REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 14 OF 2010

REPUBLIC..... PROSECUTOR
VERSUS
1. AHMED MOHAMMED OMAR .....1ST ACCUSED
2. AHMED ABDALLAH SHAFFI .....2ND ACCUSED
3. MICHAEL NGUNGU LEWA .....3RD ACCUSED
4. MOSES LOCHICH .....4TH ACCUSED
5. NELSON KIPCHIRCHIR TOO .....5TH ACCUSED
6. ERICK EBERE MELCHIZEDEK .....6TH ACCUSED
7. ALEX MUTETI MUTISYA .....7TH ACCUSED

R U L I N G

The applicant, AHMED MOHAMED OMAR, has moved the court by way of a Chamber Summons premised on Articles 20 (3) and (4); 21(1); 22(3) and (4) 49(h) and 50 (2) of the Constitution of Kenya, 2010, as read together with Section 19 of the Sixth Schedule to the Constitution of Kenya, 2010. Through this application, the applicant seeks bail pending trial, which he contends is his constitutional right.

It is common ground that the applicant is one of seven accused persons, who are alleged to have jointly murdered seven men. The offence is said to have been committed along Naivasha Road, Kawangware in Nairobi, on 11th March 2010.

The applicant was arrested on 12th March 2010. Thereafter, he was first arraigned in court on 17th March 2010.

Although he is being tried for murder, the applicant asserts that he has a constitutional right to be granted bail pending trial.

His advocate, Mr. Kilukumi, submitted that the applicant's right to bail could only be derogated from if there were compelling reasons.

The learned counsel further pointed out that the court was the guardian of the rights and freedoms of individuals. However, he did also appreciate the fact that the court needs to weigh the rights to bail against the interests of the justice system operating properly, with a view to the said system providing the society with safeguards against lawlessness.

To that end, the applicant pointed out that although he could only be deprived of bail if there were compelling reasons advanced by the prosecution, the Constitution had not defined the phrase "compelling reasons". He therefore invited me to adopt the meaning assigned to the word "compelling" by the "Oxford Advanced Learner's Dictionary".

Using the said definition, the applicant said that the prosecution was obliged to demonstrate reasons that were so strong that one had to do something about it.

To illustrate that point, the applicant cited REPUBLIC Vs JOHN KAHINDI KARISA & 2 OTHERS, MSA HCCRC NO. 23/2010

It was his understanding that in that case the court held that the burden of proof was on the state, to prove that there were compelling reasons.
The applicant went further to submit that the standard of proof was on a balance of probability. He explained that the state was under an obligation to prove that in all probability, the accused would not turn up for his trial, if he was granted bail pending trial.

Another authority that was cited by the applicant was from Malawi. It was the case of JOHN ZENUS UNGAPAKE TEMBO & 2 OTHERS Vs THE DIRECTOR OF PUBLIC PROSECUTIONS, M.S.C.A. CR. APPEAL NO. 16 of 1995

The applicant pointed out that in that case, the applicant was a police officer. Therefore, that was an answer to the state; argument that he might intimidate witnesses, if he was granted bail.

The applicant's understanding was that the court held that it would not deny bail to the applicant on the basis of simple speculation.
The next point that the applicant dealt with relates to the contention that he would be tempted to abscond because if he were convicted, the court would sentence him to death.

Relying on the decision in GODFREY NGOTHO MUTISO Vs REPUBLIC, (MSA) CRIMINAL APPEAL NO. 17 of 2008, the applicant submitted that it was not mandatory that a person convicted of murder be sentenced to death.

In any event, the applicant says that he is well aware that since 1982, nobody in Kenya had ever been hanged even though many have been sentenced to death. Therefore, the applicant submitted that the fears of the state, regarding such fear as the applicant may have for the death sentence, were misplaced. He says that he has no such fears.

Furthermore, the applicant reiterates that he was yet to be convicted.

At present, he is presumed innocent. Therefore, if he should be denied bail, the applicant believes that he would be undergoing punishment before conviction.

Although the applicant is an Administration Police Oficer, he says that the state had failed to indicate why it fears that he would come into contact with the civilian witnesses, who allegedly fear him.

If he remained in custody pending trial, the applicant visualizes himself being in custody for very long. His said assessment is based on the fact that there were still 33 more prosecution witnesses yet to testify. Meanwhile, he had already been in custody for seven (7) months. During that period of time, only nine (9) witnesses had testified.

