



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL APPEALS NOS.114 & 115 OF 2011

(Being conviction and sentence of Principal Magistrate at Webuye in Cr. Case No.1568 of 2008)

RONALD SIMIYU WANJALA.....1ST APPLICANT
KENNEDY BARASA WANJALA.....2ND APPLICANT

~VRS~

REPUBLIC.....RESPONDENT

RULING

The Applicants were jointly convicted by the Principal Magistrate at Webuye of common assault contrary to section 250 of the Penal Code in count 1 and each sentenced to 12 months imprisonment. They had been charged with grievous harm contrary to section 234 of the Penal Code whose particulars were that on 18/11/2008 at Sirisia area in Misikhu location of Bungoma East District in Western Province, they had unlawfully grievously injured Sabina Nanjala Wekhuyi. The trial court reduced the charge to common assault. This was because the prosecution had not produced medical evidence. In count 2 the second Applicant was charged with grievous harm contrary to section 234 of the Penal Code, that during the incident he grievously injured Lyncalvin Nameme. He was, however, convicted of common assault contrary to section 250 of the Penal Code on account of the non-production of medical evidence. In count 3 the Applicants were jointly convicted of destroying crop of cultivated produce contrary to section 334 (a) of the Penal Code, that at the same time and same place they unlawfully ploughed by oxen the sweet potatoes and groundnuts worth Ksh.959/= the property of Sabina Nanjala Wekhuyi. They were each jailed for 5 years. They were aggrieved by the conviction and sentence and appealed to this court. This is their application for bail pending the hearing and determination of that appeal.

I have considered the submissions by Mr. Khakula who prosecuted the application on behalf of the Applicants. The State was represented by Mrs. Leting who did not oppose the request.

The usual presumption is that the Applicants were properly convicted and sentenced. They can only be released on bail if the appeal they have preferred can be demonstrated to have overwhelming chances of success. **(Dominic Karanja V. Republic [1986] KLR 612)**. Where it is shown that the appeal will be

successful to the extent that the prison term may be reduced to non-custodial treatment, an occasion for the release on bail has arisen.

One of the complaints about the conviction was that the trial court did not at all consider the defence case. The prosecution evidence was that Sabina, Lyncalvin, John Sirengo, James Orengo and Christine Majuma were at home when the Applicants came with oxen pulling a plough and ploughed the shamba of Sabina in which sweet potatoes and groundnuts were growing. When she questioned the Applicants, they attacked her by cutting her with panga on the head and hitting her with a stick. They also assaulted Lyncalvin. The damage to the produce was assessed to be Ksh.959/=. Each Applicant gave sworn defence. Their testimony was that they were the ones who were attacked by the prosecution witnesses when they had gone to plough this shamba which they owned. They called witnesses, including John Maelo Wekhui who had sold the land to them. John is the step-son of Sabina. It would appear from the judgment that there was no reference made to the testimony of the Applicants and their witnesses. It will be upto the court hearing the appeal to decide whether the omission to consider the defence was fatal to the conviction.

Secondly, now that the Applicants were charged with grievous harm and there was evidence that P.3 forms had been completed to confirm the injuries, the question is whether the court could reduce the charges to common assault instead of finding that the charges laid had not been proved altogether.

Thirdly, there will be the question regarding the gravity of the sentences. For common assault or destruction of property worth Ksh.959/= was imprisonment the appropriate treatment of the Applicants? Were the offences proved of such gravity that none of the non-custodial penalties under section 24 of the Penal Code could be preferred? Again, all these issues will be discussed during the appeal. At this stage, however, after considering the record, the grounds of appeal and the submissions, it is clear to me that the appeal has overwhelming chances of success. I admit the Applicants to bail. Each will deposit cash bail of Ksh.30,000/= and to appear before the Deputy Registrar to be given the attendance dates.

Dated and delivered at Bungoma this 19th day of October, 2011 in the presence of the Applicants, the State Counsel Mrs. Leting and Lilian Gimose the court clerk.

A. O. MUCHELULE
JUDGE