REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CRIMINAL APPLICATION 238 OF 2004

ISAAC GITAU KARANJA..... APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

This is an application for bail pending appeal. The application is prophesied to have brought pursuant to the provisions of section 351 of the Criminal Procedure Code.

Relying upon the wisdom of the learned authors of "*Archbold on Criminal Practice and Procedure*", Mr Mwicigi Kinuthia Advocate submitted that the High Court was empowered to release the appellant on bail in cases wherein there were exceptional circumstances, such as the likelihood of success of the appeal.

Learned counsel then stated that the exceptional circumstances in this case are the following. On 19th January 2004, the appellant was convicted and then sentenced to 10 years imprisonment, in Kibera Criminal Case No 6035 of 2003 *Republic v Isaac Gitau Karanja*. The offence of which the appellant was convicted was indecent assault on a female contrary to section 144(1) of the Penal Code. A perusal of the record reveals that the particulars of the charge were spelt out as follows:

"Isaack Gitau Karanja. On the 10th day of August 2003 at Ongata Rongai Township in Kajiado District within the Rift Valley Province unlawfully and indecently assaulted Tabitha Wanjiru Wang'ombe by grabbing, hugging and kissing her on the cheeks"

Count II of the offence was to the effect that the appellant indecently assaulted Esther Njeri Kibobi, by kissing her on the cheeks.

In his submissions, Mr Kinuthia advocate confidently expressed the view that the appeal had a high chance of success as "there is no such thing as kissing on the cheeks".

It was contended by the appellant's counsel that kissing could only be to the mouth or lips of somebody. In his view, any connection to the cheeks can only be termed as either a "peck, "hug" or a "brush".

I understand the appellant to be saying that as he was charged with an offence which involved kissing to the complainant's cheeks his appeal had overwhelming chances of success because the complainant could not have been "kissed on her cheeks" At worst she could have been pecked, hugged or brushed.

In support of this application, the appellant has cited the case of *Hamisi v Republic* [1972] EA 365, and *John Njuguna Gitau v Republic* {1982-88} 1 KAR 148.

He submitted that a peck to the cheek of a lady was not indecent.

He further submitted that the evidence which was tendered before the lower court was full of inconsistencies. To illustrate the perceived inconsistencies, counsel pointed out that PW1 had testified to the effect that she did not know the appellant prior to the incident which gave rise to the charges against the appellant. She had also stated in her evidence that at the material time, there were many people at the scene.

The appellant says that PW2 could easily have been mistaken in her identification of the appellant, as she had only identified him on the basis of the cap he was wearing.

I have perused the record. I note that PW2 said during cross-examination that she clearly saw the appellant. She could not recall the clothing which the appellant wore, but was able to remember that he wore a “marvin” on his head. I must say that I failed to trace the meaning of the word “marvin” when I checked the dictionary. I therefore do not know whether it was some form of head gear, or if it was the standard sort of cap.

Be that as it may, I note that in the process of her further cross-examination, PW2 emphatically stated as follows:

“I am not mistaking you for the culprit. I am sure it is you who kissed Esther on her right cheek”

On his part PW4 a police officer, said in his evidence that, after he received a report from the complainants, he accompanied them, on the next day, to the bus stop. Once there, the complainants pointed out the appellant to the police. During cross examination PW4 stated, *inter alia*, that:

“The complainant identified you. It is the hat/cap you were wearing. That cap is not in court”.

From my reading of that piece of evidence, I am unable to say whether or not PW4 was stating that the reason why the complainant was able to identify the appellant was because of the cap he was wearing at the material time,

But one factor is significant; the complainant’s testimony on this issue of identification. PW1 is recorded as saying:

“You kissed me on my right cheek and I closely looked at you.”

It is noteworthy that the appellant has not cast any aspersions on her evidence, in that regard. It is also noteworthy that her evidence was corroborated with that of PW2.

I therefore do not think that there was a strong possibility of mistaken identification, as suggested by the appellant.

The next point raised by the appellant was that PW4 had received a report that the complainants were first fondled. However the complainant, PW1, and PW2 did not give any evidence that the appellant started fondling them, with the intention of kissing the complainant.

Having perused the record, I note that PW1 and PW2 did not give evidence to the effect that the appellant “started fondling them, wanting to kiss them”. To that extent, the appellant is right, to say that there was some inconsistency between the testimony of PW4, the investigating officer, and PWs 1 and 2.

