



(From the original conviction and sentence in Criminal Case No. 322 of 2007 of the Chief Magistrate’s Court at Nairobi)

BALI HASSAN GODANA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

CONSOLIDATED WITH

Criminal Appeal 312 of 2009

SOKE DONO GOSKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicants Bali Hassan Godana and Soke Dono Goskei, were jointly charged in the Chief Magistrate’s Court Nairobi, with subjecting a child to an early marriage contrary to Section 14 as read with Section 20 of the Children Act, No. 8 of 2001. After a full trial during which the prosecution called 5 witnesses, both applicants were found guilty as charged convicted and each of them sentenced to serve one year in jail. They have moved to this court applying for bail pending appeal.

The particulars of the charge were that the applicants, **“between the 6th day of February, 2007 and 9th day of February, 2007 at Huruma Estate in Nairobi within the Nairobi Area Province, jointly subjected IS I J B aged 13 years to an early marriage without her consent.”** At the hearing of the application, Mr. Ombati appeared for the Applicants while Mr Limo appeared for the Republic. I would like to be very economical with the language I use since this is not an appeal and some statements I might make could easily embarrass the appellate court.

After considering the application and the submissions of both counsel, I note that the age of the applicant is very central to the conviction of the appellants. Several statements were made about the complainant’s age. The charge sheet says she was aged 13 years old. She was however referred to Kenyatta National Hospital for age assessment, and she said that she was told that her age was assessed at 17 years old.

The complainant’s sister (PW 2) testified that the complainant was 14 years old at the time of the hearing and her elder brother, who was the 1st accused in the lower court and one of the appellants/applicants herein, testified that he was aware of the complainant’s age. As of 25th March, 2009, on which date he made a sworn statement in his defence, the complainant was 20 years old. In 2007, she was 18 years old, and that she was born in May 1989 although he could not remember the day of the month. If that statement is true, it would place the complainant’s age at 17 years and 9 months as

of February 2009, the month in which the alleged offence took place.

To all these inconsistencies, , the doctor (PW 5) testified that from her tests she concluded that the complainant was **“about 17 years of age.”** And under cross examination, she said –

“... Yes. Generally teeth erupt earlier in female(s) than in males. Between 16 to 25 years but in a female they will erupt earlier than 25 years that is why I assessed age at 17 years.”

She concluded her testimony on that issue by stating –

“You cannot say that the patient was exactly 17 years in this case ...”

The issue of age is crucial to the conviction or acquittal of the appellants and, prima facie, the totality of circumstances surrounding that issue discloses substantial merit in the appeal which could result in the appeal being allowed.

Secondly, bail pending appeal may also be granted where there is a risk that the applicant(s) may serve the imprisonment term imposed by the trial court before the appeal is heard and determined. But this consideration is subservient to the existence of overwhelming chances for the success of the appeal. In this matter, the appellants were sentenced to serve 1 year imprisonment with effect from 16th July, 2009. They have already served three months, and if they observe good conduct should be out of jail in about 5 months time. Combined with what I have observed on the age of the complainant, I find that this is a proper case in which to exercise my discretion in favour of the applicants, which I hereby do, and admit them to bail.

The applicants are accordingly granted bail upon payment of cash bail of KSh. 50,000/= each. It is so ordered.

Dated and delivered in Nairobi this 22nd day of October, 2009.

L. NAJGI

JUDGE