



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NOS. 53, 54, 55, 61 & 62 OF 2011

FREDRICK MUTHIKE MWANGI.....1ST APPLICANT
SIMON GACHANJA MAINA.....2ND APPLICANT
PAUL GICHIRA MUTUGI.....3RD APPLICANT
MAGDALENE WANJIKU KARIUKI.....4TH APPLICANT
BEATRICE WAIRIMU MAINA.....5TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The Applicants were jointly convicted of arson contrary to Section 332(a) of the Penal Code and each asked to serve 5 years in jail on Count 1. On Count 2 all the Applicants, except the 3rd, were jointly convicted of assault causing actual body harm contrary to Section 251 of the Penal Code and each sentenced to a term of 6 months in jail. They were each aggrieved by the conviction and sentence and have appealed to this court. In the meantime, each has applied to be released on bail pending the hearing and determination of the appeal. The applications were consolidated as the Applicants were all represented by Mr. Utuku. The State was represented by Ms. Matiru who opposed the applications.

The facts on which the Applicants were convicted were that at about 10 p.m. on 6th December 2009 Jecinta Wairimu Kiti (PW1) who comes from Karimi in Kirinyaga District was away in Nakuru. Her husband John Mugo (PW3) and son Julius Githae Kiti (PW2) were at home. The Applicants came to their home and found PW2 and PW3. They were led by the 2nd Applicant who had a panga. The 5th Applicant had a knife. The 2nd Applicant asked for a mobile phone which he had allegedly left here the previous night. He had indeed been here the previous night while drunk. He had come with the phone, flour and liquor. He had gone away leaving only the flour. When PW2 and PW3 told him that he had not left the phone he got offended. He and the 5th Applicant attacked PW2. PW3 run away into hiding after they had announced that they will burn the house. They had paraffin which the 1st and 5th Applicants poured into the house. The 2nd Applicant lit the house with a match. The house got burnt. In the incident, PW2 was injured. His testimony was that the 2nd Applicant had cut him on the right hand and the 5th Applicant had hit him on the left hand. There was medical evidence contained in the P3 (Exhibit 2) to support the fact of injury. The witnesses testified that the Applicants were their next door neighbours who were well recognized by use of moonlight. Each Applicant gave unsworn testimony to deny being in the attack.

The Applicants are convicted and sentenced persons. There is against them the presumption that they have been properly convicted and sentenced and therefore the onus is on them to show why they should be released on bail pending the determination of the appeal they have preferred. (**RAGHBIR SINGH LAMBA VS REPUBLIC [1958] EA 337**). They have to demonstrate that, among other things, the appeal has overwhelming chances of success. (**DOMINIC KARANJA VS REPUBLIC [1986] KLR 612**). An

applicant will be released on bail pending appeal in the exercise of the court's discretion. Considering the presumption above, such discretion can only be exercised in exceptional circumstances.

In the affidavits sworn to support the application the evidence upon which the Applicants were convicted was being attacked, as was the failure by the prosecution to call an officer from Scenes of Crime and the officer who recorded the statements. It was also complained that the court did not warn itself regarding the evidence of identification. I hasten to add that this was a case of recognition, and not identification, as the witnesses knew the Applicants before. Lastly, it was deponed that if the Applicants are not released on bail they may serve the sentence before the appeal is heard and determined. That would, in their view, render the appeal nugatory now that it had good chances of success. An appeal that has good chances of success would not be the basis for bail. The appeal should be shown to have overwhelming chances of success.

It was not shown that the diary of the court is such that the appeal is unlikely to be heard and decided before the term of 5 years has been served. In any case, the proceedings and judgment have already been typed and what is therefore awaiting is the admission of the appeal and fixing of the hearing date.

The court is not the one that will hear the appeal and therefore nothing should be said at this stage that would prejudice any party or embarrass the court that will deal with the matter. All that I want to say is that, having listened to the arguments of the learned counsel in the matter and having considered the evidence upon which the Applicants were convicted I am of the view that the appeal raises serious grounds that the court will have to grapple with. That is not to say, however, that it has been demonstrated that the appeal has overwhelming chances of success or that there is anything exceptional or unusual that the application has presented.

The result is that the application for bail pending appeal is dismissed.

DATED, DELIVERED AND SIGNED AT EMBU THIS 29TH DAY OF JUNE, 2011.

A. O. MUCHELULE
JUDGE