**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Miscellaneous Application 182 of 2011**

**GEORGE MUNGAI WANJIRU..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**DIRECTIONS**

The application before me is for Bail pending appeal.

The applicant, GEORGE MUNGAI WANJIRU, was tried before the Chief Magistrate's Court, Nairobi, in Criminal Case No. 1411/2003.

He was convicted for the offence of robbery with violence **contrary to section 296 (2) of the Penal Code**. He was then sentenced to suffer death as by law prescribed.

Being dissatisfied with both the conviction and the sentence, the applicant appealed to the High Court. His appeal is No. 438/2006.

After waiting for about five (5) years, the applicant felt that there had been an undue delay in the hearing and determination of his appeal. He therefore filed an application for bail pending appeal. In the alternative, the applicant asked the court to prioritise the hearing and determination of his appeal.

For an application for bail to be canvassed, the record of the proceedings from the trial court must be made available. The reason for that is that the applicantion's determination is largely dependant upon the appeal's chances of success.

The applicant, the respondent and the court hearing the application, cannot assess the appeal's chances of success if the record of the proceedings from which the appeal emanates, is not available to

them.

Therefore, this court called for the record of the proceedings from the trial court.

On 11th July 2011, the Executive Officer at the Chief Magistrate's Court wrote to the High Court, informing the court that there were suspicions that the original records from the trial court had been tampered with. Consequently, the Criminal Investigations Department (C.I.D) commenced investigations into the alleged tampering.

From the investigations, the CID were convinced that the records had been tampered with.

Because the records had been tampered with, the CID traced the persons who were believed to have been involved in that exercise. When the persons were arrested, they were charged in **Chief Magistrate's Court, Criminal Case No. 53 of 2009 Republic Vs Dominic Njoka & 2 others.**

And because the record which was tampered with is an exhibit before the court handling that criminal case, it cannot be available to the High Court, for purposes of either the Bail Application or the Appeal.

In any event, even if the said exhibit was made available, it could not be useful, because it is not a true record of what transpired before the trial court.

The applicant has confirmed to this court that the record was definitely tampered with. He pointed out that the record was incomplete.

Ms Mwanza, learned state counsel, indicated that the state would probably ask for a retrial, subject to the availability of the witnesses and exhibits. She therefore asked for more time to ascertain whether or not the prosecution witnesses and the exhibits would be available, if this court were to order for a retrial.

Meanwhile, the applicant reiterated that because he had remained in custody for the last nine (9) years, any further delay was unfair to him.

He added that he had no objection to an order for a retrial.

When this court asked him if he had any other suggestions about how the matter can move forward, the applicant said that he had none.

In the circumstances, it is obvious that the application for Bail pending appeal cannot be prosecuted. I suggest that the applicant should withdraw it.

Secondly, as the appeal cannot be heard before one Judge; and because an order for a retrial can only be made after the determination of the appeal, I do direct that the appeal be listed for hearing before a bench of two Judges. The hearing date for the said appeal is to be fixed on priority basis.

Finally, the appellant and the respondent must start giving consideration to the submissions that they will advance before the court that will determine the appeal. I point out that fact because ordinarily there are clear guidelines in cases in which an appellate court is asked to order for a retrial. The first such consideration is that the appeal is allowed, and that the basis for allowing it is that there was an irregularity in the manner in which the trial was conducted.

In this instance, I have not heard any of the parties suggest that there was any irregularity in the proceedings. Therefore, it will be interesting to hear from the parties about their reasons for seeking a retrial or any other reliefs.

**Dated, Signed and Delivered at Nairobi, this 15th day of May, 2012.**

**.....**
**FRED A. OCHIENG**
**JUDGE**