



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL CASE NO. 23 OF 2004

REPUBLIC PROSECUTION

VERSUS

NDIKIRA MVUMBA KIZUNDU 1ST ACCUSED
CHANGOTI CHIBAO GANJA

Alias SAIDI 2ND ACCUSED

RULING

The two accused in this case **NDIKIRA MVUMBA KIZUNDU** and **CHANGOTI CHIBAO GANJA** alias **SAIDI** have both applied to be released on bond citing S. 49(1)(b) of the Constitution of Kenya. It is worth noting that both accused face a charge of Murder contrary to S. 203 of the Penal Code. S. 49(1)(b) of the new Constitution provides as follows –

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

(b) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

This provision makes it clear that a suspect is to be released on a bond pending his trial unless the court finds ‘***compelling reasons not to order such release***’. The two accused in this case have been charged with the offence of Murder contrary to S. 203 as read with S. 204 of the Penal Code. The penalty upon conviction for this offence remains the death penalty which is mandatory. S. 204 of the Penal Code provides

“Any person convicted of murder shall be sentenced to death.”

No doubt the offence of murder is a very grave and serious charge as it involves the loss of human life. The penalty even taking into account recent pronouncements from our Court of Appeal, include the very real possibility of a death sentence. Whilst the issue of whether or not a suspect ought to be released on bond is left largely to the discretion of the trial court. I do feel that certain key considerations must be borne in mind when making that decision. These include

The nature of the charge

The strength of evidence supporting the charge

The gravity of the punishment in the event of a conviction

Whether or not the accused is a high flight risk

As stated earlier the charge of murder carries the death penalty. Due to human nature and the desire for self preservation this fact alone greatly increases the likelihood that an accused will abscond trial.

I have considered the unfortunate history of this case. The matter has been ordered to start de novo for

the second time. The first retrial was occasioned by the transfer of Hon. Justice David Maraga to Nakuru High Court and the second was occasioned by a mistrial declared by Hon. Justice J. Serگون. I also note that the accused have been in remand for four (4) years awaiting the conclusion of their case. However despite all this and more so because of this history I am convinced that the accused pose a high flight risk. This is because they have heard the evidence which has been tendered against them and are aware of the weight of the prosecution case. In these circumstances and taking into account the serious nature of the charge as well as the possibility of the death penalty, all make the accused unlikely to return for trial if released on bond. For the above reasons I reject their application for bond and order that the two accused remain in remand pending the hearing and determination of this case.

Dated and Delivered at Mombasa this 1st day of October 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Obura for Accused
Mr. Onserio for State

M. ODERO
JUDGE
1/10/2010