However, I believe that insofar as the evidence of the complainant and PW2 who was present at the time of the incident, confirm the elements of the charge sheet, the inconsistency herein is not such as would

provide the appeal with an overwhelming chance of success. But I say no more, lest I be accused of already sitting on appeal. The appellant also seriously criticized the sentence meted out to him. It was pointed out to the Court that the appellant is a young man, aged 25. Assuming that he had committed the offence, by kissing the complainant on her cheek, it is contended that the trial court could have exercised its powers pursuant to the provisions of section 4 of The Probation of offenders Act cap 64. The appellant feels that he was a proper candidate for release on probation, upon appropriate terms. He says that sentencing him to 10 years imprisonment was bizarre. The effect of the said imprisonment was to take away the appellant's youth, when the incident complained off had not had a serious negative impact on the victim. The appellant noted that the complainant had still been able to proceed to Sunday service, after the incident. That in his view was an indication that the complainant had not been too adversely affected.

In those circumstances, it was not right for the learned trial magistrate to impose the maximum sentence within her jurisdiction. For all these reasons, the appellant believes that his appeal against sentence has very good chances of success. He therefore feels that he should be granted bail pending appeal.

In answer to the application, the learned state counsel, Miss Otieno opposed it, vehemently. She submitted that the appellant had not demonstrated any exceptional circumstances that would warrant the grant of the orders sought. In support of her submissions, Miss Otieno observed that the appellant's understanding of the word "kiss" was wrong. The appellant was thus operating from the wrong premises when he was assessing his chances of success on appeal. In that regard, this court is in agreement with the submissions of the state.

A look at "*Collins Concise Dictionary*" shows that the word "kiss" has the following definition;

"1. To touch with lips or press the lips against as an expression of love, greeting, respect, etc.

2. To join lips with another person in an act of love or desire.

3. To touch (each other) lightly.

4. Billiards (of balls) to touch each other lightly while moving.

5. A caress with lips.

6. A light touch".

Clearly kissing means much more than joining lips with another person. I therefore have absolutely no hesitation to hold, as I hereby do, that the act of either touching or pressing ones lips to the cheek of another person can be, correctly, defined as kissing.

Miss Otieno submitted that by kissing the complainant, against her wishes, and at a very public place amounted to indecent assault. The complainant was a stranger to the complainant. He kissed the appellant on her cheeks. This action took place at a bus stop, when there were many people present. The question that arises is whether or not that assault on the complainant was indecent. However, it is not for this Court to give a final answer to that question, at this stage. The final answer ought to be given by the court which will hear the appeal.

In the case of *John Njuguna Gitau v Republic* {1982-88} KAR 148 the Court held that by stripping the complainant naked constituted the offence of indecent assault. The Court also held that it was not necessary that the assault be accompanied by utterances suggestive of sexual intercourse for it to be termed indecent.

The learned state counsel in this case is a lady. She appeared to me to be speaking from her heart when she submitted that the act of being kissed by a stranger, even if it be on a lady's cheeks, if uninvited and more so in a crowded public place was clearly indecent. On the other hand, the appellant's counsel expressed the view that the victim was not traumatized by the kiss. Whilst I do not have to decide, in this

application, whether or not the act was indecent, I can at least note that the issue is not so clear cut as to give rise to a ground of appeal that had overwhelming chances of success. *Archbold on, Criminal pleading, Evidence and Practice, 2002,* states at paragraph 20 – 148 as follows;

"(a) Most indecent assaults will be clearly of a sexual nature. Some may have only sexual undertones. The jury must decide whether "right-minded persons would consider the conduct indecent or not". The test is whether what occurred was so offensive to contemporary standards of modesty and privacy as to be indecent".

Archbold further elaborated on the issue by stating that one of the factors that was relevant in helping to determine whether or not the act was indecent was the relationship of the defendant to the victim (relative, friend or stranger).

Bearing the foregoing consideration in mind, I am unable to accept the applicant's contention that his appeal has an overwhelming chance of success.

The sentence of 10 years was said to be very harsh. That is the appellant's contention. But the State views the said sentence as lenient. The provisions of statute formerly stipulated that the sentence for the offence of indecent assault would be up to five years imprisonment. However, Act No 5 of 2003 revised that sentence revised steeply upwards, to twenty-one years. I believe that the said upward revision of the sentence was a clear statement by the Legislature that it abhorred the offence. But more significantly, I believe that the learned trial magistrate cannot be faulted for sentencing the appellant to serve 10 years in prison. The said sentence was well within the law. It was less than one – half of the maximum sentence stipulated by the statute. Therefore, even though I might possibly have condemned the appellant to a lesser or different sentence, that would not by itself make the decision by the trial court so manifestly wrong as to be subject to an almost automatic order setting it aside.

I also believe that there is little likelihood that the appellant would have served the sentence before his appeal is heard and determined. If that had been the case, it would have been a factor to influence this Court towards granting bail.

In conclusion, whilst I may sympathise with the appellant's position, I nonetheless find no merit in law to grant him bail pending appeal. The application dated 26th April 2004 is dismissed with costs.

Dated at Nairobi this *2nd* June 2004

FRED A. OCHIENG

AG. JUDGE