REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

CRIMINAL APPEAL NOS. 89, 90, 91, 92, 93 & 94 OF 2010

MANASSEH MBOGO NYAGA & 5 OTHERS…….APPLICANT
VERSUS
REPUBLIC……..…..……..RESPONDENT

R U L I N G

There are a total of six Appeals arising from the conviction and sentence by the Principal Magistrate Embu in criminal case No. 642A of 2008. All 6 appellants were convicted and each sentenced to a prison term of 18 years for 2 counts of "GRIEVOUS HARM" contrary to Section 234 of the penal code. They each filed the Appeals and Applications for bail pending Appeal separately. They are nonetheless represented by the same counsel and their circumstances being almost similar, the court decided to hear the said applications together. Counsel did however highlight any circumstances that were different from those of the other Applicants. Such were circumstances pertaining to the individual applicants e.g. family responsibilities and sickness. As stated by the Court of Appeal in **DOMINIC KARANJA VS REPUBLIC (1986) KLR** however
"The previous good character of the Applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners".

The court actually notes that indeed, the ground of ill health is not even an account of any of the Applicants but on the mother of Manasse Mbogo Nyaga who is one of the Applicants.
I fail to see how his mother's alleged arthritis becomes an unusual or exceptional circumstance in this case.

In considering whether to release the Applicants on bail pending Appeal or not, the court will basically be guided by the following widely accepted principles.
(i) Whether there are exceptional or unusual circumstances (see Lamba Vs Republic 1958 EA 337).
(ii) Whether the Applicant is likely to serve the sentence or a substantial part of it before the Appeal is heard; and
(iii) Most important is whether the Appeal has overwhelming chances of success.
The Court of Appeal has held (see e.g. DOMINIC KARANJA'S case supra) that
"If the Appeal had such overwhelming chances of success, there was not justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances."

The same court held that a solemn assertion by the applicant (like in this case) that he will not abscond even if supported by sureties is not sufficient ground for releasing a convicted person on bail pending Appeal. The presumption here is that a person who has been convicted is already serving a lawful sentence and the presumption of innocence does not therefore work in his favour. Having indicated earlier on in this ruling that no exceptional or unusual circumstances exist which can be construed in favour of

the Applicants, what remains for this court to consider is whether indeed this appeal has overwhelming chances of success. The grounds counsel for the Applicants seems to rely on to state that their Appeal has overwhelming chances of success is firstly, that the Applicants were taken to court after 24 hours had already expired and their rights under Section 72(3) of the now repealed constitution were violated. I have perused the copy of the proceedings, accompanying these applications. It is evident that all Applicants were represented by counsel right from the date of plea. They did not raise that issue. The Court of Appeal has restated the position through many cases to the effect that the violation of Section 72(3) of the constitution must be raised at the earliest possible opportunity and where the appellant was represented by counsel and he did not raise it, then he is deemed to have waived his right to raise the issue thereafter. This point I believe will be raised in the substantive Appeal and that is why I do not find it necessary to cite the said authorities at this stage. It is further noted that it is not clear whether upon arrest, the applicants were released on police bond or not. That could have come out more clearly if the original record is in this court but it is not. That is not therefore a ground that can be said to have overwhelming chances of upsetting the conviction herein. Learned counsel also cited the magistrate's failure to comply with Section 200 of the CPC. With respect to counsel however, the matter was not taken by Ms. Mutai in Embu as a part heard. The case was transferred to Embu before any evidence was taken and so it commenced before her. The issue of recalling witnesses or starting the matter de novo which is the purpose of the compliance with that Section does not therefore arise.

I have read the proceedings and the contradictions highlighted are not so material as to create overwhelming chances for the Appeal succeeding. They may create an arguable appeal but not one with overwhelming chances of success. The other issue that works against the applicants in this case is that the offences they were convicted of are of a personal nature to the complainants. They suffered serious injuries which according to the learned trial magistrate "almost halted their lives completely".
Again I do not wish to venture into the details of the evidence before the trial court and will reserve that task for the court that will be seised of the appeal. The nature of the injuries and the acrimonious relationship between the Applicants and the complainants militate against their being released on bond at this stage.

I wish to state that the state counsel did concede the application but on what in my view were very flimsy or baseless grounds. She said that there were contradictions, and amazingly that PW2 (who was 16 years old) and PW3 (17 years old) were not subjected to voire dire before their evidence was taken. I can only remind the state counsel that persons of 16-17 years of age cannot by a long shot be descried as "children of tender years" who would raise any doubt as to their capacity to understand the nature of an oath. Learned counsel may need to appraise herself of the provisions of the Children's Act which defines who a child of tender years is.
Having considered very keenly the applications before me, I find absolutely no basis for me to exercise my discretion in favour of the Applicants and granting them bail pending Appeal. There are no unusual or exceptional circumstances in this case; there is no likelihood that the appellants might serve a substantial or entire sentence of 18 years before the Appeal is heard and determined; and although they may have an arguable appeal, their Appeal cannot be described as one with overwhelming chances of success.

For the foregoing reasons, I must which I hereby do, dismiss all 6 applications for bail pending Appeal in respect of all the Appellants/Applicants.

W. KARANJA
JUDGE
Delivered, signed and dated at Embu this 19th day of October 2010.
In presence of:- Ms. Muthoni for Mr. Mwai for all Applicants & Ms. Matiru for state.