



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL NO. 21 OF 2013

(From the original conviction and sentence in criminal case no. 411 of 2006 the Chief Magistrate's Court at Malindi before Hon. N. Shiundu – PM)

ABDALLA KIRAO MKARE WANJE

ALI KIRAO WANJE

EMMANUEL MLEWA MKARE

SIRIA NGUMBAO CHARO

LILIAN KAZUNGUAPPELLANTS

VERSUS

REPUBLICRESPONDENT

RULING

1. The five appellants herein were together with a sixth person charged in criminal case no. 411/2006 in the Lower Court for three offences as follows;

COUNT 1: Attempted Murder contrary to Section 220 (a) of the Penal Code

PARTICULARS were that Abdalla Kirao, Kenga Kirao, Emmanuel Mkare Mlewa, Siria Ngumbao, Ali Kirao and Lilian Kazungu on the 27th day of February, 2006 at Ziwa la Furunzi village in Ganda Location within Malindi District of the Coast Province, jointly with others not before court attempted unlawfully to cause the death of Said Abdallah Bakshwein by pouring petrol into a vehicle setting it ablaze while the owner was inside.

COUNT 2: Malicious Damage to Property contrary to section 339(1) of the penal code.

PARTICULARS were that Abdalla Kirao, Kenga Kirao, Emmanuel Mkare Mlewa, Siria Ngumbao, Ali Kirao and Lilian Kazungu on the 27th day of February, 2006 at Ziwa la Furunzi village in Ganda Location within Malindi District of the Coast Province, with others not before court willfully and unlawfully damaged one motor vehicle registration number KAG 899U Land cruiser, one wrist watch make Seiko 5, one shirt, one long trouser, office keys and one vest all valued at Kshs. 129,450/- the property of Said Abdallah Bakshwein

COUNT 3: Stealing contrary to Section 275 of the Penal Code.

PARTICULARS were that Emmanuel Mkare Mlewa on the 27th day of February, 2006 at Ziwa la Furunzi village in Ganda Location within Malindi District of the Coast Province, stole one knife and one mobile phone make NOKIA 6290 valued at Kshs. 18,502/- the property of Said Abdallah Bakshwein.”

2. Following a full trial, the five appellants were convicted on the 1st and 2nd counts. Their co-accused was acquitted. The appellants were sentenced to serve 15 years imprisonment on the 1st count and 2 years on the second. The sentences were to run concurrently.
3. The five applicants through their advocate Mr. Otara have appealed to this court against the conviction and sentence, and have now applied to be released on bail pending appeal.
4. It was argued on behalf of the appellants that their appeal has high chances of success. Mr. Otara contended that there was no evidence connecting the 3rd, 4th and 5th appellants to the assault on the complainant. That if indeed any count was proved against these, it would have to be the count for malicious damage, and even then, the 3rd appellant's role in the latter was unclear.
5. Mr. Otara stated that the Lower Court dismissed the defences offered by the appellant without giving reasons. In particular the allegation that the complainant was the aggressor and that the parties had been involved in a long-running land dispute. That undue emphasis was placed on the evidence of the co-accused who was acquitted. Finally, Mr. Otara urged the court to note the personal circumstances of the appellants as stated in their mitigation and the fact that they had faithfully honored their bail terms in the trial which took over 7 years.
6. The State, through Mr. Nyongesa opposed the application. He directed the court to the evidence by the prosecution witnesses which he said placed all the appellants at the scene of the offence, and their respective roles in the transaction starting with the assault and setting ablaze of the complainants' vehicle. He contended that the trial court gave reasons for accepting the evidence of the acquitted co-accused. Mr. Nyongesa argued that the prosecution evidence was consistent and the appeal does not have any high chance of succeeding, and neither are there any exceptional circumstances to warrant release of the appellants on bail pending appeal. He relied on the case of **Dominic Karanja vs R (1986) KLR 612.**
7. The considerations for the grant of bail pending appeal are well settled. In **Dominic Karanja v R**, the Court of Appeal restated the principles enunciated in **Somo v R [1972EA] 476** by stating inter alia:

“The most important issue...is if the appeal has such overwhelming chances of success that there is no justification for depriving the applicant of his liberty. The minor relevant considerations would be whether there are exceptional or unusual circumstances. The good character of the applicant and the hardship, if any, facing the wife and children of the applicant are not exceptional or unusual factors...A solemn assertion by an applicant that he will not abscond if released is not sufficient....”
8. I have taken time to peruse the proceedings of the trial, including the judgment, in light of the appellants' grounds of appeal, and submissions made before me. It is apparent that the charges arose from one long transaction during which the complainant was assaulted, relieved of his goods and held in his vehicle which was set ablaze with him inside. The roles of the appellants are stated in the evidence of the witnesses. Without preempting the appeal, I am not persuaded at this stage that the appeal preferred has an overwhelming chance of being successful. I think it would be premature for the court to truncate the transaction and to make definite findings on the individual counts. In the the appellants' application is refused.
9. While perusing the record, I have noted certain errors in the typed record of the proceedings. The

Deputy Registrar is directed once more to compare the typed record with the original to ensure that the former is an accurate reflection of the latter.

10. At the same time, I am of the considered view that the substantive appeal ought to be heard by a different judge other than myself. This is because I have just recently (3rd October, 2013) delivered judgment in **HCC 40 of 2008 (OS) Francis Katana Nzuga & 102 others vs Salim Abdalla Baskwein & Another** pitting some of the appellants herein against the complainant and his brother. The subject matter therein is the land dispute which on the face of it is the genesis of the incident leading to the offences herein.

11. Upon certifying the proceedings, the Deputy Registrar is directed to forward the file to the High Court of Kenya in Mombasa so that a judge in the criminal division can take over this matter for purposes of hearing the appeal. For this reason, I direct that this file be mentioned before the Deputy Registrar in Mombasa on 15th November, 2013 for appropriate directions.

Delivered and signed at Malindi this **23rd** day of **October, 2013** in the presence of the Appellants Mr. Gekanana holding brief for Mr. Otara, Mr. Nyongesa for the State.

Court clerk – Samwel.

C. W. Meoli

JUDGE