



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 145 of 2008, 147 of 2008 & 146 of 2008

ANTHONY GATHOGO KIAMA APPELLANT

Versus

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of L. W. GITARI, Senior Principal Magistrate in the Chief Magistrate's Criminal Case No. 3316 of 2006 at NYERI)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 147 OF 2008

JUSTUS MAINA WACHIRA APPELLANT

Versus

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of L. W. GITARI, Senior Principal Magistrate in the Chief Magistrate's Criminal Case No. 3316 of 2006 at NYERI)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 146 OF 2008

CHARLES WAMBUGU NGIMA APPELLANT

Versus

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of L. W. GITARI, Senior Principal Magistrate in the Chief Magistrate's Criminal Case No. 3316 of 2006 at NYERI)

RULING

The appeals presented by the three appellants as above were consolidated, with Criminal Appeal No. 145 of 2008 being made the lead file. The appellants were charged in the lower court with *gang defilement contrary to Section 10 of the sexual offences act No. 3/06*. The particulars of that offence are as follows:-

1. JUSTUS MAINA WACHIRA 2. CHARLES WAMBUGU KIAMA 3. ANTONY GATHOGO KIAMA: *On the 16th day of June 2005 at G Village in Nyeri District within Central Province jointly, intentionally and unlawfully committed an act of penetration to VWW a girl between the age of 12 and 14 years.*

They were also charged with an alternative charge of *indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3/06*. The particulars of the alternative charge were as follows:-

1. JUSTUS MAINA WACHIRA 2. CHARLES WAMBUGU KIAMA 3. ANTONY GATHOGO KIAMA: *On the 16th day of June 2005 at GVillage in Nyeri District within Central Province jointly, intentionally and unlawfully committed an act of indecent act with VWWby causing your genital organs to touch her sexual organ.*

The appellants were convicted by the lower court on the substantive charge. Each of them was sentenced to 15 years imprisonment. They have brought before court an application seeking an order to be released on bail pending the hearing of the appeal. In the affidavit in support of that application the advocate has deponed that they have high probability of success in their pending appeal. Bearing that in mind it was argued that it would be detrimental for the appellants to be held in custody while awaiting the hearing of the appeal. It was submitted that the appellants during the lower court hearing were out on bond. With reference to the chances of success in their appeal Counsel argued that the charge before the lower court was defective since the appellants could not jointly commit the act of defilement. It is however be noted that the defectiveness if any of the charge was not raised in the grounds of appeal. The state counsel was of the view that since appeals in this court are now being heard expeditiously the appellant will not suffer prejudice if bail is denied.

The principles that the court should consider when an application for bail is brought are to be found in the case of SOMO VS REPUBLIC (1972) EA where it was held:-

“The most important ground is that the appeal has an overwhelming chance of being successful; in that case there

is no justification for depriving the applicant of his freedom;”

I have carefully considered the appellant's application, the lower courts proceedings and judgment. I am satisfied that the appellants appeal is not frivolous and that the chance of succeeding is not remote. I find that there is sufficient justification to have the appellant released on bail. I make the following order:-

1. *That the appellants and each one of them shall be released from prison custody upon each of them executing personal bond of kshs. 500,000 plus one surety of like sum to be approved by the Deputy Registrar of this court.*

2. *On release the appellant shall attend the mention of the appeal before the Deputy Registrar every 30 days until the appeal is heard and determined. The first mention shall be on 3rd March 2008.*

Dated and delivered this 3rd Day of February 2009

MARY KASANGO

JUDGE