IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 86 OF 2010

DAVID NJUNO MBIYU……...……APPLICANT

VERSUS

REPUBLIC……..RESPONDENT

RULING

The applicant, David Njuno Mbiyu is facing a charge of murder in Nakuru High Court Criminal Case No.129 of 2010.

In the meantime, he has brought the present motion on notice seeking to be admitted to bail pending his trial. That motion is premised on the grounds that the applicant is entitled to reasonable terms of bail. He is over 70 years of age and is hypertensive with other unrelated ailments as a result of which he requires constant medication and the doctor's attention. His medical condition is said to have deteriorated since his incarceration in prison remand.

He is a Kenyan citizen, a family man with many children and grandchildren who depend on him. He is a farmer at Kiambaa whose income is in millions of Kenya shillings, apart from being one of the administrators in the billion worth estate of the late Cabinet Minister, Mbiyu Koinange..

The State has opposed the application on the grounds contained in the replying affidavit of S.P. Abdi Salat, the Divisional Criminal Investigations Officer, Nakuru, who is also the investigating officer in the said criminal case. S.P. Salat has deposed that investigations are complete. He is however, opposed to the applicant's admission to bail for the reason that the applicant is likely to abscond in view of the seriousness of the charge; that it is in the interest of the applicant not to be released on bond as his life would be in danger due to the prevailing tension; that some witnesses in the criminal case have been threatened and further that the applicant, if released on bond may compromise and manipulate the witnesses. It is further averred that as a member of the Nakuru District Public Security Committee, S.P. Salat attended a meeting at Tipis Market where he witnessed heated argument between the communities and is apprehensive that if the applicant is released, ethnic violence may erupt. S.P. Salat argues that the prison has medical facilities to respond to the applicant's health condition.

I have given considerable thought to these arguments as well as the authorities cited by each side and hold the following view of the matter. No doubt the offence with which the applicant is charged is extremely serious and the possible punishment is equally severe.

The law on bail prior to the promulgation of the present Constitution provided that no person charged with an offence punishable by death could be admitted to bail (See **Section 72(5)** of the repealed**Constitution** and **Section 123(4)** of the **Criminal Procedure Code**). These provisions will only be remembered when Kenya's human rights history is written. **Article 49(1)(h)** of the **Constitution** now

provides in no uncertain terms that:

"49 (1) (h) Any arrested person has the right –

(a) …….

……..

…….…….

> **(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."**

The Constitution does not draw a distinction between capital and non-capital offences. All persons arrested for any criminal offence are entitled, as of right to be admitted to bail on reasonable conditions, unless there are compelling reasons that would justify their detention.

This provision is based on the rebuttable presumption of the law **(Article 50(2))** that every accused person has the right to be presumed innocent until the contrary is proved.

It is also in line with the provisions of the following international instruments on human rights which Kenya has ratified:

1. **Article 11 of the 1948 Universal Declaration of Human Rights**
2. **Article 7 of the African Charter on Human and Peoples' Rights and**
3. **Article 9 of the International Convention on Civil and Political Rights**

It is vital that the rules relating to fundamental rights be interpreted and construed in harmony with the above instruments. The State and every State organ (including the Courts, the Police and the office of the Director of Public Prosecutions) are enjoined by **Article 21** of the **Constitution** to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. The courts must play their constitutional role in ensuring the recognition and protection of these rights.

The respondent has opposed the application and advanced the following grounds as being the compelling reasons for the applicant not to be released:

- the likelihood of the applicant absconding
- the serious nature of the charge and possible punishment
- the prevailing tension and likelihood of ethnic violence
- the threats to some of the prosecution witnesses
- the likelihood of interference of the prosecution witnesses by the applicant

I have noted earlier that even prior to the promulgation of the Constitution on 27th August, 2010, the courts have, as a matter of course, been granting bail in non-capital criminal cases, unless the circumstances justify denial; that the Constitution today does not draw a distinction between capital and non-capital cases. The court can, however, in its absolute discretion deny an accused person bail if there are compelling reasons.

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 first ground advanced is that the applicant is likely to abscond. That assertion is not supported by any antecedents of the applicant. The fear is based only on the seriousness of the charge and likely punishment. If I were to uphold that argument, then no person charged with any serious offence would ever be granted bail and that would negate the very essence of the present Bill of Rights. After all, the court can guard against an accused person absconding by granting conditions to be fulfilled to ensure his attendance when required. The second ground is to the effect that there is tension on the ground which is likely to explode into violence. Whenever a person is killed in the manner the deceased was killed, there would naturally be anger among his family members and friends. But that alone cannot be a ground for denying the applicant his fundamental rights.

I reiterate that at this stage, the applicant is presumed innocent and any anger directed at him would be misplaced. Any person anticipating to attack a mere suspect will not only be committing a criminal offence but also usurping the jurisdiction of the court. The public cannot determine whether or not the applicant committed the offence with which he has been charged. That is the preserve of the court.

In the case of **Republic** Vs. **Shadrack Mutonga Maina and Joseph Maina Chege**, Nkr. H.C.CR.Case No.92 of 2010, I declined to grant bail after the State persuaded me that the lives of the applicants were in danger. There was evidence that upon the death of the deceased in that matter and after the accused persons were arrested, the villagers descended upon their properties, destroying their shop and attacking the wife of one of the suspects. Of course the conduct of the villagers was completely unacceptable and criminal and I believe some of them have been arrested and charged. But in view of that clear threat, it was safe for the time being to hold the applicants in custody and the court made it clear that they were at liberty to renew their application for bond should the situation improve.

Secondly, the security organs of the Government are bound by **Articles 29(c)** and **238** of the **Constitution** to ensure the security and safety of every Kenyan. The State cannot say, as it does here that the only secure place in this country is the prison. It was in the wisdom of Kenyans when they adopted the Constitution that persons facing any kind of criminal charge be released on bond. The court cannot question that wisdom and will give effect to the wishes of the people of Kenya, unless, of course there are compelling reason not to do so.

The deceased, it is said, was a leading human rights crusader in this region. The way he believed in human dignity is the same way I expect those who admired him to respect the rights and dignity of the applicant as well as the sanctity of the Constitution. The court in weighing whether or not to grant bail will be guided mainly by the consideration whether an accused person, given his antecedents, will attend his trial on a date and place fixed by the court and whether he is likely to interfere with witnesses and exhibits.

The applicant has averred that he has a fixed aboard; that he is a farmer; that he hails from a prominent family. Nothing has been shown to the court to suggest, even remotely that he is one of those who have threatened the prosecution witnesses. He is an elderly person with poor health. All the grounds presented by the respondent do not met the threshold of being compelling.

For the reasons I have given, it is ordered that:

1. the applicant shall be released upon executing a bond in the sum of Kshs.1,000,000 with two sureties of a similar sum
2. upon release, and pending his trial he will appear before this court for mention once every month starting from 28th February, 2011.
3. he will deposit with the court his passport and will not leave the country except with the court's leave
4. he will have no contact with the prosecution witnesses .
5. if he violates any of the above conditions, the bond shall be cancelled forthwith.

Dated, Delivered and Signed at Nakuru this 28th day of January, 2011

W. OUKO

JUDGE