REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Case 26 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

DANSON MGUNYA

KASSIM SHEEBWANA MOHAMMED.....ACCUSED

R U L I N G

The two Applicants herein Danson Mgunya and Kassim Sheebwana Mohamed were charged in this court on 13th October, 2008 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. It was alleged that on 21st day of May, 2006 at Mbwajumali Village within Kizingitini Division of Lamu District within Coast Province murdered one Mselem Mohammed Ali,

The two denied the charge and pleas of Not Guilty finally entered on 16.12.2008 At the said time under the provisions of Section 123 of the Criminal Procedure Code the offence of murder was non-bailable. No accused person in respect of murder, treason or robbery with violence could be granted or released on bail. They remained in prison remand from 13.10.2008 to date 13.10.2010

However, the law charged with the promulgation of the New Constitution of Kenya on 27th August 2010. Under the provisions of Article 49 it is now possible for an accused on a murder charge to apply for and be released on bail/bond. Article 49 1(h) provides as follows:-

"49 (I)(h)

An arrested person has the right to be released on bond or bail, or reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released."

In view of this provision the said Article 49 overrides the provisions of S. 123 of the Criminal Code. The supremacy of the Constitution is set out in Article 2 which inter alia provides:-

"2 (1) This Constitution is the Supreme Law of the Republic and binds all persons and all State Organs at both levels of government.

(2)……

(3)……..

(4) Any law including customary law, that is inconsistent with this Constitution is void to the extent of the said inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5)……

(6)…… "

The result of the foregoing is that a murder suspect has a Constitutional Right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.

In the light of the New Constitution and the aforesaid provisions, the Applicants naturally exercised their right to apply for bail pending the finalization of the trial. They made their application through their advocates, Dr. Khaminwa and Mr. Odera respectively at the resumed hearing on 5th October 2010. By this time, the prosecution had called 10 witnesses out of the 21 listed witnesses. This means that the trial was half-way. The trial started in earnest before me on 10th September 2009.

Our new law has only come into force from 27th August 2010. There are no rules or procedures which have been passed or even suggested on how bail applications for capital offences have to be made. Capital offences are those offences which attract the mandatory sentences of Death. The sentence of death is still applicable to one convicted of the offence of murder. It is the only sentence expressly provided for in the Penal Code.

In some countries or jurisdictions there are statutory procedures for the evaluation of bail applications and the criteria to be used. In others there is a practice that affidavit evidence be tendered and considered when considering a bail application.

In view of the foregoing it is my view that, in the present circumstances and context and more so at this threshold application of the provisions of the New Constitution, once an accused person applies for bail in a murder case, then the same principles and consideration in bail applications in respect of any other Criminal offences shall be applicable.

The Primary consideration is whether the Accused person shall attend court and be available at the trial. All factors, and facts and circumstances must be considered with this central principle in mind.

In the case of *WATORO –V- REPUBLIC (1991) KLR 220* at P.283 Porter J stated:

"… I think I have made it clear over a number of rulings in bail application that I take the view on authority that the paramount consideration in bail application is whether the Accused will turn up for his trial…"

Counsel for the Applicants submitted that the Applicants are presumed to be innocent until proven guilty. That the First accused is and Administration Police Officer while the second Accused is a Chief. That they are old people, born and bred in Kenya. It is submitted that their children and spouses are in Kenya. That they are not likely to abscond.

Dr. Khaminwa asked the wife of his client to stand up in court which she did to demonstrate that they are Senior Citizens who will not run away or abscond.

Counsel for the Respondent Mr. Muteti opposed the application for bail. He submitted that:-

- The sentence for murder is death.
- Section 26 (3) of the New Constitution saves the death sentences and is still the sentence for murder.
- People of Kenya through the Referendum decided to retain the death sentenced.
- As a result, the severity of the sentence should be considered and the resulting possibility of flight or absconding for fear of being sentenced to death and executed if convicted.
- Article 49 (1) (h) is not absolute. It is not an automatic right.
- The court must exercise its discretion judiciously.
- There are compelling reasons to deny bail.
- In this case the public interest is great.
- This is demonstrated by the fact that the court room has always been crowded when this matter comes for trial.
- The security of the accused should be taken into account as they can be harmed by the public and the court must protect the suspects.
- There should be no discrimination on the ground that the applicants are public servants. There must be equality in the eyes of the public.
- They have heard evidence against them which are incriminating.
- The temptation to run away is a significant consideration.
- The victim and the family must be considered. The suffering and anguish of the victim's family ought to be taken into account.
- That 10 witnesses have testified and 4 remaining.
- The case has proceeded expeditiously and is about to be concluded.
- The public will lose faith in the Justice system if bail is granted.

In their rejoinder through counsel, the applicants told the court that the public

turn out in court was in their favour. That most of those in court are friends and relatives and of the Chief, the 2nd Accused. That they have not felt any tension or threat to their lives. That the Advocates have never feared for their lives or been threatened.

