



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KITUI

#### CRIMINAL APPEAL NO. 48 OF 2016

#### CONSOLIDATED WITH

#### CRIMINAL APPEAL NO. 47 OF 2016

**PETER KIMANZI MALII.....1<sup>ST</sup> APPLICANT**

**TITUS KIKUYU MUASYA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

### RULING

1. **Peter Kimanzi Mali**, hereinafter referred to as the 1<sup>st</sup> Applicant and **Titus Kikuyu Muasya**, hereinafter referred to as the 2<sup>nd</sup> Applicant for purposes of their applications dated **13<sup>th</sup> December, 2016**. The Applicants were jointly charged with two Counts of **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code**. They were tried convicted and sentenced to serve **1½ years imprisonment** on each Count. Sentences were to run consecutively.

2. Being dissatisfied with the conviction and sentence thereof they have appealed and now seek to be released on bail pending Appeal.

3. The Applications are based on grounds that: The Appeal shall be rendered nugatory given the time taken for Appeals to be heard and that the Applicants were not legally represented and it was their Constitutional right to be represented.

4. The applications are supported by affidavits sworn by **Vincent Suyianka Lempaa**, their Advocate who depones that if the Appeal succeeds it will be rendered nugatory as they will have served most of the sentence term. The Appeal has a high probability of success; they are breadwinners of their family and they did attend court as required while out on bond.

5. At the hearing Counsel for the Applicants, **Mr. Lempaa** reiterated what he stated in the affidavit and submitted further that the Applicants have been serving sentence since **11<sup>th</sup> August, 2016**. There are glaring errors in the decision and they will attend court if admitted on reasonable bail terms.

6. The State through **Mr. Wanjala** State Counsel opposed the application on the ground that there were no exceptional circumstances demonstrated by the Applicants who are convicts and that the Appeal has no chance of succeeding.

7. In the case of **Jivraj Shah vs. Republic**, the Court of Appeal held inter alia:

***“(1) The principle 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 interest 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 an account of some substantial point of law to be urged and the sentence or substantial part of it will have been served by the time the appeal is heard and conditions for granting bail will exist.”***

8. It has been alleged but not demonstrated that the Appeal has a high chance of succeeding. Therefore, depriving the Appellants herein freedom is not prejudicial to them since they are no longer innocent having been proved guilty by the Lower Court. As correctly submitted by the learned State Counsel, nothing exceptional exists that would move this court to grant the Applicants bail. Lack of representation by a legal representative is not a ground for release on bail. With regard to the Appeal being rendered nugatory I do take note that the Appeals

have been presented before court. The record of the Lower Court has been availed. The appeals are due for admission. Had Counsel pursued the process of admission the Appeal could have been heard and judgment delivered. In the circumstances the Appeals will not be rendered nugatory.

9. In the premises I find the application lacking merit. Accordingly, it is dismissed.

10. It is so ordered.

**Dated, Signed and Delivered at Kitui this 17<sup>th</sup> day of January, 2017.**

**L. N. MUTENDE**

**JUDGE**