REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 97 & 98 of 2006

[Consolidated applications in Appeals Nos. 97/06 & 98/06]

JOSEPH MBOYA DIN

SIMON ONDU DIN……..APPELLANTS/APPLICANTS

VERSUS

REPUBLIC…….RESPONDENT

R U L I N G

In their applications made to this court on 16.11.06, Joseph Mboya Din and Simon Ondu Din, the Appellants in Appeals Nos. 97 of 2006 and 98 of 2006 respectively, sought bail pending appeal. They were in that order the 1st and 2nd Accused in Kakamega C.M. Cr. Case No. 1426 of 2006 in which they were jointly charged with two counts, the first being of malicious damage to property c/s 339(1) of the Penal Code, Cap 63, and the second being of creating disturbance in a manner likely to cause a breach of peace c/s 95(1) (b) of the Penal Code. On 14/7/06, the trial court found them guilty and convicted them on both counts and sentenced each of them to imprisonment for a term of 4 years in each count to run concurrently.

On 27.9.2006, each of the appellants filed appeal against both conviction and sentence. They set in their respective Petitions of Appeal 8 identical grounds of appeal.

The Appellants' applications for bail which were consolidated and heard together were also identical in every aspect. When the applications came up for hearing before me, Mr. Nyanga, learned Counsel for the Appellants, submitted that the appeals by the appellants had overwhelming chances of success and urged the court to admit the appellants to bail on this ground. He also contended that the sentences meted out to the appellants were excessive.

Mrs. Kithaka, the learned Senior Principal State Counsel, did not oppose the applications. In her view, the sentences meted out were very harsh and excessive.

Under Section 357 (1) of the Criminal Procedure Code, Cap 75, this court has jurisdiction where an appeal has been filed by a person entitled to appeal to admit such person to bail. The grant of bail pending appeal is predicated on the premise that it is unnecessary to keep an appellant in jail if his conviction will eventually be quashed and sentence set aside. For this reason, it is imperative that the court is satisfied that the appeal has overwhelming chances of success before granting bail pending

appeal. There may be other circumstances that might justify grant of bail pending appeal but these are not relevant here.

The Appellants did not demonstrate either in their affidavits in support of their respective applications or in court during the hearing of the applications that the appeals have overwhelming chances of success. True, the allegations that the appeals have overwhelming chances of success were made. But neither the deponent in the supporting affidavits nor the learned counsel who argued the applications for bail clearly showed how or why the appeals were said to have overwhelming chances of success. The germane paragraph was No. 7. It read:

7. "THAT is apparent from the Memorandum of Appeal and proceedings hereof that the applicants appeal has overwhelming chances of success as the trial conviction and sentence was based on provisions which were at variance with the express provision of the Penal Code Criminal Procedure Code and the notes of natural justice and the true tested legal authorities and cannot stand the vigours of an appeal on sound law."

On the face of it, the two counts against the appellants did not seem to violate any law.

I have perused the record of appeal. It shows that the Appellants are brothers. Their father, one Pius Din Ondu, died on 22-4-2006, the day the appellants were alleged to have committed the offences. Pius Din Ondu was the brother of the Appellant' father and so, the appellants would call him uncle or "baba". Indeed, the 1st appellant, Joseph Mboya Din, in his unsworn evidence referred to Peter Okore Ondu as "Baba Peter."

The Appellants' uncle, Peter Okore Ondu, gave evidence as did his sons, Isaac Nyambok and Austin Ondu. Isaac Nyambok told the court he saw the appellants and a third person (whom the police never found) carrying poles with fencing wires which had been removed from the land of Peter Okore Ondu. Austin Ondu testified that the appellants pulled out 4 poles and threatened to harm him. They had pangas. When they made unsworn statements, the Appellants who also called two witnesses denied the offences. They also denied being at the scene of the crime. The learned trial magistrate who saw, heard and observed the appellants found their evidence contradictory and false.

At this stage, the court need only endeavour to see whether the appellants' appeals have overwhelming chances of success. I am not persuaded that the appeals have overwhelming chances of success on the issue of conviction.

Perhaps, as regards sentence, having regard to the circumstances in which the offences were committed a case for reduction of sentence could be made out.

In the light of the above, I do not find a case made out for bail pending appeal. I therefore dismiss the applications.

I direct that the appeals be heard on 21-3-2007.

Dated at Kakamega this 23rd day of February, 2007.

G. B. M. KARIUKI

J U D G E