IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & SICHALE, JJ.A.)

CRIMINAL APPLICATION NO. 3 OF 2020

BETWEEN

RAPHAEL MUOKI KALUNGU.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an application under Rule 5 (2) (a) and Rule

5 (2) (b) for bail pending appeal from the Ruling of the High

Court of Kenya at Nairobi (Wakiaga, J.) refusing to admit the

applicant to bail given on 28th January, 2020 inCriminal Case No. 77 of 2014)

****

RULING OF THE COURT

The applicant faces a charge of murder contrary to **Section 203** as read with Section 204 of the Penal Code in the High Court, where he is accused that between 6th and 7th July, 2014, along Mombasa Road, within Nairobi County, jointly with others not before the court, he caused the death of Mary Waruguru Maina.

After pleading not guilty to these charges, he applied to be released on bond pending trial. The court, (Kimaru, J.) considered the application but dismissed it being satisfied that the prosecution had established compelling reasons against releasing the applicant on bond.

Subsequently, the trial commenced before Wakiaga, J. and by the time the ruling giving rise to this application was rendered, 20 prosecution witnesses had testified and the applicant put on his defence. At this stage, the applicant renewed his application for bond.

The learned Judge who understood the application before him to be one to review the aforesaid order of Kimaru, J. rejected it by a ruling of 28th January, 2020, rejecting the arguments that Kimaru, J. having dismissed the application, the applicant was barred from bringing a similar application for reason of being res judicata, and expressing the view that, though the applicant was denied bond on the ground of likely interference with prosecution witnesses, and that though this position has changed with the testimony of all prosecution witnesses, there was a new compelling reason to deny him bail, namely, the apparent strength of the evidence so far presented by the prosecution. He said in conclusion that;

> "**25. In the present case, after hearing ten witnesses, I am prepared to say that the prosecution case is not tenuous. I do not wish to say more for the fear of embarrassing the remaining trial and pre-judging issues. This in itself would not be sufficient reason to deny bail as I stated above. However, here, it is coupled with the unresolved question of Mr. Nelson Njiru who is a fugitive of justice in this case. Both direct evidence received in Court as well as the statement by the 1st Accused Person establish a connection between Mr. Njiru and both Accused Persons. The almost literal vanishing of Mr. Njiru into thin air should give us pause about the real possibility that the two Accused Persons could follow suit hence subverting justice in this case…**
>
> **26. It is a rare and exceptional case when the Court will deny bail to an Accused Person. The circumstances of this case makes this one of those rare and exceptional cases. To mitigate the effect of this decision and balance the rights of the**

Accused Persons, the Court shall prioritize the hearing of this case…

27… I am prepared to find that the risk of the accused absconding trial is real and may not be wished away notwithstanding the support of his parents".

With that, the Judge dismissed the application prompting the applicant to take out the instant notice of motion pursuant to **Articles 22, 25, 49(1)(b)(c) and (d), 50(2) and 64(3)** of the Constitution, section 3 of the Appellate Jurisdiction Act, sections **123, 123A, 379 and 379A** of the Criminal Procedure Code and **Rule 5(2)(a), 5(2)(b), 42,43,47,62,63,64 and 67** of the Court of Appeal Rules. In this motion the applicant once again applies to be released on bond on reasonable terms pending the hearing and determination of the appeal challenging the decision of Wakiaga, J. of 28th day of January, 2020 or in the alternative, that he simply be released on bail or bond on reasonable terms.

The application is premised on the grounds that since the only reason for denying the applicant bond has dissipated with the testimony of all the prosecution witnesses, there is no basis for his continued incarceration since 2014 when he was first arraigned in court; that there are unusual, special and exceptional circumstances that warrant the release of the applicant on bail during his trial; that due to the advent of Covid - 19, he has been unable to prepare for his defence with his counsel, given the restrictions imposed by the Prison services and after the trial court rejected both his requests to be escorted to his counsel's chambers and an opportunity to meet his counsel at Kamiti Prison in the absence of prisons guards; that he cannot be a flight risk after air travel was suspended; that for the same reason of Covid-19 pandemic, his trial will be on indefinite hold; and that the expected delay will not only amount to a denial of justice but also a derogation of his constitutional right to bail.