The applicant says that because he is employed by the Government of Kenya, as an Administration police Officer, the said Government knows where he and his family live. He also added that he had no intention of relocating from Kenya to any other country.

He therefore invited the court to grant him bail, because there should not be a judicial policy to deny bail to suspects.

In answer to the application, the learned state counsel, Mr. Karuri, pointed out that the applicant was charged with seven (7) counts of murder.
As far as the state was concerned, if any accused person was convicted of murder, he would be liable to receive the death sentence.
In this case, the witness statements indicate that all the seven victims were shot dead.

Bearing that fact in mind, alongside the fact that the applicant would be entitled to have access to firearms, in his capacity as an Administration Police Officer, the civilian witnesses are said to be likely to fear giving evidence against the applicant.

The state also pointed out that there was no judicial policy to deprive accused persons bail.

Mr. Karuri submitted that he was asking the court to reject the application simply because the state had put forward strong and cogent reasons to warrant a rejection of the application.

The prosecution indicated a willingness to have the trial expedited.
Finally, the state cited the following two authorities;

(a) REP.Vs JOHN KAHINDI KARISA & 2 OTHERS, (MSA) CR.C. NO. 23/2010; and
(b) REP. Vs. NDIKIRA MVUMBA KIZUNDU & ANOTHER, (MSA) CR.C. NO. 26/2010

Article 49 (1) (h) of the Constitution of Kenya, 2010, reads as follows;
"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 applicant has asserted, in the grounds cited on the face of his application, that that constitutional provision gives him;

"a qualified constitutional right to be released on bond or bail on reasonable conditions."

In effect, the applicant has readily conceded that his right to bail pending trial is not absolute. That position has been accepted as correct, by the state. And, with respect, I find that the parties have accurately interpreted the said legal provision.

Secondly, the state is under an obligation to satisfy the court that there are compelling reasons, to warrant a denial of bail to the applicant. Thirdly, I do accept as accurate, the applicant's contention that the standard of proof is on a balance of probabilities.

In the case of JOHN ZENUS UNGAPAKE TEMBO (above-cited) the Supreme Court of Appeal, of Malawi, expressed itself thus;

".....where a person has been charged with an offence, the wheels of justice are set in motion and the accused person is expected to be prosecuted for the offence, and the law requires that the accused shall be available to stand his/her trial until the case is completed." – emphasis is mine.

Their Lordships held that that was the paramount consideration when a court is giving consideration to an application for bail pending trial.
The court went on to state that the seriousness of the charge brought against the accused person is one of the factors to be taken into consideration by the court.

It was a holding of the court that;

"Fear is a natural instinct in human beings, so that generally speaking, the more serious the offence, a capital offence for example, and the sentence it may call for upon conviction, the greater the likelihood that the Accused person would be disposed to abscond. All the same, the court has to consider all the circumstances of the particular case."

However, the applicant says that he is not fearful that he could be hanged, if he were to be convicted. His reason for so saying is that since the early 1980's, none of the persons convicted of murder has been executed.

This court takes Judicial notice of the fact that in Kenya, there have been no executions for over two decades, even though many persons had been sentenced by the courts, to suffer death as by law prescribed.

However, this court is unable to state, with any degree of certainty, that just because executions had not been undertaken for so long, that will continue in the future.

In any event, the fact that those who have been sentenced to death have continued to stay in custody for indeterminate periods of time is not in itself an attractive preposition. Some people may actually consider that fact as tantamount to unmitigated mental torture.

In the case of JOHN ZENUS UNGAPAKE TEMBO, the applicant was charged, alongside two other persons, with charges of murder and conspiracy to murder. Following an application to the High Court, the charges of murder were ordered to be tried separately from those of conspiracy to murder.

In the matter before the Supreme Court, the applicants had lodged an appeal against the decision to deny them bail, in the case in which they were charged with conspiracy to murder. The maximum sentence for that offence was fourteen (14) years imprisonment.

As Kalaile JA observed, that fact did strongly exercise his mind in deciding to grant bail. Meanwhile, Villiera JA pointed out that whilst the burden is on the prosecution to prove "on a balance of probabilities, that it will not be in the interest of justice for an applicant to be released on bail,"

it would not be in the interest of justice to grant bail to an accused who would likely not answer to his bail or would likely flee the jurisdiction.

But would not it be deemed as premature punishment to hold in custody an accused person, when he is presumed innocent until he is proved guilty? Villiera JA quoted, with approval, the following words of Farriss C.J. in Rex Vs. Hawken (1944) 2 DLR 116;

"The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the Judge is satisfied that the bail will ensure the accused appearing at his trial."

