THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.CR. MISC.13 OF 2011

JOANNESS KISENGESE.....PLAINTIFF

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Each of them (**1**) Joanness Kisengese, (**2**) Mumo Musembi, (**3**) Josphat Musembi, (**4**) Josphat Samuel (**5**) Mutuku Muilu and (**6**) Vinzi Mauta (**the Applicants**) filed their respective Petitions of Appeal all bearing date the 7th February, 2011. They say they are dissatisfied and aggrieved by the sentence meted on the 28th February, 2011 by the learned trial Resident Magistrate in Mutomo Criminal Case No.23 of 2011 in which they were convicted and sentenced to serve twelve (12) months imprisonment without an option of fine thus rendering the sentence and unreasonable considering the nature of the offence. For these reasons the Applicants pray that the lower court's sentence be set aside and/or quashed and an option of fine provided for.

2. The Applicants also individually took out Chamber Summons on the 10th February, 2011 under section 37(1) of the Criminal Procedure Code seeking to be admitted to bail/bond pending the hearing and determination of their respective appeals. The applications are all sought on the ground that the sentence against the Applicants was oppressive and unreasonable considering the nature of the offence and that unless the Applicants are released, they are likely to serve a substantial part of the sentence before their appeals are heard rendering them nugatory. Each of the Applicants respectively swore his own affidavit in support of their application on the 7th February, 2011 reiterating the grounds and reasons aforesaid.

3. The applications were consolidated and heard on the 10th May, 2011, learned counsel for the Applicants emphasized that the appeals will be rendered nugatory unless the applications are allowed. Learned Senior State Counsel pointed out that the Applicants having been convicted on their own pleas of guilty, their appeals are against sentence only. The offence for which they were convicted carries a maximum sentence of five (5) years and there is no likelihood of the sentence of twelve (12) months imposed by the lower court being overturned.

4. The Applicants were charged with the offence of attempting to compel another person to take an oath contrary to section 38 as read with section 62(1) of the Penal Code in that on the 27th January, 2011 at about 9.00 p.m. at Kisenga Village, Mathima Location of Mutomo District, the Applicants jointly and unlawfully attempted to compel Jane Nzembi Kaseve to undergo through Akamba oathing ceremony commonly known as "***Ngata***" against her wish. The charges were read to the Applicants in Kikamba and each of them replied – "it is true". Each of the Applicants also pleaded to the truth of the following facts:

"Facts are that on 27.1.11 at around 2.30 p.m. the complainant left her home and proceeded to her uncle's home to check on a donkey hit by a motorbike – she left for her home at around 7.00 p.m. She met her sister who informed that there was a group of people gathered near her home. She proceeded home and found the accused persons near her homestead. The accused persons confronted her and pushed her. They tied complainant's hands and removed her clothes. Complainant complied. They escorted her to Mutomo where they wanted her to take the illegal oath called "*Ngata*". The person conducting the oath refused to administer the oath. Complainant's sister reported the matter to police. The accused persons were identified and charged before court."

5. The learned trial Magistrate accordingly proceeded to convict the Applicants on their own respective plea of guilty. Before sentencing the Applicants, the learned Magistrate stated as follows:-

"I have considered the fact that the accused persons are first offenders. I have also considered their mitigations. However, the offence committed by the accused persons is widespread and requires a deterrent sentence. I hereby sentence each person to serve 12 months imprisonment."

6. In **Dominic Karanja vs. Republic** [1986] KLR 612, it was enunciated that the most important issue to consider in an application of the nature of the ones now before me is that if the appeal had such overwhelming chances of success, there was no justification for depriving the Applicant of his liberty. As I have already said, the Applicants were convicted and sentenced on their own plea of guilty. None of them challenges that fact. The learned trial Magistrate clearly took into account their mitigations and gave reasons for imposing a custodial sentence. In these circumstances, the learned trial Magistrate who was not bound to impose a fine opted to sentence the Applicants to twelve months imprisonment for having committed an offence for which they could have been imprisoned for a term not exceeding five (5) years. I cannot see that the appeals of the Applicants can be said to have overwhelming chances of success. The Applicants therefore cannot succeed.

7. In the result, each of the Applicants' Chamber Summons dated the 7th February, 2011 and filed on the 10th February, 2011 respectively fails and each of them respectively be and are hereby dismissed.

Orders accordingly.

Dated and delivered at Machakos this **5th** day of **July**, 2011.

P. Kihara Kariuki
Judge