



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 100 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FRANCIS KARIKO KIMANI.....ACCUSED**

**RULING**

The Accused's counsel has applied to this court for the release of the accused on cash bail pending the trial of the accused. The accused's counsel has relied upon this court's epistolary jurisdiction vested to it under Section 22 of the Constitution in that the court should do justice and not rely on technicalities. Whereas this is order in simple cases, the matter is different where the offences are grave and the release of an accused person on bail may be dangerous to the accused himself and may generally lead to serious breaches of the peace.

Section 49(1)(h) of the Constitution requires that an accused person charged with an offence punishable by imprisonment for a term of not less than six months may be released on bond/bail unless there are compelling circumstances why he should not be released.

The repealed Constitution Section 72(5) prohibited the grant of bail to any person charged with the offence of murder. Section 123 of the Criminal Procedure Code, clearly states that no accused charged with the capital offences of murder, treason, robbery with violence and attempted robbery with violence may be released on bond/bail. To this list I would add persons charged with mass murder - acts of terrorism.

These are in my opinion compelling reasons within the provisions of Section 49(1)(h) of the Constitution why an accused person facing charges of an offence of a capital nature should not be released on bond/bail.

Further, an accused person being a member of society has breached his social contract by committing the serious offence. Society demands that while he is under suspicion, he must be kept aside until that suspicion is removed.

Finally, whilst epistolary jurisdiction developed in countries such as India is welcome it usually concerns major issues such as effects of industrialization on environment and today climate change, and are determined by the Supreme Court upon investigation of the issues raised in the complaint. That jurisdiction on matters of capital offences should be used sparingly and I would direct that it be done formally in writing as required under the Criminal Procedure Code. This will help the formal development of jurisprudence under the new Constitution.

For those reasons I decline to release the accused on bail, and direct that he be held in custody pending the hearing and determination of his case.

**Dated, signed and delivered at Nakuru this 8<sup>th</sup> day of October, 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**