



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 22 OF 2013

(Consolidated with Criminal Appeal No. 24 of 2013)

PETER KINYUA IRERI 1ST APPELLANT/APPLICANT

JOHN MUCHANGI NJIRU2ND APPELLANT/APPLICANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Criminal Case No.478 of 2011 at the Chief Magistrate's Court at Embu by Hon. R.O. OIGARA –Ag SPM on 30/05/2013

R U L I N G

The Appellants/Applicants appeals were consolidated on 7/8/2013.They had filed applications dated 26/6/2013 seeking orders of their release on bond pending appeal.

The applications will be heard together. They are premised on the following grounds;

1. ***That the Appellants were tried on a defective charge in that the charge did not state the essential ingredients of the offence.***
2. ***That the evidence tendered did not prove the charge the Appellants were convicted of.***
3. ***That the sentence slapped on the Appellants was harsh and excessive and therefore wrong in principle.***
4. ***The sentence was passed on wrong factual basis.***
5. ***Matters were taken into account which should not have been.***
6. ***That the learned trial Magistrate erred in law and facts in upholding that the Prosecution had proved their case beyond reasonable doubts.***

It is also supported by an affidavit by Counsel Mr. Githinji. In his submissions he pointed out errors/omissions which he thinks favour his clients whom he says should be released on bond pending the hearing of the appeal. M/s Ingahizu for the State did not oppose application.

The Applicants were convicted of two offences;

- i. Preparation to commit a felony contrary to section 308(1) of the Penal Code
- ii. Being in possession of a firearm without a firearm certificate contrary to section 4(1) as read with section 4(3) of the Firearm Act (Cap.114 Laws of Kenya).

The facts of the case are that PW1 – PW4 who are Community Policing Officers were on normal patrol when they met the two Applicants. The 2nd Applicant was carrying something in a sack. He was asked to open it and when he did a gun was recovered from therein. They were arrested and charged. They had no certificate authorizing them to be in possession. PW5 confirmed that the gun was a firearm under the Provisions of the Firearm Act.

In their unsworn defence they denied the charge facing them.

The general presumption is that when one has been convicted she/he has been properly convicted. Conditions which the Court should consider in an application for bond/bail pending appeal are;

1. The appeal has high chances of success and is not frivolous and vexatious.
2. Exceptional circumstances exist
3. There are chances that the Applicant may complete the sentence before his/her appeal is heard.

Issues of the particulars in the charge sheet and the evidence adduced have been raised. I have had a chance of pursuing the record. My finding is that the Applicants have an arguable appeal.

Considering and applying the above conditions and in particular condition number one (1), I do find this to be an instance where I should exercise my discretion and admit the Applicants on bail.

Each Applicant to execute a bond of shs.150,000/= with a surety in similar sum.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 8TH DAY OF JULY 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Ingahizu for State

Mr. Githinji for Appellants/Applicants

Kirong – C/c