



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 81 OF 2001**

**REPUBLIC .....**  
**PROSECUTOR**

**VERSUS**

**JOSIAH NYANGARI ORERO.....**  
**.....ACCUSED**

**RULING**

According to the information filed by the prosecution, the accused is charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence was that on 17<sup>th</sup> May 2004 at Park Road Nairobi, the accused murdered Elizabeth Musembi. The accused was tried and convicted of the offence. He appealed to the Court of Appeal against the said decision. The appeal was successful. His conviction was quashed basically on a legal technicality. The Court of Appeal, however, directed that the accused be retried. In reaching this decision, the Court of Appeal must have taken into consideration the holding in **Fatehali Manji – versus – Republic [1966] EA 343** at page 344 which states as follows:

*“... In general, a retrial will be ordered only when the original trial was illegal or defective; It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessary follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”*

The Court of Appeal must have formed the opinion that there is potentially sufficient evidence which the prosecution can adduce during the retrial to enable the accused to be convicted. In the present application the accused has invoked the provisions of **Article 49(1) (h)** of the **Constitution** seeking to be admitted to bail pending the hearing and determination of the retried case. The accused argues that since he was first arraigned before the court, he has been in remand custody for a period of eight (8) years. He opines that since the offence that he has been charged with is bailable, there is no reason why he should not be released on bail pending the hearing of the case. The accused promises that he will abide by any terms that may be imposed by this court to enable him be released on bail pending the hearing and determination of the case.

On the other hand, the prosecution is opposed to the accused being released on bail. IP Kileges, the investigating officer of the case, has sworn a replying affidavit putting forward the reasons why the accused should not be released on bail. The accused has narrated the circumstances that led to the conviction of the accused by the High Court and the subsequent order by the Court of Appeal directing that the accused to be retried. The investigating officer explained that the accused will likely to interfere with the witnesses if he is released on bail. The reason for this fear, he posed, was because the accused has already heard the witnesses as they testified and clearly became aware of the nature of the evidence that will be tendered against him. It was the prosecution’s case that there was no guarantee that if the accused is released on bond he will attend court on the dates that the case will be scheduled for hearing. This is because the accused was a person of no fixed abode. The state further argued that the fact

that the accused has been in remand custody for eight years is sufficient incentive for the accused to abscond if he is released on bond pending the hearing of the criminal case facing him.

The principles to be considered by this court in granting bail to an accused person facing a capital offence, I think, is now well settled. **Article 49(1)(b)** of the **Constitution** provides that an accused person has a right to be released on bond on reasonable terms unless there are compelling reasons for such an accused person not to be so released. Apart from the **Constitution**, the court has to take into consideration several other factors which were elucidated by Ochieng J in **Nairobi HCCRC No. 23 of 2008 Republic – vs- Joseph Wambua Mutunga & 3 others** where at page 16 of his ruling is cited the Malawian decision of **Fadweck Mvaha – vs – The Republic MSCA Criminal Appeal No. 25 of 2005** (unreported) with approval. At page 9 of that decision that court had this to say:-

*“... In considering the issue of bail and the interest of justice the paramount issues the court will consider include the likelihood of the accused attending his trial, the risk that if he is released on bail the accused person may interfere with the prosecution witnesses or tamper with evidence, the likelihood of his committing another offence of other offences, and also the risk to the accused person, if granted bail and his return to his village where the deceased’s relation may harm him. In considering these issues the court may take into account, among other things, such factors such as the gravity of the offence, the punishment likely to be imposed and, indeed, as was conceded by the court in the **Lunguzi** Case that the accused is a sickly person.”*

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.

Whereas this court is aware of the constitutional tenet to the effect that every accused person is presumed innocent until proven guilty by a court of competent jurisdiction, this court cannot ignore the fears expressed by the State that the accused may likely interfere with the witnesses if he is released on bail. Another aspect which is apparent from the court proceedings is that the accused person having attempted to take his life after allegedly committing the offence. It is likely that he may be a danger to his own life if he is released on bail.

For the above reasons, this court is of the opinion that the accused has not made a suitable case to be released on bond pending the trial. There are compelling reasons to persuade this court refuse to grant bail. The bail application lacks merit and is hereby dismissed. The accused shall remain in remand custody pending the hearing and determination of the criminal case facing him.

**DATED at NAIROBI this 26<sup>th</sup> day of JANUARY 2012.**

**L. KIMARU**  
**JUDGE**