**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Criminal Case 88 of 2005**

**REPUBLIC .....COMPLAINANT**

**VERSUS**

**REV. FR. DR. GUYO WAQO MALLEY.....1ST ACCUSED/APPLICANT**

**MOHAMMED MOULU BAGAJO .....2ND ACCUSED**

**ADEN IBRAHIM MOHAMMED .....3RD ACCUSED**

**MAHAT ALI HALAKE .....4TH ACCUSED**

**ROBA BALLA BARICHUI .....5TH ACCUSED**

**MOHAMMED DIKA WARIO.....6TH ACCUSED**

**R U L I N G**

The 1st, 2nd, 4th and 6th accused persons have filed applications for Bail pending trial.

All the six (6) accused persons are on trial for the offence of murder. The particulars of the charge

facing the accused persons are that on 14th of July 2005, at about 7.30p.m, at Isiolo Catholic Diocese in Isiolo District within Eastern Province, they, jointly with others who were not before the court, murdered **BISHOP LUIGI LOCATI**.

The accused persons were all arrested in the year 2005. Since then, they have remained in custody.

Prior to the promulgation of the Constitution of Kenya 2010, it was not possible for any person who had been charged with a capital offence to be granted bail pending the hearing and determination of his case. Therefore, because the sentence prescribed for the offence of murder is the death penalty, the accused persons could not have sought or obtained bail.

However, by dint of the provisions of **Article 49 (1) (h) of the Constitution of Kenya 2010,** 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.

In effect, there is no longer any category of criminal offences for which an accused person cannot, by law, apply to be granted bail or bond pending either his being charged or pending his trial. It is for that reason that the accused persons can now apply for bail even though they are on trial for the offence of murder.

The applications before me were consolidated, so as to make it more convenient for everybody concerned. The application was then canvassed by Mr. Ojwang Agina, on behalf of all the applicants.

Mr. Agina submitted that the application before the court was founded on **sections 123 (1) and 123 (3) of the Criminal Procedure Code,** as read together with **Article 49 (1) (h) of the Constitution of Kenya.**

The applicants pointed out that although they had already been in custody for over six (6) years, there still remained more than 20 prosecution witnesses who were yet to testify. Therefore, the applicants believe that it will take a considerable length of time to finalise the criminal case against them.

The applicants pointed out that because their case would be competing with other cases which were in the court's diary, there will be a long delay before this case can be concluded.

Therefore, the applicants asked this court to grant them bail, pointing out that it was their constitutional right.

If granted bail, the applicants vowed to adhere to any conditions which the court may impose.

They added that they were not likely to abscond from Kenya or from any part of Kenya where the court may restrict them to.

The applicants also said that they would not interfere with any of the prosecution witnesses, whether or not such witnesses had testified.

The 5th accused person denied the contention of the Investigating Officer, that he was arrested when he was trying to flee into Ethiopia. As far as the 5th accused person was concerned, the deposition of Mr. Mohamed Amin was nothing more than mere allegations.

On his part, the 1st accused person denied the contention that he would probably flee to Mozambique, if he was granted bail.

Meanwhile, as regards the death penalty, the applicants submitted that the said sentence, of itself, cannot be deemed as constituting a compelling reason.

The applicants also pointed out that although the prosecution had asserted that the evidence against them was great, it was not the function of the prosecution to assess the weight of evidence. That function can only be carried out by the court.

In answer to the application, Mr. Ondari, learned state counsel, submitted that although all criminal offences are now bailable under the new constitution, the right to be granted bail was not automatic.

As far as the respondent was concerned, the court can deny an accused person bail, if there were compelling reasons.

This court was invited to hold that the court being asked to grant bail pending trial should take into account two (2) principles, namely;

***(a) The possibility of the accused turning up for trial; and***

***(b) The seriousness of the offence, coupled with the likely sentence.***

The other factor that the respondent made reference to was the need to balance the right to bail against the other competing rights of the public.

In this case, the respondent submitted that the 1st accused had always had the desire to go to Mozambique.

The other applicants were said to have been hiding in Northern Kenya after committing the offence. In the circumstances, the respondent submitted that if bail was granted to the applicants, they are unlikely to be traced.

Meanwhile, some witnesses are said to have expressed real fear of the accused persons. Therefore, the respondent submitted that there was a probability that the witnesses may be interfered with by the applicants.

In **DAVID NJUNO MBIYU Vs. REPUBLIC, MISC. CRIMINAL APPLICATION NO. 86 OF 2010,** Ouko J. granted bail to an accused person who was on trial for murder.

