REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEALS NOs. 102, 103 & 104 OF 2011

(From original conviction and sentence in Cr. case No

422 of 2010 at the Senior Principal Magistrate's Court Kerugoya)

SIMON NJOGU GACHEWA …..……..1ST APPLICANT
PETERSON KARIMI GACHEWA …….. 2ND APPLICANT
DENIS GAKONO GACHEWA ……...3RD APPLICANT

VERSUS

REPUBLIC … ……. RESPONDENT

R U L I N G

The Applicants were jointly convicted by the Senior Principal Magistrate's court at Kerugoya of arson contrary to section 332(a) of the Penal code and each sentenced to serve 7 years in jail. The particulars of the charge were that on 24th April 2010 at Kirigo village in Kirinyaga District of the Central Province they jointly willfully and unlawfully set fire to the dwelling house of Kennedy Muriithi (PW 1) whose value was kshs.300,000/=. They were aggrieved by the conviction and sentence and have each appealed to this court. Pending the hearing and determination of the appeals, they seek to be released on bail. The applications were consolidated and were prosecuted on their behalf by Mr. Mwai. Mr Wohoro represented the state and did not oppose the application.

In urging this application, Mr. Mwai brought to the attention of the court the decision of the Court of Appeal in ***SIMON MWANGI KIRIKA –V- REPUBLIC, CRIMINAL APPLICATION NO.3 OF 2006 AT NAIROBI*** in which the court reiterated the principles governing the grant of bail pending appeal as stated in ***JIVRAJ SHAH –V- REPUBLIC [1986] KLR 605*** where the court held as follows:

"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."

The court has to bear in mind that the Applicants have been convicted and sentenced and there is the presumption that they hadve been properly convicted and sentenced. They have to show that their application presents an exceptional and unusual occasion that entitles them to bail as they wait to have their appeals heard and determined. In the affidavits sworn by Mr. Magee Advocate to support the application it was indicated that the only evidence upon which his clients had been convicted was that of recognition by PW 1 and yet the circumstances of the case did not favour accurate recognition. Such evidence was allegedly materially contradicted by that of PW 2 and 3. It was alleged that each Applicant had raised the defence of alibi which had not been countered. Further, that the trial magistrate had shifted the burden of proof to the Applicants. Lastly, the trial court had relied on unproved extraneous facts to convict the Applicants. Regarding sentence, the Applicants indicated through the further affidavits of Mr. Mwai that, given the diary of the court, it was likely that the sentence or a substantial part of it will have been served by the time their appeals are heard and determined.

The background of this case was that the Applicants are the brothers of the late mother of PW 1. There is a long standing dispute between PW 1 and the Applicants over the piece of land on which the house in question was standing. The Applicants wanted to evict PW1 from here. According to PW 1, his late mother had not been married and the Applicants wanted to inherit this piece of land. When she died in 2006 the Applicants were suspected to have caused her death. The parties live in the same neighbourhood. The prosecution case was that on 24th April 2010 at about 10.30pm PW 1 was in his house when he heard the Applicants calling him from outside. When he did not respond they concluded that he was asleep. PW 1 heard the 2nd Applicant say that they should pour petrol in the doorway of the house. PW 1 sensed danger and came out of the house through the window. It was dark. By this time the house had been set on fire. Using light from the fire he saw the three Applicants next to the burning house. The 1st Applicant had a rungu and the 2nd Applicant was holding a jerican which he threw into the fire. The 3rd Applicant had nothing. PW 1 screamed and ran to the police station to report. PW 2 (Faith Wambui Karani) and PW 3 (Jane Nyawira Kiama) are neighbours who heard the screams and came to the scene where they found the Applicants standing and scaring people away.

The Applicants each gave sworn testimony to say he was asleep at home with his family when he was woken up by the commotion of the burning house. This is what led them to go to the scene. Each Applicant called witnesses to support their version.

The court believed the prosecution version. The learned magistrate found, among other things, that the Applicants had a motive to burn the house. The court observed that they wanted this land and had *"probably"* killed their sister to make way for the acquisition of the land. It is not clear from the record why the trial court came to the conclusion that the Applicants had killed their sister. It was complained that the court had relied on extraneous unproved facts to convict the Applicants.

The court that will hear the appeal will review and reconsider the evidence to be able to reach its own conclusion regarding the conviction. It will consider whether, given the strained relationship, PW 1 had himself burnt the house and blamed it on the Applicants. This was the contention by the Applicants in their defence. The other issue raised by the defence was that PW 1 had reported to police that all his documents, including the identity card, had been burnt in the fire. Yet he had subsequently been found with the identity card. They alleged that there was no explanation for this and that he had, following this discovery of identity card on him, been arrested for giving false information. It would appear that the fact that the PW 1 was indeed arrested for giving false information in regard to the identity card was unchallenged. The court will have to decide whether by arresting PW 1 the police were doubting the truthfulness of their own witness. The Applicants are contending that the truthfulness of the evidence of PW 1 in regard to the said arson should have been resolved in their favour.

For the purpose of this application, and after considering the evidence upon which the Applicants

were convicted, I am of the view that it has been demonstrated that the appeals have overwhelming chances of success. Consequently, I admit each Applicant to bail. Each will be released on cash bail of kshs.100,000/= and appear before the deputy registrar for indication as to the mention dates.

DATED, SIGNED AND DELIVERED AT EMBU THIS 20TH DAY OF SEPTEMBER 2011

A.O. MUCHELULE
J U D G E