REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 5 OF 2011

REPUBLIC ……..… PROSECUTOR

- Versus -

1. NZARO CHAI KARISA ….....……..……. 1ST ACCUSED

2. MOHAMMED TAWA KEA ……..……... 2ND ACCUSED

3. WILLIAM JUMA SHAURI ….....…… 3RD ACCUSED

4. SALIM SHAURI MWABORA .....…….…… 4TH ACCUSED

RULING

Nzaro Chai Karisa, Mohammed Tawa Kea, William Juma Shauri and Salim Shauri Mwabora are jointly charged with the murder of ALI MWABARI MWADZIWE who died on 6th February, 2011 at Shauri Moyo Village in the Kilifi County. They were first brought to court on 15th February 2011 and remain in the custody of the state. By an oral application presented by their counsel, all the four accused persons have applied to be placed on bail pending the hearing and determination of their case. To enable this court consider the application, it called for pre-bail reports which were prepared by B. M. Karanja a Probation Officer, Mombasa.

The office of the Directorate of Public Prosecution, through Mr. Gioche, opposed the application. It is their argument that there are compelling reasons why bail should be declined. That to release the accused persons before the trial is complete is to put them in harms way as there is extreme bad blood between them and the family of the deceased. Further, given the seriousness of the possible sentence, the death sentence, there is a real possibility that the accused persons would abscond. The State nevertheless asked the court to consider the special circumstances of the 1st and 2nd accused persons and make a decision based on the pre-bail reports. The former is aged 78 years and the latter is a minor aged 17 years.

The right to pre-trial bail is guaranteed by Articles 49(1) (h) and 49(2) of The Constitution 2010. The right as enshrined in Article 49(2) is absolute in respect to an offence punishable by a fine only or by imprisonment for not more than six months. Save for these category of offences, the right under Article 49 (1) (h) can be limited where there are compelling reasons to do so. The provisions of Article 49 (1) (h) of the Constitution seem clear enough. An accused person has a right to bond or bail unless there are compelling reasons for it not to be granted. Secondly, once granted, the conditions imposed must be reasonable. Reasonable so that they can as much as possible guarantee the attendance of the accused during trial and yet not so inhibitive as to make the right unattainable and a mirage. Where the accused

person is a child regard also needs to be given to the provisions of the Children Act, 2001.

The Child Offenders Rules governs the conduct of proceedings in respect of child offenders. They form part of The Children Act by virtue of the provisions of Section 194(1) of the Act. Rules 10 and 12 thereof deal directly with the question of bail and the child offender. Rule 10(4) provides that a child offender shall not be remanded for periods not exceeding;

(a) Six months in the case of an offence punishable by death; or

(b) Three months in the case of any other offence

Similar provisions are repeated in Rule 12(3) which reads as follows:-

"where, owing to its seriousness, a case is heard by a court superior to the Children's Court the maximum period for remand for a child shall be six months, after which the child shall be released on bail."

It must be remembered, however, that Article 49(1) (h) and 49(2) of the Constitution remain the key provisions of the law when it comes to issues of bail. A child offender facing a charge of murder will therefore benefit from the provision of Article 49(1) (h) and will be released on bail unless there is compelling reason. On the other hand, where for compelling reasons a child offender has been remanded in custody, the child cannot insist on automatic release after the end of either three months or six months as provided by Rule 10(4) of The Child Offenders Rules where those reasons persist. In this way there will be instances where the provisions of Rule 10(4) must give way to the provisions of Article 49(1) (h) of The Constitution. I have found it necessary to discuss these provisions because the 2nd accused, who is a minor, has been in custody for nine (9) months now and this court must determine whether there is good reason for him to remain there even after the permitted six months have lapsed.

I turn to consider the application of each of the accused starting with the 2nd accused. He is a child of 17 years as confirmed by an age assessment carried out by Dr. Sambi on 21st March, 2011. He is currently remanded in a separate Juvenile facility at Shimo La Tewa Prison. Although it is said that he is a candidate in this years K.C.P.E examinations, no evidence of his registration with the Kenya National Examinations Council was given to court. At any rate the State Counsel assured this court that the Prison has an examination center where inmates or remandees would sit their exams. The main thrust of the States objection to the release of all the accused persons is that they are a flight risk given that they face an offence which carries a possible sentence of death. Can this be said of the 2nd accused? Section 18(2) of The Children Act outlaws capital punishment or life imprisonment in respect of child offenders. Again, Section 190(2) of the same Act is in similar terms and explicitly provides that-

"No child shall be sentenced to death."

If the 2nd accused was to be found guilty of the offence he faces then the order (not "sentence" see Section 189 of The Children Act) for which he would be liable would neither be a death sentence or life imprisonment. Indeed the order he would suffer would be prescribed, not by the Penal Code, but by Section 191 of the Children's Act. In a sense the fate awaiting the 2nd accused (in the event of a finding of guilt) is certainly not as stark as submitted by the state. The compulsion to abscond is reduced.

The second argument by the state is that there is extreme hostility between the family of the deceased and the accused persons and to release them would be to put them in harms way. The court is not persuaded by this reason. This was a statement from the bar and there was no evidence, affidavit or otherwise, to support it. In any event this line of argument is untenable and has been roundly rejected by this court on other occasion. See the decision of Justice Ibrahim in **Mombasa Criminal Case No. 23 of 2010 Republic –Vs- John Kahindi Karisa and 2 Others** when he said-

"As a result, it would amount to a judicial aiding and abetting of this Criminal trend of public murders

or so called "mob justice" for the court to purport to deny bail to the accused so as to protect them from being lynched by members of the public."