I have considered the application, submissions by all counsel, the record and all material placed before me. In Kenya it is not the practice for parties to file affidavits evidence when applications for bail are made. In most cases, advocates or the accused persons personally present oral submissions including statements of fact from the bar. There is no rule or bar against the use of affidavit evidence. Perhaps this is because in most cases, the particulars of the accused i.e. name, address, occupation, standing in society etc are not disputed facts though in the future where these facts are contested or where there are questions about the character, demeanor or other propensities then it may be necessary and wise to invite affidavit evidence to assist the court weigh the facts and analyze the possibilities/probabilities of flight or any alleged interference with witnesses and evidence etc.

I have carefully considered the aforesaid arguments and submissions. The counsel for the 1st Applicant Dr. Khaminwa referred to a decision of the Supreme court of Nigeria ALHAJI MUJAHID DUKUBO – ASARI –V- FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006; in which the said court set out some essential criteria on the issue of whether to grant bail pending trial of an accused by the trial court. Justice Ibrahim Tanko Muhammad J.S.C. held that:-

"…When it come to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

(i) The nature of the charges
(ii) The strength of the evidence which supports the charge
(iii) The gravity of the punishment in the event of conviction
(iv) The previous criminal record of the accused if any

(v) The probability that the accused may not surrender himself for trial

(vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him

(vii) The likelihood of further charges being brought against the accused.

(viii) The probability of guilty

(ix) Detention for the protection of the accused

(x) The necessity to procure medical or social report pending final disposal of the case.

The said court stated that the criteria was not exhaustive. Other factors not mentioned my relevant to the determination of grant or refusal of bail to an accused person.

I am of the view that in time, trial courts in Kenya may need to set out a basic criteria for our own situation and circumstances. However I am of the view that most of the criteria set out above are reasonable and ought to apply in our cases with a caveat that the most important or critical criteria is whether the Accused will turn up or be available at his trial.

I think that criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is statements that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence.

While agreeing with Justice Ibrahim Tanko Muhammad's judgment, one of the three judges on the Bench, Justice Niki Tobi gave an illuminating and persuasive decision when he said:-

"The main function of bail is to ensure the presence of the accused at the trial ……

Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above. Dealing with

the said criteria, the Working Party on bail procedure in Magistrate's Courts in the United Kingdom said in paragraph 22 of the Report:-

"There are a number of other considerations to be taken not account in deciding a bail application, but in general they are not in themselves reasons for granting or refusing bail, but indicators of the likelihood or otherwise of the defendant's appearance"

As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the greater the incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanor, like affray. The distinction between capital or non capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused person absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature. This does not however apply in this case because the appellant is charged with treasonable felony, a heinous offence carrying a prison term of life. (*emphasis is mine)*

Bail was refused in the above case on the basis of the contents of a confessional statement of the Applicant. The court took into account the instability and political turbulence in the Niger Delta area where the Applicant was from.

I was referred to a case decided by the High Court of Malawi in *CLIVE MACHOLEWE –V- REPUBLIC (171 OF 2004) (2004) MWHC 53,* which I found quite interesting and touched on similar issues of law and facts. In the said case Justice J. Katsala referred to a Malawi Supreme Court of Appeal decision – M. LUNGUZI –V- REPUBLIC, MSCA APPEAL NO. 1 OF 1995 Unreported) in which the Supreme Court stated:-

"There are two points which must be made about the effect of Section 42 (2) e of the Constitution. In our view the right to bail which Section 42 (2) (e) now enshrines does not

create an absolute right to bail. The Section still reserves the discretion to the courts and it makes the position absolutely clear that courts can refuse bail if they are satisfied that the interest of Justice so requires. The second point we would like to make it is that Section 42 (2) (e) does not create a new right. The right to bail has always been known to our law and all that section 42 (2) (e) does is to give it Constitutional force. We would like to emphasize that S.42 (2) (e) does not give an absolute right to bail. The courts will continue to exercise their discretion depending on the circumstances obtaining in each particular case .

……"

S.42 2 (e) of the Malawi Constitution almost bears similarity with our Article 49 (h) (1) but there is a difference in the provision. It provides that:

"Every person arrested for or accused of the alleged Commission of an offence shall, in addition to the rights which he or she has as detained person, have the right to be released from detention, with or without bail unless the interest of justice requires otherwise."

Hence while discretion as given to the court, the court is to consider a criterion of what the interest of justice would demand.

In our Constitution it is stated expressly, positively and unequivocally that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial. This means an accused must be released on bail or bail on reasonable conditions. The only exception or fetter to this right is that there must be "compelling reasons not to be released" . The court must therefore exercise its discretion with this in mind – "existence of compelling reasons."

