REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 5 OF 2020

JULIUS MURAYA MWANGI alias STUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Application for bail pending appeal from the decision of I. Gichobi, Senior Resident Magistrate, in Cr. Case No. 300 of 2018 at Kangema dated 9th August 2019]

RULING

1. The appellant was adjudged guilty of *preparation to commit a felony* contrary to section 308 (1) of the **Penal Code**. He was sentenced to *seven years' imprisonment.*

2. The particulars were that-

On the night of 13th day of April 2018 at Kiangema village, Kiambuthia Sub-Location within Murang'a County, was found armed with a dangerous weapon namely a jarican [sic] containing petrol in circumstances that indicated that he was so armed with the intent to commit a felony namely arson to a vehicle registration number KYQ 488 make Nissan Sahara Pick-up, the property of John Waweru Wandurwa.

3. The appellant lodged a *petition of appeal* on 18th February 2020 challenging both the conviction and sentence.

4. Pending the hearing and determination of the appeal, the appellant has presented a *notice of motion* of even date pleading for bail. It is supported by a deposition of his learned counsel, *Mr. Nahashon Kiriba*.

5. The appellant's new counsel, *Mr. Marete* and *Mr. Mahugu*, submitted that the appeal has overwhelming chances of success. They contended that the key ingredients of the offence were not proved. For instance, they argued that the prosecution failed to establish an overt act or to prove that the container of petrol was a dangerous weapon.

6. It was also submitted that there was a dearth of evidence connecting the appellant with the intended arson. Counsel also argued that there was no clear demarcation between the complainant (John Wandurwa), Kiru Tea Factory or KTDA. In counsel's opinion, the charges were trumped up to mask factional fights over the control of the tea factory.

7. I was implored to take into account that the appellant is physically challenged and has already spent a year in custody. Learned counsel submitted that a substantial part of the sentence may be served before the hearing and determination of the appeal.

8. In a synopsis, the appellant's case is that there are exceptional circumstances that warrant grant of bail. Reliance was also placed on a list and bundle of authorities filed on 27th July 2020.

9. The application is contested by the Republic. Learned prosecution counsel, *Mr. Mutinda*, submitted that the combined evidence of the six prosecution witnesses was overwhelming; and, that the defence was unimpressive. He underlined the testimonies of PW2, PW3 and PW4. He said that PW6 produced the flammable petrol liquid which had been examined by the Government Analyst. He submitted that the alleged politics in the tea sub-sector were a red herring.

10. Regarding sentence *Mr. Mutinda* submitted that the penal section provided for a minimum sentence of seven years. In a word, he opined that the appeal stood no chance of success; and, that accordingly, the present motion was unmerited.

11. The legal parameters in an application of this nature were well stated by the Court of Appeal in ***Jivraj Shah v Republic*** [1986] KLR 605-

If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is ***Somo v Republic*** [1972] EA 476 *which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986,* ***Daniel Dominic Karanja v Republic*** *where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed.*

12. I decline the invitation to interrogate the full merits of the appeal. That will be the true province of the first appellate court to *re-evaluate* the veracity of the evidence; and, to consider whether the punishment was deserved.

13. But I note that the conviction largely turned upon the evidence of Paul Ing'ara Kireru (PW3) and Samuel Kihumba (PW4). They told the court that the appellant had *hired* them to commit the arson. The record shows (page 19 of the bundle) that PW3 told PW4 that *"we will not do the work Stuka is hiring us to do…we wanted to teach him a lesson"*

14. PW3 then disclosed to the complainant about the scheme. On the material day, PW2 and PW3 left the appellant with the jerrican at a *bodaboda* shed; and rushed to the complainant's house. The latter mobilized the village elder and the public who went back to the shed and arrested the appellant.

15. There is also a statement made on oath by the appellant in his defence that on his way atop the *bodaboda* bike with PW3, he *"realized he had forgotten the match box. He (PW3) told me I can buy one up the hill where there is a bar near my home"*. The learned trial magistrate formed the opinion that the matchbox was intended to ignite the petrol.

16. From the materials before me, I find that a substantial point of law and evidence arises on two fronts: Firstly, on the *weight* of the evidence of the two informers; and, whether that evidence and the *incriminating* statement by the appellant disclosed an *overt act*.

17. Secondly, whether on the totality of all the evidence by the prosecution's six witnesses and the defence, the primary *ingredients* for the offence were proved. See generally ***Manuel Legasiani & others v Republic*****,** Mombasa, Court of Appeal, Criminal Appeal 59 of 2000 [2000] eKLR.

18. Regarding the sentence, it is true that the penal section provided for a *minimum* sentence of seven years. The sentence handed down was thus *not* illegal. But the appellate court may still interrogate the sentence in view of the landmark decision of the supreme Court in ***Francis Karioko Muruatetu & another v Republic***, Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR.

19. In the end I find that the points raised in the petition of appeal are *arguable* and that they disclose *exceptional grounds;* or, *substantial points of law and evidence*. That is *not* to say that the appeal will succeed.

20. The appellant *may* be released upon executing a cognizance in the sum of Kshs 1,000,000 (one million) together with *one* surety of a similar amount. The surety shall be approved by the Deputy Registrar of this Court.

21. The appellant *must* appear at the mention or hearing of the appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 29th day of September 2020.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. Mahugu for the appellant instructed by Kithinji Marete & Company Advocates.

Mr. S. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Mwai watching brief for the complainant.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.