



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

Criminal Case 47 of 2011

REPUBLIC

VERSUS

NICHOLAS NZOKA MBISI.....ACCUSED

RULING

1. By an application filed in Court on 20/01/12, **Nicholas Nzioka Mbisi** (“Mr. Mbisi”), the accused person herein, seeks to be admitted to bail pending the hearing of his criminal trial. He predicates his application in the Constitutional provisions and specifically section 49(i)(h) which stipulates:

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

2. **Mr. Mbisi** is charged with murder contrary to section 203 as read together with section 204 of the Penal Code. He is accused of killing his own father. He was presented in Court on 11/07/2011 and took the plea on 01/11/11.

3. During the hearing of the Application, Mr. Mbisi was represented by **Ms. Mwangi** who was holding brief for **Mrs. Nzei**. She simply relied on the application as filed.

4. In an unsworn “affidavit” (which, in the interests of justice I will treat as valid), Mr. Mbisi argues that it is his constitutional right to be admitted to bail. He relies on the famous case of *Damson Mgunya & Another v Republic* 2010 eKLR where Justice Ibrahim relied on section 49(i)(h) of the Constitution to grant bail to suspects facing a capital trial after finding that there were no compelling reasons to continue to hold the accused persons in detention.

5. Here, Mr. Mbisi pledges to come to Court and abide by any conditions placed by the Court. He says that he has contracted some serious medical conditions while in remand and needs to go home so that his family can take care of him. He says that he was infected in Tuberculosis while in custody and his body is also becoming paralyzed. No medical reports were attached, however. The only medical report on record is one by **Dr. Kokonya**, a psychiatrist who examined the accused and found him fit to withstand trial. Curiously, **Mr Mbisi** also says he needs to take care of his “one parent who is jobless and very old to afford to support herself.”

6. The state opposes the application for bail and raises three reasons. First, **Mr. Kimanthi**, for the Director of Public Prosecutions, argued that there is a very strong likelihood of interfering with witnesses since Mr. Mbisi will go back to live with his family. Yet, his own mother is the first prosecution witness

and his uncle is a crucial witness, too, in the trial in which he is accused of killing his own father. **Second, Mr. Kimanthi** says given the severity of the sentence associated with the offence of murder, it is likely that Mr. Mbisi will abscond. The fact that he has “tasted” (Mr. Kimanthi’s word), the conditions of remand makes it even more likely that he will not come back to face trial if released on bail. Third, Mr. Kimanthi argues that Mr. Mbisi should remain remanded for his own welfare: the members of the public are still hostile about his “offence” and they are likely to administer “mob justice.” Lastly, Mr. Kimanthi says there is overwhelming evidence of guilt here which is a factor in determining the likelihood of the accused showing up for his trial.

7. In response to these arguments, **Ms. Mwangi** said **Mr. Kimanthi’s** arguments are all based on speculation not facts and repeated her assertion that it is Mr. Mbisi’s constitutional right to be released on bail.

8. As *Justice Ibrahim* correctly held in the *Mgunya case* cited above, the bifurcation between bailable and non-bailable offences went by the wayside when the new Constitution was promulgated in 2010. Section 49(i)(h) gives every accused person the right to be released on bail. But, of course, it does not end there. That self-same section creates the proviso that bail can be denied where there are compelling reasons for doing so. Justice Ibrahim, who decided the *Mgunya case* and admitted the accused persons to bail there, came to the opposite result in *Republic v John Kahindi Karisa & 2 Others* (Mombasa HC Crim. Case No. 23 of 2010 (unreported)) where he said:

Balancing and considering all the facts and circumstances of this case and bearing in mind the Applicant’s Constitutional right to bail and their respective presumption of innocence I am still not convinced that the two accused here have given the court sufficient comfort and assurance that they will be available and attend court from time to time and for the trial.

9. The jurisprudence emerging in our cases is that the right to bail in section 49(i)(h) while an important constitutional right, like all other rights, is not an absolute one. Where there are compelling reasons, the Court can still deny bail. Like most other rights, the court must engage in an act of balancing the rights of the accused with the need to ensure that the accused will attend trial, and if convicted, be available to serve any sentence imposed by the Court. A number of cases have established the factors which a court should consider in exercising its discretion on whether to grant bail or not. Properly seen, these factors go towards establishing if there are “compelling reasons” to deny bail in the Constitutional parlance. The factors that have emerged include the following:

- a. *The likelihood that the accused person will appear at trial;*
- b. *The likelihood that the accused person will interfere with witnesses or with investigations;*
- c. *The severity of the sentence likely to be imposed in the event of conviction;*
- d. *The likelihood of commission of more offences or whether the accused person is a risk to the community;*
- e. *The safety or security of the accused person.*

10. The most important consideration, which the Nigerian case of *Mujahid Dukubo Asari v Federal Republic of Nigeria* SC 20A/2006 called the “mother” of all factors, is whether the accused person will show up at trial. As most courts realize, however, each case must turn on its own facts.

11. In the instant case, **Mr. Mbisi** pledges to show up at trial. He also pledges to abide by any conditions placed by the Court. However, beyond these pledges, there is little else to give the Court the comfort and security that he will show up at trial. The offence he faces is undeniably a very serious one. If convicted, he will be sentenced to death. Out of respect for the constitutional principle that Mr. Mbisi is innocent until proved guilty, I will say nothing about the strength of the prosecution case. Yet, it is obvious that he faces an offence which will create powerful incentives for him to abscond. In those circumstances, I think

it behooved him to put more on the record to give the Court the sense that he will not abscond if released on bail. He does not even disclose that he has a fixed abode. He does not disclose what he does for a living. He does not discuss his ties to the community. There is simply nothing, beyond his word, to reassure the Court that he will show up at trial.

12.I have also taken into consideration the plausible argument by **Mr. Kimanthi** that **Mr. Mbisi** is likely to interfere with witnesses. If one needed some evidence of that, it is in his very own “affidavit.” In it, he claims he wants to go home so that he can take care of his one, remaining jobless parent. That parent is his mother. That mother is the star prosecution witness. This in itself shows that Mr. Mbisi will be unlikely to be sufficiently self-aware to stay away from key prosecution witnesses who are members of his family. He concedes that he is going to live with the self-same family to get their help with his medical issues. This creates a serious concern about the likelihood of him interfering with witnesses.

13.In the circumstances, I am inclined to deny bail at this point. I will respectfully remind Mr. Mbisi that he will have an opportunity to renew his application in the future if the circumstances change.

DATED, SIGNED and DELIVERED at MACHAKOS this day 25TH day of JANUARY 2012.

J.M. NGUGI
JUDGE