



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL (MURDER) CASE NO. 21 OF 2010

REPUBLIC.....PROSECUTION

VERSUS

1. MOHAMMED DADI KOKANE
2. ALFRED NJURUKA MAKOKO
3. SAMUEL MWACHALA MWAGHANIAACCUSED
4. JAMES CHACHA MWITA
5. DANIEL MDACHI MNENE SULEIMAN

RULING

By the Notice of Motion dated 14th October 2010 the Applicants seek to be released on bond pending the hearing and determination of their trial. The Applicants were first arraigned in court on 3rd September 2010 on a charge of Murder Contrary to S. 203 as read with S. 204 of the Penal Code of Kenya.

Mr. Kithi for the Applicants quoted the provisions of Article 49(1)(h) of the Constitution of Kenya in support of his submission that the Applicants are entitled to bail. The said Article 49 (1) (h) reads

***“An arrested person has the right –
(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 wording of this provision of the Constitution, which is the supreme law in this country are clear and unambiguous. However Article 49 does not make this right to bail an absolute right. It provides that where ‘**compelling reasons**’ are found to exist the court may decline to grant bail. **MR. MUTETI**, learned State Counsel opposed the release of the Applicants on bail. He argued that there existed the very real threat that if so released they would interfere with potential witnesses.

As a general rule an accused person’s right to bail is sacrosanct and should only be tempered by the court

for very good reason. Generally in considering whether or not to grant bail the court ought to consider factors such as but not limited to the following

- (i) The nature of the offence
- (ii) The likely penalty upon a conviction
- (iii) The likelihood that the accused may abscond from trial
- (iv) The likelihood that if released on bail the accused may interfere with witnesses.

The four (4) accused are all charged with Murder which no doubt is a serious offence. The penalty in the event of a conviction under S. 204 of the Penal Code is the death penalty. There surely can be no penalty more severe than this. The fact that one faces the likelihood of a death sentence would in my view increase the temptation to abscond from trial.

However having said all this I am persuaded by the affidavit sworn by one **AMOS MUANGE KIAMBA**, a potential witness in the case, which affidavit was sworn on 11th October 2010. In this affidavit the witness has enumerated the several threats he has received against his life. He believes that these threats are directly related to his involvement in this case and, that the said threats emanate from the accused persons or persons acting on their behalf. This witness has averred that he is convinced that the death of his daughter and son-in-law are directly related to this case. The witness lives in fear for his life. It is clear that this affidavit provides the “**compelling reasons**” referred to in S. 49 of the Constitution. There is strong evidence of attempts to interfere with witnesses leading to the very real possibility that if the accused persons are released from custody they will interfere with the prosecution witnesses. This is a statement made on Oath. The only persons who stand to benefit from threats to this witness are the accused persons. I am satisfied that compelling reasons have been shown to deny the accused persons bail. I therefore decline to admit the 5 accused to bail. They will remain in remand custody pending the hearing and determination of this case.

In addition I do hereby direct that the O.C.P.D. Coast Province make adequate arrangements to guarantee the security and safety of this witness. The State is advised to consider him for witness protection.

Dated and Delivered in Mombasa this 15th day of November 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-
Mr. Kithi for All accused

M. ODERO
JUDGE
15/11/2010

MR. KITHI: Accused 5 Daniel Mdachi requires the services of a consultant Oncologist. He wishes to secure private therapy at his own cost.

MR. ONSERIO: No objection

COURT: Officer in Charge Shimo-la-Tewa Prison to facilitate for Accused 5 to attend to his personal consultant oncologist at his own cost.

M. ODERO
JUDGE
15/11/2010