



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL CASE NO. 29 OF 2014**

**REPUBLIC .....PROSECUTOR/RESPONDENT**

**VERSUS**

**BENMUCHERA MWEBI..... ACCUSED/APPLICANT**

**RULING**

1. This ruling is on whether an accused person who is convicted of the offence of murder and sentenced to suffer death is entitled to bail pending an appeal to the Court of Appeal. The applicant herein, **BEN MUCHERA MWEBI**, approached this Court by way of a Notice of Motion dated 07/01/2016 seeking the following orders:

***1. This Application be certified urgent***

***2. The Honourable Court be pleased to grant and/ or admit the Applicant herein to bail pending the hearing and determination of his intended Criminal Appeal to the Court of Appeal at Kisumu.***

***3. That upon granting prayer (2) above, the Honourable Court be pleased to suspend the execution of the sentence and / or Order Appealed against pending the hearing and determination of the Appeal.***

***4. Costs of this application be borne by the Applicant.***

***5. Such further and /or other orders be made as the court may deem fit just and expedient, in the interest of justice.***

2. The application was supported by the Affidavit of the Applicant sworn on even date. The Respondent opposed the application by filing Grounds of Opposition.

3. Parties tendered oral submissions where the applicant through Counsel made reference to three authorities in urging this Court to grant the orders sought. They included the persuasive decision of the **Supreme Court of Uganda Criminal Application No. 1 of 2003 Arvind Patel v. Uganda** (unreported) where the applicant therein had been charged with the offence of conspiracy to murder before the subordinate courts, found guilty, convicted and sentenced to five years in prison. His twin appeals to the High Court and the Court of Appeal were both dismissed hence the application to the apex Court in Uganda. There was also the Court of Appeal at Nairobi **Criminal Application No. 18 of 1986** reported as **Jivraj Shah v. Republic (1986) eKLR** where the applicant's appeal to the High Court against conviction and sentence of two years imprisonment was dismissed where an appeal was preferred to the Court of Appeal and an application for bail

pending appeal made. The last decision was that of **Samuel Macharia Njagi v. Republic (2013)eKLR** where an applicant was admitted to bail pending an appeal he had preferred to the Court of Appeal against the dismissal of his appeal by the High Court which appeal challenged the conviction and sentence by a subordinate court which sentenced the applicant to four years imprisonment for the offence of preparing to commit a felony.

4. Responding to the applicant's submissions, the State which had earlier on filed a formal opposition to the application reconsidered its position and conceded to the application on the ground that the applicant had fully observed the bail terms during the trial.
5. The **Constitution of Kenya** provides for a conditional right to bond or bail to an accused person pending hearing and determination of a trial. That is in **Article 49(1)(h)**. The **Constitution** however makes no provisions for bail or bond to a convicted person pending hearing and determination of an appeal. Those provisions are instead contained in the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya (**the CPC**).
6. **Part XI** of the CPC provides for appeals from subordinate courts to the High Court. Under **Sections 356 and 357**, the CPC makes provisions for bail pending the hearing and determination of appeals in such instances.
7. Appeals from the High Court to the Court of Appeal are provided for under **Section 379** of the CPC and in respect to the granting of bail pending an appeal from the High Court to the Court of Appeal, **Section 379(4)** of the CPC has the following to say:

*'379 (4) Save in a case where the appellant has been sentenced to death, a Judge of the High Court, or of the Court of Appeal, may where an appeal to the Court of appeal has been lodged under this section, grant bail pending the hearing and determination of the appeal.'*

8. The above provision is so clear on the issue. The High Court therefore has no jurisdiction to either entertain an application for or admit a convicted person who is sentenced to suffer death to bail pending the hearing and determination of an appeal against that conviction and/or sentence. This position is so depicted throughout all the decisions referred to by the applicant herein as none of the applicants therein had been sentenced to suffer death.
9. Since **Section 379(4)** of the CPC has not been amended, repealed or declared unconstitutional, this Court declines to take up jurisdiction which has not been handed over to it. It hence remains the sole and humble duty of this Court to uphold the provisions of **Section 379(4)** of the CPC.
10. Consequently the Notice of Motion dated 07/01/2016 be and is hereby struck out for want of jurisdiction.

**DELIVERED, DATED and SIGNED** and at **MIGORI** this **20<sup>th</sup>** day of **July** 2016.

**A. C. MRIMA**

**JUDGE**