REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 81 OF 2010

GEOFFREY MWANGI MURIUKI .....APPLICANT

VERSUS

REPUBLIC .....PROSECUTOR

RULING

1. The Application before me is dated 02/07/2019. In the main, it seeks for a prayer that the Applicant, Geoffrey Mwangi Muriuki, be admitted to bail pending his appeal to the Court of Appeal.

2. Briefly, the facts are as follows. In a judgment dated 22nd June, 2018, Geoffrey Mwangi Muriuki ("Applicant") was convicted of the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The trial was conducted by Lady Justice Maureen Odero who prepared the judgment. I read the judgment on her behalf as she had been transferred out of the station by the time the judgment was ready for delivery.

3. It also fell upon me to conduct a sentence hearing and pass sentence. In a Sentence Ruling delivered on 18/10/2018, I sentenced the Applicant to ten years imprisonment in a considered Ruling.

4. The Applicant is dissatisfied with both the conviction and the sentence. He has timeously appealed to the Court of Appeal and now requests to be admitted to bail pending the hearing and disposition of his appeal.

5. Through his lawyers, the Applicant filed a Supporting Affidavit, a Further Affidavit and Written Submissions in support of his application. His counsel, Mr. King'ang'i, also appeared on video-conference and orally highlighted the submissions.

6. The Applicant was vehemently opposed by the Prosecution. The DPP filed a Replying Affidavit. Ms. Verne Odero, Prosecuting Counsel, orally opposed the application during the video-conference hearing.

7. In short, Mr. King'ang'i argued sequentially as follows:

> a. First, he argued that the filed appeal has very high chances of success. He argued that he thought so on at least two grounds. One, that he was of the opinion that the Court did not properly appraise the uncorroborated evidence of an accomplice in arriving at its guilty verdict. Relying on Benard Munungi Njau v Republic [1979]eKLR, Mr. Kang'ang'i argued that the Court erred because it did not treat the testimony of PW1 as the evidence of an accomplice and thereby require corroboration. Two, Mr. King'ang'i argued that the tenor of the judgment makes it clear that the Court did not take into account the Defence evidence.
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> Taken together, Mr. King'ang'i argued that the appeal stood very high chances of success.
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> b. Second, Mr. King'ang'i argued that the Court should take note of the fact that the appeal is likely to take very long to be decided and that, as a result, the Applicant is likely to serve all or substantially all of his sentence. In support of this position, Mr. King'ang'i argued that two factors conspire to make it likely that the appeal will take very long to conclude: first the on-going COVID-19 pandemic with attendant effects on case delays; and second, the publicly known shortage of judges at the Court of Appeal owing to the refusal by the President of the Republic to swear in Judges of Appeal recommended for appointment by the Judicial Services Commission. Mr. King'ang'i pointed out that this impasse had led to the filing of a suit being Nairobi Petition No. 359 of 2019: Adrian Kamotho Njenga v Attorney General & 2 Others in which the Court declared the President's actions unconstitutional.
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> c. Third, Mr. King'ang'i argued that there are special circumstances in this case. The special circumstances are that, he said, the Applicant is sick: he suffers from abdominal pains which culminated in his admission to a hospital in June, 2019. He said that the

Applicant had attached doctor's receipts and other documentation to support this.

8. The Applicant relied on a number of authorities on the question of bail pending appeal. The most pertinent ones are: ***Jivraj Shah v Republic [1986] KLR 605*** and ***Peter Hinga Ngatho v Republic [2015] eKLR***. The former is a celebrated decision of the Court of Appeal which laid down the principles the Court applies in determining cases of bail pending appeal. The latter is a persuasive decision of the High Court applying those principles.

9. Ms. Odero, the Prosecuting Counsel, opposed the Appeal on all the points raised by Mr. King'ang'i. She is of the opinion that the appeal filed raises no arguable points and is hopelessly poised for dismissal. She argued that the Court properly appraised the evidence of PW1 as an accomplice; and further that the judgment is clear that the Court took into consideration the defence evidence.

10. Ms. Odero further disputed that there are any special circumstances warranting the grant of the orders sought. She said that there has been no demonstration that the appeal will take unduly long to complete; and indicated that the Applicant could request for an expedited hearing date from the Court of Appeal. Regarding the alleged illness of the Applicant, Ms. Odero pointed out that the documents attached show that the illness was, first, for June, 2019; and second, it was not for any life threatening condition to warrant release on bail.

11. Finally, Ms. Odero asked the Court to consider the antecedents of the Applicant before making any order for release on bail. She argued that evidence adduced in the trial showed that the Applicant was a law breaker who had engaged in a serious felony during the commission of which he attacked the Deceased and killed him. This showed, Ms. Odero argued, that the Applicant was a violent man who should not benefit from positive orders of bail pending appeal. She also said that the Court should consider the Deceased's family's sentiments and sense of justice: they had strongly recommended that the Applicant be put in custodial sentence for them to feel that justice had been served. A discharge of the Applicant on bail pending appeal, she argued, will deepen their sense of loss and injustice.

