



## IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 38 OF 2015

JOHN KARANJA NJUGUNA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

### RULING

The applicant herein **John Karanja Njuguna** filed this application under certificate of urgency seeking to be released on bail/bond during the pendency of his appeal. The appellant had been tried on a charge of murder by the High Court sitting in Nakuru on 20/12/2013. **Hon. Justice Anyara Emukule**, the trial Judge convicted the applicant and his co-accused persons of the offence of murder. Thereafter on 28/2/2014 the learned Judge sentenced each of the convicts including the applicant to a term of twenty (20) years imprisonment. The applicant has filed an appeal to the Court of Appeal against both his conviction and sentence. In the meantime the applicant through his advocate **Mr. Maragia** has filed this application seeking bail pending the hearing and determination of his appeal. The State represented by **Mr. Chirchir** learned state counsel vehemently opposed the application.

I have carefully perused the record of the trial. It must be pointed out at this early stage that this court is **not** being asked to determine the merits or otherwise of the applicant's appeal. Indeed this court being of concurrent jurisdiction to the trial court cannot sit in appeal over that judgment. This court is only being asked to determine whether the applicant's prayer for bail pending appeal is merited. Counsel for the applicant has cited Article 51 of the Constitution of Kenya in support of his contention that even as a convicted person the applicant is still entitled to enjoy all the fundamental rights and freedoms guaranteed by Article 50 of the same Constitution. Article 50 of the Constitution provides for the rights which must be accorded to all suspects in order to ensure that they are accorded a fair trial. This includes the rights to be presumed innocent. Article 49(h) provides for the rights of an accused person to be released on bail. A person such as the applicant herein who has already been tried by an impartial court in a fair, open and transparent trial cannot in my view claim the right to presumption of innocence in the same way that a non-convicted suspect would do. The applicant is no longer a mere suspect – he is now a convict for murder having been tried and found guilty by a court of competent jurisdiction. I am very alive to the fact that the applicant has opted to exercise his right of appeal and the Court of Appeal may very well overturn his conviction by the High Court but until that happens the presumption of innocence is no longer available to the applicant.

Article 51 of the Constitution of Kenya provides:-

**“A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental, freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.”** (my emphasis).

In asserting his right to be released on bail the applicant is no doubt relying on the Rights to Liberty as enshrined in the Bill of Rights. Although Article 51 guarantees all fundamental rights and freedoms to all persons imprisoned or detained in custody (remandees) the said Article contains an important proviso. The right to liberty is clearly inconsistent with the fact of the applicant's imprisonment after trial for the offence of murder. As such the applicant cannot claim the right to liberty as of right given his present circumstance.

Be that as it may the courts do have discretion to grant to a convict bail pending appeal. Specifically Sections 356(1) and 357(1) of the Criminal Procedure Code authorizes the High Court to grant bail. In coming to a decision on whether or not to grant bail pending appeal a court is required to put into consideration several points including but not limited to:-

- nature and seriousness of the offence;
- likelihood that the accused may abscond and fail to attend the appeal hearing;
- whether the appeal is arguable;
- severity of the sentence;
- how long it is likely to take before appeal can be heard and determined.

In this case the applicant was convicted on the charge of murder which is without doubt a serious offence. He was after conviction sentenced to serve twenty (20) years imprisonment. Once again I reiterate that it is not my duty to determine the chances of success or otherwise of the applicant's appeal. That would be overstepping my mandate. I take note of the fact that the Court of Appeal is due to sit in Nakuru in a couple of weeks time. This appeal is likely to be disposed of quite soon. Taking into account all relevant factors, I am not persuaded that this is a case in which bail pending appeal ought to be granted. I therefore decline to admit the applicant to bail and I direct that he continue to serve his sentence pending the hearing and determination of his appeal. It is so ordered.

**Dated in Nakuru this 25<sup>th</sup> day of September, 2015.**

**MAUREEN A. ODERO**

**JUDGE**

**PRESENT:**

Mr. Maragia for applicant

M/s Ngovi for State