



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO.81 OF 2011**

**JOSIAH NYANGARI ORERO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The application before me dated (4<sup>th</sup> December 2012 and filed on 6<sup>th</sup> December 2013) seeks orders that the applicant be released on bail pending retrial. The applicant, **Josiah Nyangari Orero** has sworn an affidavit stating that he was arrested in May 2004 and charged with the offence of murder for which he was tried and convicted; that he subsequently appealed to the Court of Appeal which ruled that the trial was “muddled with serious irregularities”, quashed the conviction and sentence and ordered a retrial; that the current retrial would take long; and that he will attend trial if released on bail.

**No. 38874 PC Peter Makara** (the investigating officer) has sworn a replying affidavit opposing the application. He avers that the applicant was likely to be found guilty in the retrial; that the retrial has been delayed by the applicant himself; that there exist “bad blood between the accused and the witnesses arising from the 1<sup>st</sup> trial” and that there was likelihood of the applicant intimidating and interfering with such witnesses; and further, that the applicant was likely to abscond.

Submissions have been made by **Mr. Okatch** for the applicant to the effect that the previous proceedings which have been quashed by the court of appeal ought not be used against the accused and that there cannot be bad blood between the applicant and the witnesses there having been a time lapse of almost 10 years since the alleged murder. Learned Counsel has also dismissed the authorities presented by the respondent as having been overtaken by the new constitution.

**Ms. Ikol** for the respondent has submitted that the applicant was likely to abscond if released. She bases her fear on the fact that the 1<sup>st</sup> trial court arrived at a conviction and that the appellate court only quashed the conviction on a technicality. It is her fear that the applicant may abscond owing to the knowledge that he may be convicted again.

I have considered this application. I have also taken the liberty to peruse the record. I note that the judgment of the appellate court is not in the file. I cannot therefore form an opinion on the submissions of counsel to the effect that the retrial was ordered on a technicality. I observe however that there are various orders for the psychiatric evaluation of the applicant to facilitate the start of the retrial. I also observe from the record that the applicant had made an earlier application for bail which was considered and dismissed by **Kimaru J.** vide a reasoned ruling dated 26<sup>th</sup> January 2011. Neither the applicant nor the respondent has referred to the said application or ruling. In the ruling, **Kimaru J.** considered the possibility of the applicant absconding or interfering with witnesses if released. On denying the applicant

bail, **Kimaru J.** rendered himself thus;-

“In the present application, having taken into consideration the facts of this case and the applicable law, there is no doubt that the accused will be a flight risk if he is released on bail pending the hearing and determination of this case. Unlike the case where the accused person may not know the strength of the prosecution’s case facing him, in the present case, the accused has been convicted on the same charge but subsequently had the conviction quashed by the Court of Appeal on a technicality. In its wisdom, the Court of Appeal was of the opinion that the appellant should be retried: It was apparent to this court that the Court of Appeal was of the opinion that there was potentially sufficient evidence which will be adduced by the prosecution witnesses that may result in the conviction of the accused.”

I agree with the conclusions drawn by **Kimaru J.** in this application. No new circumstances have been demonstrated to me to warrant a review of the observations and conclusions drawn by **Kimaru J.** as quoted above. I therefore do not consider this application one in which the court’s discretion can be exercised in favour of the applicant.

The application is dismissed.

**Ruling delivered, dated and signed at Nairobi this 28<sup>th</sup> day of August, 2013**

**R. LAGAT - KORIR**

**JUDGE**

**In the presence of:**

<b>Mosinko</b>	<b>:</b>	<b>Court clerk</b>
<b>Josiah Nyangari Orero</b>	<b>:</b>	<b>Applicant</b>
<b>N/A Okatch</b>	<b>:</b>	<b>For the accused/applicant</b>
<b>Konga h/b for Ikol</b>	<b>∴</b>	<b>For the State/respondent</b>