The learned Judge expressed himself as follows;

***"It is for the state to demonstrate to the satisfaction of the court that there exists compelling reasons. The word 'compelling' connotes something forceful and powerful. In order for the court to deny an accused person bond, the reasons advanced by the state must be forceful and powerful."***

The court added that there was need to weigh whether or not an accused person would attend court for his trial.

I do share the views expressed by my learned brother.

Meanwhile, in the case of **GEORGE ANYONA & 3 OTHERS Vs REPUBLIC, MISC. CRIMINAL APPLICTION NO. 358 OF 1990**, Porter J. urged courts to approach applications for bail pending appeal with an inclination towards granting bail, requiring the State to advance justification for its stand that bail should not be granted.

Therefore, although that case was determined well before the current Constitution was enacted, it is relevant to the matter before me.

I will borrow the reasoning of the learned Judge on two (2) of the issues which he said should inform the court that was called upon to determine an application for bail pending trial. He said;

***"(a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty; where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.***

***(b) The strength of the prosecution's case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused is strong it may be justifiable to remand him in custody."***

In that case the applicants had been in police custody for a long period, prompting the court to observe that that was the basis upon;

***"which the applicants are entitled to appeal to the sympathy of the court . . .*** ."

Nonetheless the court rejected the application; notwithstanding the legal presumption of the applicant's innocence.

In **REPUBLIC Vs. DANSON MGUNYA & ANOTHER, (MSA) CRIMINAL CASE NO. 26O of 2008,** Ibrahim J. (as he then was) granted bail to 2 accused persons who were on trial for the offence of murder.

In the considered view of the learned Judge;

***". . . all other criteria are parasitic on the omnibus criterion of the 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 it is not invariably true."***

The court went on to find that after 10 prosecution witnesses had testified, there were only 3 to 4 "formal witnesses" who were yet to testify. Those formal witnesses included police officers, a doctor and the Investigating Officer. Therefore, the court held that the remaining witnesses cannot be threatened or interfered with.

In the course of arriving at his decision the learned Judge noted that in the Nigerian case of **ALHAJI MUJAHID DUKUBO ASARI Vs FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006;**

***"Bail was refused .... on the basis of the contents of a confessional statement of the Applicant."***

I would therefore presume that the court did take into account the nature and the *prima facie* strength of the evidence already on record by the time the accused persons applied for bail. That was possible because already, 10 witnesses had testified, leaving only about 4 more witnesses.

In **NGANGA Vs REPUBLIC [1985] KLR 451,** Chesoni J. (as he then was) held that the primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial.

The Court addressed itself as follows:

***"In considering whether or not the accused will attend his trial the following matters must be considered:***

***(a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty; where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive***

***(b) The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenous, even if the charge is serious. On the other hand, where the evidence against the accused is strong, it may be justified to remand him in custody."***

In this case, the prosecution has already called a total of 26 witnesses. The learned state counsel, Mr. Ondari, did inform the court and the accused persons that the prosecution would be calling no more than 5 to 6 more witnesses.

Indeed, it has been estimated by the prosecution that, subject to the length of the cross-examination undertaken by the accused persons, the remaining part of the prosecution case should be covered within a span of about 5 days. In effect, this case is literally on its last lap, currently.

Mr. Mohamed Amin, a Senior Assistant Commissioner of Police swore the Replying Affidavit, in answer to the affidavits of the applicants'.

At paragraph 20 of the said affidavit he deponed thus;

***"THAT serious incriminating evidence has already been received by the Court against all the accused persons and thus the temptation to flee and/or abscond is real."***

What is the nature and scope of the alleged serious incriminating evidence?

I believe that the respondent must be alluding to the statements which appear, on a *prima facie* basis, to constitute confessions made by the accused persons. In my considered view, if the alleged confessionary statements were to be upheld by the court as constituting confessions, the evidence against the accused persons would be damning.

Having so held, I find that the accused persons, who might be sentenced to death, if convicted, would therefore have a real incentive to abscond if they were granted bail.

In effect, that constitutes a compelling reason to warrant the rejection of the application for bail. Accordingly, as the interest of justice requires the court to refuse bail, the application is dismissed. However, I direct that the further hearing of this case be concluded as soon as practicably possible.

In that regard the further hearing will proceed on the dates already scheduled. The prosecution will not be granted any other adjournments. And the advocates for the accused persons will also be expected to attend court faithfully and timeously.

**Dated, Signed and Delivered at Nairobi, this 21st day of March, 2012**.

**.....**

**FRED A. OCHIENG**

**JUDGE**