For these reasons, the applicant contends that the intended appeal is arguable because the Judge erred in treating his application as a review of an earlier ruling; that he wrongly shifted the burden of proving the existence of compelling reasons to the applicant; and that there was no basis for finding him to be a flight risk.

Both the respondent and the victim have opposed the application, specifically on the grounds that this Court lacks jurisdiction to entertain it considering the provisions of **Rules 5(2)(a) and 59** of the Court of Appeal Rules; that the application does not meet the threshold contemplated under **Rule 5(2)(a); t**hat the applicant has not demonstrated exceptional and unusual circumstances to warrant the granting of the relief he has sought; and that the applicant has himself contributed to the delay in concluding his trial by looking for all manner of excuses.

This application raises an interesting question. Whereas it has been brought under numerous Articles of the Constitution and sections of the law, which we have deliberately set out at the beginning of this ruling, the true question is whether this Court can grant bail or bond to an accused person whose trial is on going before the High Court and where the High Court has denied bail or bond to him, in the exercise of its discretion. That is the question to be determined when the appeal challenging the ruling of 28th January, 2020 is finally brought and heard.

But for us at this stage, the question to answer is, whether, in the interim, we can grant the orders applied for in the instant application: To released the applicant on bail or bond on reasonable terms pending the hearing and determination of the intended appeal challenging decision of 28th day of January, 2020 or in the alternative, to simply release him on bail or bond on reasonable terms.

Article 164(3) of the Constitution and section 3 of the Appellate Jurisdiction Act both provide that the Court of Appeal has jurisdiction to hear appeals from the High Court; and any other court or tribunal as prescribed by an Act of Parliament.

The applicant has evinced, by lodging the notice of appeal, his intention to challenge the impugned decision of the High Court. And that is all he needs to do to invoke the Court's jurisdiction to bring the appeal. There can be no doubt that, by **Article 50(2)(a)** of the Constitution, the applicant, whose trial is still on-going, has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved at the conclusion of his trial. By that presumption, the applicant is entitled, by **Article 49(1)(h)** to be released on bond or bail, on reasonable conditions during the trial, "unless there are compelling reasons".

As we have stated, the question for determination on appeal will be whether the learned trial Judge improperly exercised his discretion in finding that there are compelling reasons to hold the applicant in his present state. At this stage, we have no material to pass judgment one way or another on the question. We cannot resort to our inherent powers and grant the prayers sought, which are themselves final in their application without the benefit of full arguments that the learned judge had or this Court will have.

Rule 5(2)(a) of our rules is headed **"Suspension of sentence, injunction and stay of execution and stay of further proceedings".** The message from it is clear; that it applies only to the instances we have bolded. It provides that;

"(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;

In our view, therefore, this rule is not relevant to the applicant's circumstances. From what we have said in brief, it should be clear that the Court cannot be of any assistance to the applicant.

As a matter of interest, though, we note that the decision from which the applicant intends to appeal was made on 28th January, 2020, over one year ago, yet, no appeal has been brought. Within that year, in the spirit of Article 159 and the "oxygen rule"; that justice shall not be delayed; that counsel and parties are under a duty to assist the Court to determine cases expeditiously, we believe the trial would have been concluded. All that has been pending for one year is the defence hearing.

We do not intend to say more than we have said except to state, in conclusion, that we find no substance in this application. It is accordingly dismissed.

The applicant has the option to bring his appeal from the decision of 28th January, 2020 or face the last leg of his trial.

Dated and delivered at Nairobi this 19th day of February, 2021.

W. OUKO, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR