



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KAKAMEGA  
CRIMINAL CASE NO. 32 OF 2010**

**REPUBLIC**

**VERSUS**

**STEPHEN MAMBILI ..... ACCUSED**

**RULING**

1. The Accused person herein, Godfrey Mwanzi, seeks bail pending the hearing of the charge of murder contrary to S.203 and S.204 of the Penal Code. Although his advocate did not mention any specific law that he relies upon, it is obvious that he is relying on Article 49 (1) (h) of the Constitution which provides as follows;

***“Article 49 (1) (h) - An arrested person has the right –***

- a).....***
- b) .....***
- c) .....***
- d) .....***
- e) .....***
- f) .....***
- g) .....***

***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.***

2. In opposing the release of the accused person on bail, the learned Senior Principal State Counsel has urged the point that the accused person and the deceased hailed from the same area and that there is the likelihood that the accused may interfere with witnesses and compromise the trial. Further, that it would be in the wider interests of justice that he should remain in custody pending the conclusion of his trial.

3. Learned Senior Principal State Counsel has also urged the point that the offence of murder, attracting the death sentence upon a conviction, is in a special category of offences and bail should in such a circumstance, be sparingly given.

4. In answer to the above submissions, the advocate for the accused argues that there is no evidence whatsoever that there is bad blood existent on the “**ground**” and all the issues raised by the State are based on speculation and not cogent facts.

5. Prior to 27.8.2010, it was generally the law that a person charged with the offence of murder was not entitled to bail. S.123 of the Criminal Procedure Code provides as follows , in that regard;

***“S.123 – (1) When a person, other than a person accused of murder, treason, robbery with violence or attempted robbery with violence is arrested or detained without warrant by an officer in charge of a police station, or appear or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail;***

***Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this part.***

***(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be***

*excessive.*

**(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”**

6. Although the above section has not been repealed, it would seem to be in direct conflict with Article 49 (1) (g) and (h) of the Constitution. I have elsewhere above reproduced Article 49 (1) (h) but for avoidance of doubt, sub-article (1) (g) provides as follows;

**“Article 49 (1) An arrested person has the right –**

.....

**(g) at the first court appearance, to be charged**

**or informed of the reason for the detention continuing, or to be released.**

7. The conflict between Article 49 (1) (h) and S.123 aforesaid can only be resolved by reference to Article 2 (4) of the Constitution which provides as follows;

**“Article 2 (4) – Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act of omission in contravention of this Constitution is invalid”.**

8. Further, Article 7 (1) of the Sixth schedule to the Constitution provides as follows;

**“Article 7 (1) – All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”(emphasis added)**

9. It is obvious from a casual reading of the above articles of the Constitution, that the denial of bail under S.123 of the Criminal Procedure Code is unconstitutional and the provision is void to that extent. The right to bail under Article 49 (1) (h) of the Constitution can only therefore be limited by the Constitution itself and not by legislation.

10. To my mind, there is only one limitation imposed by the Constitution to the granting of bail to an arrested person; that there are compelling reasons not to do so. What does this mean?

11. I understand the Constitution to be saying that the right to bail is not an absolute right and is limited, unlike the rights that shall not be limited under Article 25 of the Constitution. The State has urged the point that the charge of murder is serious and for reasons elsewhere set out above, the right to bail should be denied in the present instance.

12. I have taken into account the submissions made and I am inclined to deny bail for the following reasons;

13. Firstly, from the information filed on 8.9.2010, the alleged offence of murder was committed by the accused person with others **“jointly not before the court”**. It means that there are other suspects at large and investigations are on-going with regard to the matter and there is the really risk that if the accused is released, these investigations will be interfered with.

14. Secondly, the charge of murder is serious and carries the death sentence. The risk of the accused absconding if released is real and a clear possibility. No party has addressed that serious concern.

15. Thirdly, I agree with the State that where an offence is committed and it is serious as the present one, animosity is brewed and the accused may face the wrath of the deceased’s family and it is best not to perpetuate that animosity by sending him back to the same society that may consider him a threat, innocent as he may be.

16. Fourthly, it is my view that bail in murder cases should be curtailed and be granted sparingly because the effect of a casual release of murder suspects may trigger the public to take the law into their own hands and thus put the administration of justice into disrepute.

17. In the event, bail is denied at this stage but the accused may re-apply for the same later in this trial, as his right under Article 49(1) (h) aforesaid.

18. Orders accordingly.

**Delivered, dated and signed at Kakamega this 7<sup>th</sup> day of October, 2010**

**ISSAC LENAOLA  
JUDGE**