REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.1, 2,3,4, 5 & 6 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. G.H. Oduor - SPM

delivered on 24th December 2015 in Limuru SPM CR. Case No.1141 of 2015)

ANTHONY NJOROGE GATOHO.....1ST APPELLANT

MOSES NJUGUNA GATHAKU.....2ND APPELLANT

EDWIN SIMIYU WEKESA.....3RD APPELLANT

DANIEL NJOROGE MWANGI.....4TH APPELLANT

ISAAC KIBE NDUNGU.....5TH APPELLANT

SAMUEL NDUNGU GITHOME.....6TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellants were charged with the offence of **Illegal Dumping of Waste into a Government Forest** contrary to **Section 54(8)(b**) and **Section 55(1)(c)** of the **Forest Act, 2005**. The particulars of the offence were that on 23rd December 2015 at 11.00 p.m. at Kinale Forest in Kiambu County, the Appellants were jointly found illegally dumping waste material, namely rotten mangoes, by using a motor vehicles registration Nos. KBY 509W Foton lorry and KBQ 129Z Mitsubishi lorry without authority from the Director of Kenya Forest Service. When the Appellants were arraigned before the trial magistrate's court, they pleaded guilty to the charge. They were convicted on their own plea of guilty and were each sentenced to pay a fine of Kshs.3 million or in default serve ten (10) years imprisonment. The motor vehicles that were allegedly used to ferry the waste material was forfeited to the State. The Appellants were aggrieved by the decision. Each Appellant filed a separate appeal challenging his conviction and sentence. The appeal is yet to be heard.

Pending the hearing and determination of the appeal, each Appellant filed an application pursuant to

Section 357 of the **Criminal Procedure Code** seeking to be released on bail pending appeal. In their consolidated application, the Appellants stated that their appeal had overwhelming chance of success. They posited that their circumstances were special and that the court ought to, in the interest of justice, grant them bail pending appeal. They further stated that the motor vehicles that were forfeited to the State were not their properties and therefore they challenged the decision of the court to forfeit the same to the State. In particular they stated that the owners of the motor vehicles were not given an opportunity to be heard before the motor vehicles were forfeited to the State. They were of the view that the appeals that they had lodged against the decision of the trial court raised substantial questions of the law which cannot be considered, in the circumstance of this application, to be frivolous. They urged the court to allow the application.

During the hearing of the application, Mr. Thuita for the Appellants reiterated the contents of the application and the supporting affidavits. He submitted that applying the principles in **Ademba –Vs- Republic** this court ought to release the Appellants on bail pending appeal. He stated that the appeals lodged by the Appellants had a high chance of success because the plea of guilty that was entered by the Appellants was not unequivocal. The Appellants were not given a chance to mitigate before they were sentenced neither were they warned of the serious nature of the offence that they faced before they pleaded guilty to the charge. He took issue with the order issued by the trial court forfeiting the two motor vehicles to the State without notice to the owners. He submitted that the trial court ought to have complied with the provisions of the law relating to the right to be given a hearing before suffering penal consequences before the forfeiture order was made. Taking into consideration all these facts, learned counsel was of the view that the Appellants' appeal had an overwhelming chance of success. It is in that regard that the Appellants were seeking to be granted bail pending appeal.

Ms. Atina for the State opposed the application. She submitted that the Appellants were convicted on their own plea of guilty. They had no right of appeal against conviction. She argued that the plea of guilty that was recorded by the trial court was unequivocal and therefore the chance of the same being upset on appeal was remote. She stated that the sentence that the Appellants were ordered to serve was lengthy and therefore they will not be prejudiced at all if bail pending appeal is denied because they would not have served a substantial part of the sentence by the time the appeal is heard. She urged the court to dismiss the application.

This court has carefully considered the rival submission made by counsel for the parties herein. The issue for determination by this court is whether the Appellants made a case for this court to grant them bail pending the hearing of their appeals. The principles to be considered by this court in determining whether or not to release the Applicant on bail pending appeal are well settled. The principles to be considered by this court in deciding whether or not to release the Applicant on bail pending appeal were set out by the Court of Appeal in **Jivraj Shah –vs- Republic [1986] KLR 605** at page 606:

> "***There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. 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 in 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 in Somo –vs- Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No.NAI 14 of 1986, Daniel Dominic Karanja –vs- 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. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7 – 86."***

In the present application, it was clear to this court that the issues that the Appellants intend to raise on

appeal cannot be dismissed offhand as lacking in merit. Those issues include whether the sentence meted on them by the trial court was legal; whether the Appellants ought to have been informed of the serious nature of the charge facing them before they pleaded guilty to the charge; whether they were properly sentenced in view of the fact that the trial court did not give them an opportunity to mitigate their respective sentences; whether the order of forfeiture was properly made taking into consideration that the owners of the said motor vehicles were not given an opportunity to show cause why such order should not be issued. The claim by the Appellants that the owners were denied a right to be heard before the adverse order of forfeiture was made is a substantial issue of the law which the Appellants shall be given an opportunity to ventilate during the hearing of the appeal. All in all, this court is of the view that the appeals lodged by the Appellants have overwhelming chance of success.

Having found so, this court will not make any finding regarding the second limb on whether there exist special or exceptional circumstances. In the premises therefore, this court finds the Appellants' application has merit and is hereby allowed. The Appellants are hereby ordered released on bail pending appeal on condition that they deposit a cash bail of Kshs.100,000/- or in the alternative post a bond of Kshs.200,000/- with one surety of the same amount. The Appellants shall be required to prepare file and serve the record of appeal to the Director of Public Prosecution within twenty-one (21) days of today's date. The appeals are hereby admitted to hearing. The appeals shall be listed for mention on 15th March 2016 for the purpose of fixing a hearing date. The Appellants shall be required to attend all the court sessions without fail until further orders from this court. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF FEBRUARY 2016

L. KIMARU

JUDGE