REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 182 OF 2010

DAVID NDONGA KIMOTHO..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

CRIMINAL APPEAL NO. 183 OF 2010

GEORGE OLOO OKELLO...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

CRIMINAL APPEAL NO. 171 OF 2010

SVEIN OWINO OUMA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being anAppeal arising from the conviction and sentence by S. M. Muketi (Mrs), Chief Magistrate, in the Chief Magistrate's

Criminal Case No.887 of 2009 delivered on 13th July 2010 at Nyeri)

RULING

Pursuant to the provisions of *Section 357(1)* of the Criminal Procedure Code, George Oloo Okello,and David Ndonga Kimotho, the Appellants herein, took out the Summons dated 23rd August 2010 in which

they applied to be released on bail pending appeal. The application is supported by the affidavit sworn by Mr. Njuguna Kimani, the Appellants' learned advocate.

It is the submission of the Appellants that they have an appeal with overwhelming chances of success. The Appellants further averred that if they are denied the orders they will have served the entire or substantial part of the sentence at the conclusion of the Appeal. Miss Ngalyuka, learned Senior State Counsel, was of the view that the appeal has slim chances of success hence the Appellants should be denied bail. She was also of the view that there will be no delay in hearing and determining the appeal.

I have considered the rival submissions on whether or not the Appellants, should be admitted to bail. The principles to be considered in such applications were ably restated by the Court of Appeal in the case of **Jivraj Shah =Vs= R [1986] K.L.R. 605** as follows *interalia*:

1. "The principal consideration in an application for bail pending appeal is, the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interests of justice to grant bail.

2. 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 that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist.

3. The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued."

In the appeal before me it is said that the appeal has overwhelming chances of success. Mr. Njuguna Kimani pointed out that the Appellants will be able to show during the hearing of the Appeal that the particulars and mode of trafficking was not established. Secondly, that the Appellants will be able to show that the trial magistrate did not consider his submissions thus causing a miscarriage of justice.

The recorded proceedings indicates that the Applicant herein together with two others were jointly tried on a charge of trafficking in narcotic drugs contrary to Section 4(a) of narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. After undergoing a full trial, the trio were convicted for the aforesaid offence and each sentenced to pay a fine of Ksh.175,400/= and to each serve 10 years imprisonment. The trio each filed an appeal to challenge the decision. Those appeals were consolidated at the prompting of the Appellants' advocate. One of the grounds of appeal which were enumerated in the Petition of Appeal included:

(i) That the mode of trafficking was not disclosed in the charge hence the Appellants were tried on a defective charge thus causing a miscarriage of justice.

I have looked at the particulars given on the charge sheet. In fact the particulars are stated as follows:

"On 29.9.2009 at about 12.00 mid-day along Narumoru- Lumuria road, in Nyeri District within Central Province, jointly were found trafficking in by transportation of 1946 (292 Kgs) stones of cannabis valued at Ksh.583,800/= which was not in its medical preparation in contravention of the said Act."

It is the submission of Mr. Kimani that the aforesaid particulars did not disclose the mode of trafficking. The meaning of trafficking is given under Section 2 of Narcotic Drugs and Psychotropic

Substances (Control) Act No. 4 of 1994 as the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance. When drafting the charge, it is envisaged that the particulars must conform with the definition of the offence of trafficking. In the case of **Madline Akoth Barasa & Another =VS= R CR. Appeal No. 193 of 2005** (unreported) at page 8, the Court of Appeal stated in part as follows:

"In our view, for the charge sheet to disclose the offence of trafficking, the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking............the prosecution should at trial prove by evidence the conduct of an accused person which constitutes trafficking...............................

..

The element for "transportation" used by the learned judge of the superior court was not specifically relied on by the prosecution. In any case, the word "transportation" is not used in the definition of trafficking.

I have belaboured to show in detail that the ground stated by the Appellant's counsel is arguable hence it is not frivolous. The question is whether the same may lead to an acquittal. The other ground which the Appellants pointed out was that there was no evidence that they hired a motor vehicle. The evidence of P.W. 5 seems to displace this assertion. In my view the Appellants appeal does not have overwhelming chances of success. Even if the appeal is allowed, it may not lead to an automatic acquittal.

The other issue which the Appellants have argued is the ground that the Appellants may have served the whole term or a substantial part of the sentence if they are not released on bail. The Appellants were each sentenced to serve 10 years imprisonment over and above the fine imposed. The term was to run from 12th July 2010. So far the appellants have served about 11 months. It is clear from the record that the proceedings and judgment have been typed and supplied to the parties. The appeal therefore awaits for admission. It is therefore not true that if the Appellants are not released on bail, they will have served the entire or a substantial part of the sentence by the time the appeal comes up for hearing.

In the end I have come to the conclusion that the Motion does not meet the threshold set for applications for bail/bond pending Appeal. The same is ordered dismissed.

Dated and delivered at Nyeri this 17th day of June 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Kimani for the Appellants and Makura for the State.