



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Crim Appli 129 of 2006**

**HENRY NDIRANGU GATIA.....1<sup>ST</sup> APPLICANT**

**STEPHEN NGAARI NDUNGU .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**HENRY NDIRANGU GATIA** and **STEPHEN NGAARI NDUNGU**, hereinafter referred to as the Applicant were tried and convicted for the offence of defilement of a girl contrary to section 145 (1) of the Penal Code. Upon conviction, they were each sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence, the two have each lodged an Appeal being Criminal Appeal number 531/2005 and 532/2005 respectively. The said Appeals have yet to be admitted for hearing.

Being their Application dated 24<sup>th</sup> February, 2006, the Applicants have moved this Court seeking that they be admitted to and or released on bail pending the hearing and determination of their Appeals foresaid. The two Applications were by the consent of the parties consolidated for ease of hearing and as they arose from the same Criminal case in the subordinate Court. The Applications were grouped on the fact that the Applicants' Appeals had high and or overwhelming chances of success, that they were sick, had young families had been out on bail during the trial in the subordinate Court and never jumped bail and are unlikely to do so, that they would be greatly and irreparably prejudiced by their confirmed incarceration pending the hearing and determination of the Appeal that they had been running business, which would irredeemably collapse as a result of their continued imprisonment, and finally that it would be in the interest of justice that the Applicants be released on bail pending the Appeal. The Applications were further supported by Affidavit sworn by the Applicant in which they reiterated and expounded on the grounds aforesaid.

Arguing the Applications, Mr. Mwangi Learned Counsel for the Applicant submitted that the Applicants had been charged in a single charge sheet with jointly defiling the Complainant. Pursuant to the charge, the Complainant testified she had been defiled on at least 4 different occasions. On all the occasions, she did not allege that the Applicant ever defiled her. Counsel submitted further that certain key witnesses were not called to testify and corroborate the Complainant's evidence. Because of the many inconveniences in the testimony of the Complainant, there was need for corroboration. Regarding the evidence of PW3, a doctor, Counsel submitted that he had examined the Complainant and found that she had been infected by a vulnerable disease, yet the Applicants were not diagnosed with the same disease upon examination.

Mr. Makura, learned State Counsel opposed the Application. Counsel submitted that the Applicants had

not demonstrated that the Appeal had overwhelming chances of success nor had they demonstrated that the Appeal had exceptional and unusual circumstances. Counsel further submitted that the evidence adduced during the trial was overwhelming against the Applicant. The evidence of the Complainant was to the effect that she was defiled by the said Applicant with the assistance of the 2<sup>nd</sup> Applicant who held the Complainant's hands. Counsel pointed out that Section 20 of the Penal Code provides that even if a party does not commit a crime by the aid and abet in its commission, he can be charged as a principle. Apart from the evidence of PW1, there was the evidence of the Doctor who confirmed that PW1 had a recent tear of the hymen and presence of male semen. According to the Learned State Counsel these features were consistent with defilement. Counsel then submitted that in so far as PW1 positively identified the Applicants and in so far as there was no grudge between the Complainant, the Applicant or their parents she could not have framed the Applicants. Finally Learned State Counsel submitted that although the Applicants claim to be sick, that per se is not a ground for granting bail pending Appeal.

The principles upon which a Court acts on whilst considering whether or not to release an Applicant on bail pending the hearing and determination for the Appeal are now well settled. See generally **SOMO VS REPUBLIC (1972) EA 476** and **DOMINIC KARANJA VS REPUBLIC (1986) KLR 612**. They may be restated as follows:-

- (a). The most important issue is that the Appeal should have overwhelming chances of success.
- (b). Whether there are exceptional or unusual circumstances regarding the Appeal.
- (c). The previous good character of the Applicant and hardships, if any, facing his family are not exceptional or unusual factors. Ill-health per se also does not constitute an exceptional circumstance where there existed medical facilities for prisoners.
- (d). A solemn assertion by the Applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending Appeal.

It would appear therefore that the Applicants' claim to bail pending Appeal on the basis that their families are suffering, sick, were on bail during trial and that their businesses will collapse by their continued incarceration are irrelevant considerations in Applications of this nature.

To my mind the most important issue is whether the Applicants herein have been able to demonstrate that their Appeals have overwhelming chances of success. If the answer is yes, then they would be entitled to the prayer sought in their Applications as there would be no justification for depriving of their liberty. I have perused the proceedings of the lower Court, the Judgment as well as the grounds of Appeal. Without appearing to the hands of the Judge who may eventually hear the Appeal by engaging in a detailed evaluation and analysis of the evidence that was tendered during the trial, I must state that the Applicants' Appeals are certainly arguable. However I do not think that they have reached the threshold of having overwhelming chances of success. No doubt the Applicants were positively identified by the Complainant. Whether the mere fact that the Applicants were found to be ailing from venereal diseases should exonerate them from the offence is certainly arguable. However there could be an explanation as to who among the Applicants committed the offence, certainly section 20 of the Penal Code as correctly pointed out by the Learned State Counsel certainly comes into play. As to whether there was corroboration or not and whether there were inconsistencies in the testimony of the Complainant are all matters which will be canvassed on Appeal. A decision thereon will go either way. However I do not think that they are such weighty matters as to compel me to come to the conclusion that the Appeal has thereby overwhelming chances of success.

Even though not canvassed, I have also considered whether there are unusual or exceptional circumstances, upon which the Application could be merited. The Applicants were sentenced to a jail term of 20 years on 7. 1. 2005. That is only 8 months ago. There is no likelihood that the Applicants may serve the sentence before the Appeal is heard. That ground in the circumstances of the case, would not justify this Court to grant the prayers sought.

Having considered this Application, I find that they lack merit an are accordingly dismissed.

Dated at Nairobi this 26<sup>th</sup> day of June, 2006

.....

**MAKHANDIA**

**JUDGE**