REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(1) H.C.CR.A NO. 137 OF 2010

FELIX MUTHIANI NGUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(2) H.C.CR.A NO. 138 OF 2010

NICHOLAS MWANZIA KIILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(3) H.C.CR.A NO. 139 OF 2010

NZIOKA NGUNGA ERICK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(4) H.C.CR.A 140 OF 2010

MUOKI NGUNGA SABASTIAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The four Appellants in these appeals, **Felix Muthiani Ngunga** (Felix), **Nicholas Mwanzia Kiilu** (Nicholas), **Nzioka Ngunga Erick** (Nzioka) and **Muoki Ngunga Sabastian** (Muoki), were jointly charged in count one with **creating a disturbance in a manner likely to cause a breach of the peace** contrary to **section 95 (1) (b)** of the **Penal Code, Cap 63**. The particulars of the offence were that on 11th

July 2009 at K Location, Kakuyuni Division in Kangundo District within Eastern Province, they jointly created a disturbance in a manner likely to cause a breach of the peace by calling one IDA a prostitute and "kino" (vagina).
Nicholas and Nzioka were jointly charged in count two with **attempted rape** contrary to **section 4** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that at the same time and place they, jointly, unlawfully and intentionally attempted to **"cause their penises to penetrate into the vagina of IDA without her consent"**.
As an alternative to count two, Nicholas and Nzioka were jointly charged with **committing an indecent act on an adult** contrary to **section 11A** of theSexual Offences Act. It was alleged that at the same time and place they jointly committed an indecent act with IDA, a female adult aged 47 years, by rubbing their hands against her vagina and breasts.
All the Appellants denied the charges facing them and they were tried. They were all convicted of the offence in count one. Nicholas, Felix and Nzioki were each sentenced to serve **six months imprisonment.** As for Muoki, the trial court appeared not to be certain that he was an adult. He was placed on **probation for six months**.
Nicholas and Nzioka were acquitted of the offence in count two. However, they were convicted of the alternative charge of committing an indecent act on adult. They were each sentenced to serve **3 years imprisonment.** These sentences would run concurrently with the sentences in count one.
All the Appellants have appealed against their convictions and sentences. They have also applied by **notices of motion dated 12th July 2010** for bail pending hearing and disposal of their appeals. All those applications were consolidated and heard together, hence this consolidated ruling.
I have considered the submissions of the learned counsels appearing. I have also perused the evidence tendered before the lower court and have also read the judgment of that court.
In respect to count one, it was submitted on behalf of the Appellants that the particulars of the offence did not disclose the offence charged in that it was not alleged that the offence was committed in a public place. It was the submission of learned counsel for the Appellants that since section 95 of the Penal Code falls under **chapter IX** of the Act which deals with unlawful assemblies, riots and other offences against public tranquillity, it must follow that the offence of creating a disturbance in a manner likely to cause breach of the peace must be committed in a public place. Counsel further submitted that in the present case the offence was committed within the private compound or home of the complainant.
In regard to the alternative charge in count two, it was submitted for the Appellants that the particulars of the offence given in the charge did not disclose the offence charged in that it was not alleged that there was no consent of the complainant and that therefore, without such allegation, the consent of the complainant must be implied to have been present.
For the Respondent it was submitted that the offence of creating a disturbance in a manner likely to cause a breach of the peace can be committed in a private home or compound. With regard to the alternative count, it was submitted that the particulars of the offence given fully disclosed the offence charged.
Section 95(1)(b) states as follows:-
"95. (1) Any person who –
(a) ....
(b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace,
is guilty of a misdemeanour and is liable to imprisonment for six months."

The allegation contained in the particulars of offence was that the Appellants called the complainant a prostitute and vagina. The evidence tendered was that they did this in the presence of the complainant's husband who chased them away by arming himself with a firearm.
It would have been more appropriate for the Appellants to be charged under paragraph (a) of section 95. But even under paragraph (b), the particulars of the offence disclose the offence charged because calling the complainant a prostitute and vagina was "some other manner", other than a "brawl", that was likely to cause a breach of the peace.

It is also apparent from a plain reading of section 95 that the offence of creating a disturbance in a manner likely to cause a breach of the peace is not confined to a public place. Clearly the offence can be committed in a private place for the simple reason that a breach of the peace can occur in such a place. There is absolutely no necessity to impute a restriction that is absent from the plain wording of the statute.

Regarding the alternative charge to count two, the allegation was that the Appellants concerned touched the vagina and breasts of the complainant. Section 11A of the Sexual Offences Act provides as follows:-

"11A. Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."

Under section 2 of the Act, "indecent act"

"means an unlawful intentional act which causes-

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) Exposure or displays of any phonographic material to any person against his or her will."

Neither under section 11A, nor in the definition of "indecent act" under section 2, is lack of consent of the person upon whom the indecent act is committed required.

I find, without appearing to decide the appeals, regarding the submission that the particulars of the two offences did not disclose the offences charged, that the ground does not have overwhelming chances of success.

As I have already stated, I have perused the evidence placed before the trial court. That evidence was that the Appellants, who were the nephews of the complainant and her husband (except Muoki who was a grandnephew), went to the home of the complainant, and in the presence of her husband proceeded to assault her both verbally and physically.

The verbal assault constituted them calling the complainant a prostitute and vagina. The physical assault constituted touching her breasts and her vagina. It would appear that they were motivated by the existing quarrel between their father and the complainant's husband who were brothers. The Appellants were scared away only after the complainant's husband armed himself with a firearm.

Upon perusal of the available evidence and upon reading the judgment of the trial court, I would say, again without appearing to decide the appeals, that the Appellants were convicted upon sound evidence.

Regarding sentence, it is true that the Appellants received the maximum six months imprisonment provided for the offence in count one (apart from Muoki who was placed on probation). But it is apparent that the circumstances in which the offences were committed were quite aggravated and that the Appellants probably deserved the maximum sentence. But that issue will be better and fully considered when the appeals are heard.

Regarding the sentence meted out to Nicholas and Nzioka in respect to the alternative charge to count two, imprisonment for three years appears rather harsh and excessive. The maximum sentence provided for is 5 years imprisonment. But again this issue must await fuller and better consideration at the hearing of the appeals.

An applicant for bail pending appeal must demonstrate that his appeal has overwhelming chances of success, usually on a point of law. The court also has discretion to admit an appellant to bail if there are special or exceptional circumstances that would warrant this.

The Appellants in the present case have not persuaded me that the appeals have overwhelming chances of success, or that there are any special or exceptional circumstances that would entitle them to an exercise in their favour of the court's discretion to admit them to bail. Their applications are hereby dismissed. It is so ordered.

DATED AT MACHAKOS THIS 28TH DAY OF JULY 2010

H. P. G. WAWERU
JUDGE

DELIVERED THIS 30TH DAY OF JULY 2010