Justice Sergon held the same view in (**Nyeri HC Criminal Case No. 38 of 2010 Republic –Vs- Oby Tylene Oyugi and 11 Others**). This argument falls in respect to the 2nd accused as it does for all the others.

So, in respect to the 2nd accused, I am not persuaded that the reasons advanced by the state reveal any compelling reason why the accused should not be granted bail. He took plea on 15th February, 2011 and has been in remand for about 9 (nine) months. Taking everything into account and bearing in mind that Article 53 (2) of The Constitution enjoins me to consider the child's best interest; I am inclined to admit the 2nd accused to bail. I shall at the end of this decision impose the terms and conditions.

I now turn to examine the circumstances of the 1st, 3rd and 4th accused. The pre-bail reports give some background information on the accused persons. The 1st accused is aged 78 years old but seems to enjoy good health. He is married to Mnyazi Chai and is blessed with six (6) children. He has no criminal record. Before his detention in custody he was residing in Mvita Mombasa. The probation report says that he owns land, palm trees and poultry. That there is no imminent threat to his stay in the community during his trial

The 3rd accused is William Juma Shauri; he is a young man of age 19 years and was born into a family of six. His mother is a widow and a peasant farmer in Rabai. In one part of the report it is said that he is single and yet in another that he is married and has children. That his family owns land and some chicken. That there is no sign of social hostility towards him. He also has no criminal record and was at the time of the offence working as a casual labourer.

The 4th accused is a casual labourer but holds a driving licence. He is married to Rukia Salim and are blessed with a child of two years. That he is a man of fixed abode and would be easy to trace. That there is no imminent threat to his stay in the community.

The application for bail was made orally. There is no legal requirement that an application of this nature should be formal. But I must identify with Justice Sergon when he says the following in **Criminal Case No. 38 of 2010 Republic –Vs- Oby Tylene Oyugi & 11 Others**:

"Under Article 49(1) (h) of the Constitution, the Court is given the discretion to admit an accused person to bail/bond pending trial irrespective of the offence facing the accused with a rider that the Court may deny bail/bond where compelling reasons are shown. The Constitution does not prescribe that an accused must file a formal application. It would appear the courts have appreciated the fact that the court can only be well informed if parties make formal applications supported by affidavit evidence and with a response of a replying affidavit by the State. It is only upon reading the affidavits at this stage that the court may decide the application either way."

The only background information of the accused persons available to this court is the pre-bail reports. Whilst this court should believe the contents of the reports it is disturbed by some inconsistencies it has noticed. In respect to the 3rd accused (William Juma Shauri); in one part it says that he is single and has never married and another that "***he has a wife and children who largely depend on him***." This inconsistence again appears in the report of the 2nd accused. The report in one part says that the 2nd accused, a boy of 17 years, has a wife and children!

On another occasion the court would have overlooked these inconsistencies but not on this. It is dealing with a weighty issue. In proceedings of this nature the content of pre-bail reports must scrupulously credible and consistent. The inconsistencies, minor as they may appear, has caused some discomfort to this court. For this reason I am not prepared to rely on them. As the accused persons did not give affidavit evidence, this court does not have any other information that would assure it that the 1st, 3rd and 4th

accused will faithfully attend their trial should they be admitted to bail.

I now turn to the unique circumstances of the 1st accused. He is a senior citizen, that he is 78 years old. There is an argument that the court takes account of his advanced age. But he is not unwell or sickly and was infact in active employment prior to his arrest. His situation has caused me considerable anxiety. The death sentence is an ominous possibility. The court needs some comfort and assurance that notwithstanding the possibility that his life may end in this way or that his sunset days may be spent on the death row he would not be tempted to abscond. No such assurance was given. The answer to this predicament lies in an early disposal of this matter.

In the circumstances, taking into account the gravity of the offence facing the accused person, the possibility that 1st, 3rd and 4th accused persons would be sentenced to death if convicted and that this court is not sufficiently assured that they will attend court and be available at trial, I find that there is a real and actual risk that the 1st, 3rd and 4th accused persons might abscond if released on bail. I find that there is compelling reasons for the trio not to be granted bail. The applications for the 1st, 3rd and 4th accused persons are hereby rejected.

In closing, this court fully recognizes that the Children Act requires that a case involving a Child Offender must be handled expeditiously and without unnecessary delay. It might be some consolation to 1st, 3rd and 4th accused persons that the court will ensure that the hearing and disposal hereof is given priority.

Ultimately, the court makes the following orders:-

(1) The application for bail by the 1st, 3rd and 4th accused persons is hereby refused.

(2) The application for bail by the 2nd accused person is hereby allowed and he shall be released on the following conditions;

(i) The parent/s and/or guardian of the 2nd accused shall sign a bond of Kshs. 500,000/- with one surety of like amount before the Deputy Registrar of this Court.

(ii) The 2nd accused person shall together with his parent/s or guardian appear for mention before the Deputy Registrar of this Court once every month on dates to be fixed by the Deputy Registrar.

(iii) The 2nd accused shall be placed under the supervision of The Chief, Ruruma Location, Kilifi County.

(3) The hearing of this trial to proceed on priority basis.

Dated and delivered at Mombasa this 4th day of November, 2011.

F. TUIYOTT
JUDGE