



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 236 OF 2010

CHRISPINUS IKUNZA.....1st APPELLANT

WYCLIFFE LUVEMBE.....2ND APPELLANT

MARK LUVEMBE.....3RD APPELLANT

EVANS LUVONGA NAPALI.....4TH APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

R U L I N G

The appellants' appeal against their conviction by the trial magistrate for the offence of **arson** contrary to **Section 332 (a)** of the **Penal Code** was dismissed by Lenaola J. on 13th April 2011. The learned judge confirmed the conviction and sentence of the trial magistrate. Each of the appellant had been sentenced to serve five (5) years imprisonment. The appellants were aggrieved by the decision of the judge in dismissing their appeal and have duly filed notice of their intention to appeal against the said dismissal to the Court of Appeal.

Pending the hearing and determination of the said appeals, the 2nd and 4th appellants have applied to be granted bail pending the hearing of the appeal. The application has been predicated on the provisions of **Section 6** of the **Appellate Jurisdiction Act** and **Sections 356 & 357** of the **Criminal Procedure Code**. The grounds in support of the application are stated on the face of the application. Essentially, the appellants are apprehensive that by the time the intended appeal is finally heard and determined by the Court of Appeal, they would have served sentence or a substantial part thereof thus prejudicing their appeal. The appellants argued that they were on bail prior to the hearing of the appeal and they duly observed the bail terms that were imposed. They were thus willing to abide by the same terms of bail pending the hearing and final determination of the intended appeal to the Court of Appeal. The application is supported by the annexed affidavit of the 4th appellant. During the hearing of the application, Mr. Amasakha for the appellants reiterated the contents of the said application. Mr. Limo for

the State left the issue of bail for determination by the court.

The right to bail is a constitutional right. **Article 49 (1) (h)** of the **Constitution** provides that an arrested person has the right to be released on bond or bail on reasonable conditions pending charge or trial unless there are compelling reasons not to be so released. **Section 357(1)** of the **Criminal Procedure Code** grants this court jurisdiction to grant bail pending the hearing of an appeal. Some of the factors which the court will take into account in considering whether or not to grant bail pending the hearing of an appeal intended to be filed to the Court of Appeal are the nature of the offence, the strength of the evidence, the character and the behaviour of the accused, and the seriousness of the punishment which may be awarded if the accused is found guilty. There is also the primary and underlying consideration in determining whether to grant bail which is the question whether the appellants will turn up at the appointed place and time for the hearing of the appeal (see **Mwaura v Republic [1986] KLR 600**). The Court of Appeal in **Jivraj Shah v Republic [1986] KLR 605** at page 606 held that:

“There is no 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 exists 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 of law to be urged, and the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions granting bail will exist.”

In the present application, the appellants were convicted of the serious crime of arson. Their appeals to this court have been dismissed. If they are to be released on bail pending the hearing of the intended appeal by the Court of Appeal there is a likelihood that the appellants will abscond. The appellants have a serious incentive to abscond. This is because a second appeal to the Court of Appeal is only on points of law, the factual issues having been settled by the trial court and the first appellate court. There exists no exceptional or unusual circumstances that will make this court exercise its discretion to grant the appellants bail pending the hearing of their appeals by the Court of Appeal. This court was not persuaded by the argument advanced by the appellants that because they had previously abided by the terms of bail that were granted to them they would in similar vein abide by the terms that may be imposed by this court pending the hearing of the intended appeal by the Court of Appeal. The circumstance prevailing now is different from the circumstances then applying.

For the above reasons, the 2nd and 4th appellants’ application for bail pending the hearing of their appeals by the Court of Appeal is unmeritorious and is hereby dismissed.

DATED AT KAKAMEGA THIS 22ND DAY OF JUNE 2011

L. KIMARU

J U D G E