

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC.APPLIC. NO.407 OF 2013

JOSEPH NGANG'A MUGURE.....1ST APPLICANT

ERASTUS MWITA NYAKIAGO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in Kiambu Chief Magistrate's Court,
Criminal Case No. 1164/2012 by Hon. Ogombe L.D. RM on 12/8/2013)*

RULING

Joseph Ngang'a Mugure and Erastus Mwita Nyakiago and 2 others were jointly charged in Kiambu Chief Magistrate's Court Criminal Case No. 1164 of 2012 with the offence of preparation to commit a felony contrary to Section 308(2) of the Penal Code. They also faced a second count of being in possession of an imitation firearm contrary to Section 21(1) as read with Section 34(1) of the Firearms Act Cap 114.

They were convicted on both counts and sentenced to serve seven (7) years imprisonment on each count, to run concurrently.

Aggrieved by the conviction and sentence passed, they have lodged appeals against both the conviction and sentence.

They now seek to be released on bail pending the hearing and determination of their appeals. Their applications Misc. application numbers 407 and 408 of 2013 respectively dated 29th November, 2013 were consolidated by the court on 30th January 2014.

They are based on grounds that the prosecution did not call any independent witnesses and only relied on the evidence of the arresting officers who were also the complainants, and secondly that the police did not dust the recovered pistol for finger prints to establish the link with the applicants. The applications were supported by affidavits sworn by the applicants counsel.

Mr. Ngugi the learned counsel for the applicants submitted that the appeals had an overwhelming chance of success. He questioned the independence of the crucial witnesses who were also the eye witnesses as all of them were police officers. He submitted that the court unfairly believed their evidence and totally ignored the evidence of the appellants. It was his position that the recovered toy pistol was either planted under the driver's seat by the police officers or that it was there without their knowledge having hired the said motor vehicle. Besides, there was no conclusive evidence that the applicants had handled the toy pistol in question. He saw no reason for the applicants to abscond or jump bail as they had previously been given bail terms while at the lower court which they dutifully adhered to until the time when the cases were concluded. Counsel submitted that it would therefore be in the interest of justice for the applicants to be released on bail pending appeal.

Ms. Ndombi the learned counsel for the State opposed the application. She submitted that the applicants were properly convicted and sentenced. The evidence of the police officers was credible and consistent as opposed to the applicants defenses. I note that the record shows that whereas DW1 and DW4 testified that they met the said Police officers motor vehicle which they passed, then turned towards it, having

supposedly lost their way, DW2 and DW3 did not testify of having overtaken any police vehicle or even having turned at all.

Counsel for the State further added that the officers who were said to be on patrol were in a marked vehicle. She argued that the applicants act of blocking the police vehicle after overtaking it was elaborate and indicative of their intent to committing a felony, before they realized it belonged to the police and made an about turn. Finally, she submitted that the applicants had not persuaded the court on the probability of their appeals success.

Having perused the court record, and the submissions of both learned counsel, I am persuaded that the applicants have in the process pointed out the shortcomings in the prosecution's case to demonstrate that, their appeals have high chances of success. I note that during cross examination of PW2 by the 4th accused, it was clear that he took finger prints on the gun. This report however was not produced as an exhibit in court. The link between the recovered gun and the applicants herein is therefore shaky. In my view, I find that their appeals disclose substantial merit that would adequately and substantively be canvassed at the hearing..

I have formed the view that there is an arguable appeal with a probability of success. Having come to this conclusion, I find that the application succeeds and that the applicants should be released on bail as prayed in their applications. Accordingly, the applicants shall be released on executing a bond of Kshs. 100,000/= with one surety of equal sum or by depositing cash bail of Kshs. 50,000/=

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of March, 2014.

A.MBOGHOLI MSAGHA

JUDGE