate in refusing bail took into consideration all the relevant facts and correctly applied his discretion and refused to grant the Appellant bail. I agree with the finding. In the result the appeal is dismissed.

DATED at Johannesburg on this the August 2023.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	20 OCTOBER 2023
DATE OF JUDGMENT	:	27 OCTOBER 2023
FOR APPLICANT	:	ADV THUMBU
INSTRUCTED BY	:	NGOETJANE ATTORNEYS
FOR RESPONDENT	:	ADV MPEKANA
INSTRUCTED BY	:	OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

