REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 51 OF 2002

REUBEN OCHANGO KAFUNA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On 3rd July 2014, the applicant and two of his co-accused were convicted of murder. They were sentenced to suffer death. The particulars were that on the night of 10th and 11th January 2002 at Mbaya Village, Lugari District within the former Western Province, they jointly murdered Joseph Kariuki, Maureen Wamaitha, Agness Alusiola and Joseph Alusiola.

2. The applicant has preferred an appeal. Pending the hearing and determination of the appeal, the applicant has presented a notice of motion dated 2nd February 2015 praying for bail. It is supported by a deposition sworn by his learned counsel Mr. Nteng'a Marube on even date. The motion is predicated upon articles 22, 23 and 165 of the Constitution and section 379 of the Criminal Procedure Code.

3. The gravamen of the motion is that the appeal has overwhelming chances of success; and, unless the applicant is released forthwith, he will suffer irreparable damage. It is averred that the grounds in the memorandum of appeal are arguable.

4. On 3rd June 2015, I heard submissions on the matter. The thrust of the appeal is three-pronged. First, that the applicant was convicted on weak circumstantial evidence. In this case, he contends that when the 2nd accused was arrested, he mentioned him to the investigating officer which led to the arrest of the applicant. He contends that an unfair inference of guilt was made, merely because he went back to his rural home. Secondly, the applicant claims that eight of the witnesses were heard before the judge sitting with assessors. However, the remaining six witnesses were heard by the judge sitting alone. Thirdly, the applicant submitted that the trial court erred by relying on the testimony of PW10 and PW13. In a synopsis, the applicant's case is that the prosecution did not prove the charges beyond reasonable doubt; and, that his continued incarceration is a violation of his constitutional rights.

5. The motion is contested by the State. Learned State Counsel Mr. Mulati submitted that there are no exceptional circumstances in this case to warrant grant of bail; that the applicant was properly convicted; and, that a closer reading of article 49 of the Constitution and section 379 of the Criminal Procedure Code show that the applicant is not entitled to bail at this stage.

6. The legal parameters in an application of this nature were well stated by the Court of Appeal in *Jivraj*

Shah v Republic [1986] KLR 605-

> *"If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point of law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision is Somo v Republic* [1972] EA 476 *which was referred to by this court with approval in Criminal Application No. NAI 14 of 1986, Daniel Dominic Karanja v Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed."*

7. It would be inappropriate at this stage to comment about the veracity or otherwise of the evidence presented at the trial. That will be the true province of the Court of Appeal. It is true that *eight* of the witnesses were heard by the judge *sitting with assessors*. The remaining *six* witnesses were heard by the judge *sitting alone*. I am aware of the amendments to the Criminal Procedure Code that did away with the requirement of assessors in a murder trial at the High Court. It will be for the appellate court to determine whether there was a failure of justice or irregularity in this case. Suffice to say that the argument is not *novel* and does not impress me as a *substantial point of law* to be urged.

8. Whether the trial court drew a wrong inference of guilt; or, convicted the accused on weak circumstantial evidence, will be a matter to be weighed afresh by the appellate court. Being a first appeal, the court is duty bound to re-evaluate all the evidence on record and to draw its own conclusions. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Okeno v Republic* [1972] EA 32.

9. I have studied the judgment. The trial court was alive that the evidence was *circumstantial*. It devoted a large part of the judgment on the circumstances under which it could *convict* on the evidence. The court found that the applicant's disappearance from the *locus in quo* indicated guilt; and, amounted to further *corroboration*. Besides, the court found that the 3rd, 5th, 6th, and 7th accused said they were together with the applicant on 14th January 2002. The evidence of PW13, which the applicant challenges, indicated that the stolen items were taken to the house of the applicant. I also note that the court considered the *alibi* tendered by the applicant and *discounted* it.

10. I thus find that the matters raised by the applicant are *important*: but they do *not* raise a *substantial point of law*. The grounds of appeal may be *arguable*. Like I have stated, it will be the true province of the appellate court to *re-evaluate* all the evidence and draw its own conclusions. But I am not persuaded that there are *exceptional grounds* or that a *substantial point of law or evidence* has been urged. In a nutshell I cannot say the appeal has *overwhelming* chances of success as to sway the court to grant bail pending appeal.

11. The appellant was sentenced to *suffer death*. It is a mandatory sentence. *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal Appeal 5 of 2008 [2013] eKLR. The Constitution allows bail for *all* categories of offences. But I am alive that the appellant has already been *convicted*. The *presumption* of innocence no longer holds true. The considerations for grant of bail at this stage are thus markedly different. As I have stated I am *not* satisfied that the appeal has such *overwhelming* chances of success that there is *no* justification for depriving the applicant his liberty. *Dominic Karanja v Republic* [1986] KLR 612.

12. In the result, the notice of motion dated 2nd February 2015 is devoid of merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 14th day of July 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

The applicant.

Ms. Torosi for Mr. Marube for the applicant.

Mr. Ngumbi for Mr. Mulati for the State.

Mr. Kemboi, Court Clerk.