12. As our case law has firmly established, bail pending disposition of an Appellant's case at the Court of Appeal is not an entitlement. Instead, it is generally a matter of the Court's discretion upon the Appellant demonstrating to the Court existence of certain exceptional circumstances. There is no constitutional requirement to grant bail pending appeal. Article 49(i)(h) of the Constitution creates an entitlement to bail *pending a charge or trial* unless there are compelling reasons not to grant one. By its very terms, that section talks of bail to be granted before conviction and is an instance of the veritable legal principle that a person is presumed innocent until proven guilty. That presumption, however, dissipates upon a valid conviction. At that point, a different presumption kicks in: the presumption of the validity of the conviction and sentence imposed. See ***Isaac Tulicha Guyo v. Republic*** **(Crim. App. No. 16 of 2010**). As the Court of Appeals said in the ***Guyo Case***:

> *The Court has to bear in mind that a person who has been convicted by a competent court has lost the presumption of innocence conferred on him by the Constitution and that during the hearing of the pending appeal, the burden would be upon the convicted person to show that the conviction was wrong. It is not, therefore, surprising that it has been stated time and time again that bail pending appeal will only be granted in rare and exceptional circumstances.*

13. Consequently, our jurisprudence has established the legal principles which should govern the granting of bail pending appeal. The court of Appeal succinctly restated those principles in the case of ***Dominic Karanja v. Republic*** **[1986] K.L.R. 612** thus:

> *That the most important issue was that if the appeal had such overwhelming chances of success, there was no justification for depriving the applicant of his liberty and the minor relevant consideration would be whether there were exceptional or unusual circumstances*.

14. The Court of Appeal restated these principles in ***Jivraj Shah v. Republic*** **[1986] K.L.R. 605** which the Applicant's counsel cited in the following words:

> *The Principal consideration in an application for bail pending appeal is the, existence of exceptional on unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail will exist….The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which discloses substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued.*

15. Hence, even after ***Jivraj***, the test remains the same: the question here is whether the Applicant herein has satisfied the two-pronged ***Karanja*** **Test** spelled above. First, has the Applicant demonstrated that his appeal has overwhelming chances of success or are there circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed? I am perfectly willing to accept that the appeal preferred by the Applicant is eminently arguable. Indeed, it would be a rare first appeal where a party is entitled to challenge both findings of facts and law on a de novo basis that would not raise at least a single arguable point on appeal. However, saying that an appeal is arguable is not the same thing as saying that it has overwhelming chances of success. Again, it would be a rare appeal which the same Court that returned a verdict would make a finding that it has an overwhelming chance of success.

16. Consequently, while I accept that appeal as filed raises at least some arguable points – where "arguable" is defined as simply a non-frivolous and substantial point worthy of being considered by the appellate Court not one that is cock-sure of succeeding, that alone does not entitle the Applicant to bail pending appeal. A finding that an appeal has overwhelming chances of success alone would militate in favour of the grant of bail pending appeal; but not one that is merely an arguable appeal.

17. For the Applicant to succeed, then, he needed to demonstrate that there are special circumstances to warrant such an order. He attempted to do by arguing, first, that his appeal is likely to take too long to determine and thereby end up serving a substantial part of his sentence

before its disposition; and second, that he is unwell.

18. It is true that where an Applicant demonstrates that he is likely to serve the whole of her sentence or a substantial portion of it, that would likely constitute unusual and exceptional circumstances warranting the grant of bail pending appeal. Here, the Applicant was sentenced to ten years in prison. He argues that shortage of judges at the Court of Appeal as compounded by the case delays anticipated due to the COVID-19 pandemic makes it likely that his appeal will be delayed quite unduly. I do not think this double speculation meets the high threshold needed to warrant release on bail pending appeal. Perhaps the Court of Appeal, more cognisant of its own docket might make the conclusion that an undue delay is likely. However, on the basis of the public information that is available, there is no basis for making a finding that the Applicant, as indeed all others awaiting the disposition of appeals at the Court of Appeal are likely to experience such long delays that they are automatically entitled to bail pending appeal.

19. What about the health grounds suggested as forming unusual circumstances? As various cases have held, ill health without more is not sufficient reason to warrant release of a convicted applicant on bail pending appeal. One would have to demonstrate that either the ailment is serious enough of the kind that it cannot be managed in Prison; or that it is life-threatening and humanitarian considerations militate release on bail pending appeal. Neither conditions has been satisfied here. Indeed, all the documents filed demonstrate is that the Applicant had an abdominal illness a year ago. No current medical report is attached to show whether it persists and whether it is a condition which cannot be easily handled by the medical personnel in the Prison system.

20. The upshot is that the Applicant has failed to demonstrate to the Court that either his appeal has **overwhelming chances of success on the merits or that there are any exceptional or unusual circumstances to warrant his release on bail pending his appeal at the Court of Appeal. In the circumstances, the Applicant's application must fail and it is hereby dismissed**.

21. Orders accordingly.

Dated and delivered at Nairobi this 28th day of May, 2020.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. _____, and the Court Assistant

were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media and select members of the public were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.