



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEALS NOS. 84 & 85 OF 2011

JOHN MURIMI KIGORU.....1ST APPELLANT/APPLICANT
BERNARD MIANO NDWIGA.....2ND APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The Applicants were on 27th May 2011 jointly convicted by the Resident Magistrate's court at Wanguru of assault causing actual bodily harm contrary to Section 251 of the Criminal Procedure Code and were each sentenced to serve 12 months in jail. The particulars of the charge were that on 27th day of July 2010 at Thiba Village in Kirinyaga South District of the Central province, they jointly assaulted Patrick Kithaka Chobi and occasioned him actual body harm. They were aggrieved by the conviction and sentence and have appealed to this court. In the meantime, they each seek to be released on bail pending the appeal. The two applications were consolidated.

The brief facts on which the applicants were convicted were that on 27th July 2010 at 8.00 a.m. the complainant was preparing his 2 acre rice holding No. 2165B to plant when the 2nd Applicant came with seedlings wanting to plant 1 acre of this holding. He claimed the acre had been leased to him by the complainant's brother Benson Wanjohi Cubi. An argument ensued between them. The 1st Applicant came and the two held and beat up the complainant and injured him. Each Applicant denied this in sworn statement. Their case was that Benson had leased 1 acre of this holding to the 1st Applicant. On this day the 1st Applicant sent the 2nd Applicant to take the seedlings to the holding where he found the complainant who stopped the delivery of the seedlings. The 1st Applicant called the 2nd applicant who came. At that point the complainant's son attacked the 1st Applicant with a stick. The complainant joined in the attack and cut the 1st Applicant with a panga. The Applicants denied that they had assaulted the complainant.

In their respective applications of appeal the applicants complained that they had been convicted on insufficient evidence; that their defence was not considered; and that the sentence meted out was manifestly excessive. During the application, their counsel Mr. Muriithi submitted that the appeal had overwhelming chances of success. He relied on various decisions, including *JIVRAJ SHAH VS REPUBLIC [1986] KLR 605* and *ADEMBA VS REPUBLIC [1983] KLR 442*, to urge that his clients were entitled to bail. Mr. Wohoro for the State did not oppose the application. He conceded that the appeal had good chances of success. Mr. Muriithi further pointed out that, given the court's diary, it was unlikely that the appeal was going to be heard before the sentence had been served.

This was a dispute between brothers concerning the rice holding in question. It spilled over the applicants who came to plant on the same holding. It is also notable that the medical evidence shows the complainant suffered only bruises on the left mid tibia joint. The applicants were first offenders and each has a family.

It will be up to the court hearing the appeal to determine whether the conviction was safe and the sentence merited. My impression on the matter, however, is that the appeal has overwhelming chances of success. At the very least, the custodial sentence may not be allowed to stand. This will be sufficient to allow the application.

Each Applicant is admitted to bail on the condition that he deposits KShs.20,000/= to await the hearing of this appeal. Upon the deposit they will appear before the Deputy Registrar to indicate mention dates.

DATED, DELIVERED AND SIGNED AT EMBU THIS 28th DAY OF JULY 2011.

**A. O. MUCHELULE
JUDGE**