



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 395 OF 2011

BENSON MUNGAI NJENGA.....1ST APPLICANT
ANTHONY NGANGA WANJIKU.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicants, **BENSON MUNGAI NJENGA** and **ANTHONY NGANGA WANJIKU** have asked this court to grant them bail pending the hearing and determination of their respective appeals.

The applicants were convicted for the offence of robbery with violence, and they were then sentenced to death.

Both applicants continue to plead their innocence. They believe that their appeals have high chances of success. Yet they feel that the hearing and determination of their appeals will take a considerable length of time, resulting in their suffering irreparably.

Currently, the applicants are unwell, and they have previously been hospitalized. The said hospitalization was said to have taken place several times during the time when the applicants were still undergoing trial.

Therefore, Mr. Wachira, the learned advocate for the applicants' submitted that if his clients were to remain in custody for long, there was a danger that they may die.

As far as the applicants are concerned, the high chances of success of their pending appeals were premised on the issue of identification. They say that there was no proper identification or recognition.

They also describe the evidence tendered by the prosecution as extremely weak and untenable. The evidence is said to be lacking in credibility, so that the applicants believe that the trial court ought to have given to them the benefit of doubt.

Finally, the trial court is faulted for admitting and relying upon inadmissible evidence.

For those reasons, the applicants submitted that their appeals were probably going to be successful.

They then went on to describe themselves as persons who have strong community ties, and who were willing to comply with any terms which this court may impose as conditions for the grant of bail.

Mr. Mulati, learned state counsel submitted that the applicants had failed to advance any good reason to warrant the grant of bail.

Secondly, the respondent submitted that the applicants had not demonstrated any exceptional or unusual circumstances to qualify them for the grant of bail.

Finally, the respondent pointed out that the applicants were provided with proper medical treatment even whilst they remained in custody, during the trial.

I have perused the medical records exhibited by the applicants.

Benson Mungai has provided a single document dated 29th February 2009.

To an untrained mind such as mine, it appears that the said document was a record of the observations made by a doctor when the patient was presented at the hospital. On that occasion, the patient was suffering from a swelling on his cheek.

One could hardly describe that condition as life-threatening.

Meanwhile, Anthony Nganga had dysentery and anemia in February 2010. Prior to that he had been at the Kenyatta National Hospital in October 2009.

The record shows that on the 2 occasions he was at the hospital, he was treated as an out-patient.

In other words, there is no medical evidence before me that the applicants were hospitalized. However, it is clear from the record of the proceedings before the trial court that between 14th September 2009 and 19th November 2009, the applicants were admitted at the Kenyatta National Hospital.

Although it is true that the applicants were admitted in hospital at some point in the course of their trial, the applicants' have not actually produced documents to support that contention, as they asserted in their respective affidavits.

The point I am making is that when a party makes an assertion, he ought to make sure that he supports it appropriately.

However, in this case, nothing turns on the applicants' failure to exhibit medical documents to prove that they had been hospitalized.

I have given careful consideration, on a prima facie basis, to the grounds of appeal raised. I find that the appeals are arguable.

However, I do not find myself able to share the applicants' optimism about the probability of success.

I also note that one of the 2 complainants suffered the loss of an eye, during the robbery. In other words, the attack on him was vicious.

The victims and the applicants were neighbours.

And although the applicants described themselves as persons with strong ties in the community, one of the complainants (**PW 2**) described the applicants in very unflattering terms. He said that they were "known criminals".

All considered, the applicants have not demonstrated either that their appeals have a greater than even chance of success, or that there are any exceptional circumstances to warrant the grant of bail. I therefore dismiss the application.

However, I do direct the prison authorities to accord to the applicants' appropriate medical attention. I so order because although the applicants are convicted persons, **Article 51 of the Constitution of Kenya, 2010** makes it clear that they retain all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that they are imprisoned.

Dated, Signed and Delivered at Nairobi, this 1st day of November, 2011.

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FRED A. OCHIENG
JUDGE