I do hold that if the prosecutor objects to the release of the Accused from detention during the pendency of a trial, then at the first instance, the burden should be on the prosecution and not the accused person to prove or at least demonstrate the existence of the "compelling reasons". This is the correct procedure as stated by Justice J. Katsala in the Malawi case when he stated:-

"……

In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to release from detention. The burden should be on the state and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order."

I am persuaded by the aforesaid interpretation and principles of law.

It is my view and understanding of the provision of our New Constitution that:-

- An accused/person under arrest/detention has a right to challenge the lawfulness of his detention – before the court of law.

- He has the right to be brought before an independent and impartial court not later than 24 hours after his arrest to be charged or to be informed of the reason for his further detention failing which he must be released.

- The burden is on the state to take the arrested person to be before that court.

- It is at the court that the state must prove to the satisfaction of the court that the Accused though entitled to release he should not be released because of the existence of compelling reasons which must be stated, described and explained.

- If it is based on belief, then the justification or basis for the belief must be demonstrated or shown.

- This must be done within 24 hours unless the arrest was not on an ordinary court day then at the end of the next court day.

In this case, the reasons on which the prosecution rely to prove the existence of compelling reasons have been given above.

The accused are elderly members of society. They are Kenya Citizens. They are married with children. They have fixed abodes and the places of residence are known. The 1st accused is an administration police officer while the 2nd accused is a chief. They are public servants working for the Government.

From the facts and circumstances of the case, they do not appear that they are the type of people who are likely to abscond and leave the jurisdiction of the court. Where would they run to? What resources do they have to run away? There are relatively Senior Citizens who are approaching retirement age.

I have always wondered in this case and nobody and in particular the prosecution have not told me whey the two accused were charged almost two and a half ($2^1/_2$) years after the alleged murder or incident. The alleged offence was committed on 19th May 2006 and yet the accused were arrested and later produced in court on 13.10.2008. Why were they not charged immediately? What was going on for $2^1/_2$ years? Nobody has alleged that the accused had run away or absconded. They were still within the jurisdiction of the courts. In fact by the time they were charged they still were in employment. I have seen the court records. An inquest file was opened but I am not aware of an inquest which took place.

These questions will be answered at the end of this trial for record purposes.

For now, the said facts and conduct do not tend to show the accused are the type of people to abscond. If they were worried by the possibility of being charged with murder why did they not run away after the incident? Why continue with their lives and duties. To me this shows that they have no fear of being charged or face the same and they are unlikely to run away.

I think that with reasonable bail conditions, these accused persons will attend court for their trial.

The allegations about their security and possibility of being harmed by the public is not supported by any evidence. There is no evidence that any one threatened them or attacked them during the $2^1/_2$ years when they remained free. In fact that is the time they were in possible danger if they were considered as suspects and yet the state had not charged them.

In any case, the members of the public are deemed to know the law and the consequences of taking the law into their own hands.

There are 10 witnesses who have testified. I am told that the only remaining witnesses are formal witnesses (3 -4). As a result all the ordinary wananchi witnesses have testified. The police and doctor and investigation officer cannot be threatened or interfered with in my view.

I am not persuaded there are any risk of interference with witnesses or destruction of evidence. If there is any sign or proof that this has taken place while they are out there, then the state are at liberty to apply.

I therefore find that there are no compelling reasons to continue with detention of the accused at this stage. It does not matter that we are at the end of the trial with 3 witnesses remaining and that the case is about to end. Liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted. I will never take liberty for granted and I know neither will Dr. Khaminwa having both experienced the meaning of detention without trial and solitary confinement at Kamiti Prison during the struggle for the Second Liberation. Dr. Khaminwa suffered even more and longer incarcerations. We must interpret the Constitution in enhancing the rights and freedoms granted and enshrined rather than in any manner that curtails them. Each case must be decided in its own circumstances touch and context.

I do therefore order the release of the two accused on bail/bond. They are so released on a bond of Kshs.3, 000,000/- (Three million shillings) each with two sureties each for like amount.

Orders accordingly.

Dated and delivered at Mombasa this 15th day of October 2010.

MOHAMMED K. IBRAHIM

J U D G E

Mr. Muteti

I apply for copies of the typed proceedings and Ruling.

This matter raises an important point in law in the history of our country. I ask for an expeditious typing of proceedings to enable us consider everything. Otherwise we can take a date.

Dr. Khaminwa:

We ask for typed proceedings and Ruling.

Mr. Odera:

I ask for typed copies of the Ruling.

O R D E R

Further hearing shall be on 9.11.2010.

Ibrahim, J

Coram:

Ibrahim, J

Court clerk – Kazungu

Mr. Odera for the 2nd Accused

Dr. Khaminwa for the 1st Accused

Mr. Muteti for the state.

Ruling delivered in their presence.

Ibrahim, J

Republic v Danson Mgunya & another [2010] eKLR