Accordingly, if the court were to deny the applicant bail, that would not imply that the applicant would be undergoing punishment for as long as he was in custody. It would simply mean that the court was taking an appropriate step, to ensure that the applicant was available at his trial.

If the applicant was eventually convicted for the offence of murder, he may or may not be sentenced to death.

In GODFREY NGOTHO MUTISO Vs. REPUBLIC, CRIMINAL APPEAL NO. 17 of 2008, (at Mombasa), the Court of Appeal held that;

"Section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman and degrading punishment or treatment and fair trial.....

We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision."

The Court of Appeal did make it clear that upon conviction for murder, just like for other offences; and

before passing sentence, the trial court should receive such evidence as it thought fit, in order to inform itself on the proper sentence to pass. In effect, the accused person ought to be given an opportunity for mitigation.

Nonetheless, the Court went on to;

"re-emphasise that in appropriate cases, the courts will continue to impose the death penalty. But that will only be done after the court has heard submissions relevant to the circumstances of each particular case."

Thus, whereas the applicant is still presumed innocent; if he were to be convicted for murder, there is a possibility that the trial court could sentence him to death.

To my mind, therefore, the severity of the sentence remains a significant factor for consideration in an application for bail pending trial.

In HON. GODI H. AKBAR Vs UGANDA, MISC. APPL. NO. 20 of 2009, V.T. ZEHURIKIZE J. held that it would be desirable for the state to disclose the basis for the alleged fears of witnesses. The learned Judge felt that the court ought to be told what makes the witnesses so delicate to warrant the need to handle them with diligence and sensitivity.

In that case, the applicant did not know the witnesses whom the state intended to call.

In contrast, the applicant in this case is already aware of not only the names of the potential prosecution witnesses, but he is also already in possession of copies of the witness statements. To my mind, that fact alone, is reason enough to cause the civilian witnesses to have genuine fear, when they bear in mind the fact that the applicant would be moving around freely, whilst he also has access to a gun.

In REPUBLIC Vs JOHN KAHINDI KARISA & 2 OTHERS (MSA) H.C.CR.CASE NO. 23 of 2010, Ibrahim J. noted that;

"Murder is a serious offence and attracts the death penalty. Self preservation is a natural reaction or response of any human being.

Whatever the court will decide, the fear and anxiety exerting on an accused's mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused person facing a capital offence is real and cannot be wished away."

I am in full agreement with that observation of my Learned Brother.

I would only add that a potential witness in a murder case is similarly susceptible to his humanity. He knows that it is the evidence which he tenders that might lead the trial court to convict the accused. He also knows that if he did not testify, there were chances that that would lead to the acquittal of the accused. Therefore, he is fully aware that if the accused could ensure that he (the witness) did not testify, he might be tempted to do so, in order to enhance his self preservation.

If the accused was granted bail, and had access to a gun, the potential witnesses might prefer to preserve his life by keeping away from giving evidence.

By so doing, I am not saying that the applicant would necessarily go out to threaten the witnesses. Whilst that is a possibility, I am also saying that the witnesses could become genuinely apprehensive about giving evidence against a person who had access to a gun, and who was moving around freely.

In the case of REPUBLIC Vs JOHN KAHINDI KARISA & 2 OTHERS (above-cited), the Learned Judge made the following observations, which I fully associate myself with;

".....Murder involves the loss of life of the victim who is a father, mother, brother, sister, son, or daughter

of somebody in society. There is a victim who lost life and an aggrieved family. Murder touches on the social fabric and it affects the security of and peace in the community. As a result, there is great desire by a court to be assured that all things being equal, the Accused shall not likely but indeed will attend court on the day of trial, freely voluntarily and without coercive compulsion."

On those grounds, the court rejected the application for bail.

In comparison, in REPUBLIC Vs DANSON MGUNYA & ANOTHER, (MSA) H.C. CR. CASE NO. 26 of 2008, Ibrahim J. did grant bail.

It is my understanding that he did so because of the special circumstances in the said case.

Apart from the fact that one was a chief and the other an Administration Police Officer, both accused persons were senior citizens, who were approaching retirement age. Secondly, they had continued working, uninterrupted, for 2½ years, between the time when the victim was killed, until they were arrested.

During that period of time, the two did not run away, or move away from the jurisdiction of the courts.

The court expressed itself thus;

"For now, the said facts and conduct do not tend to show the accused are the type of people to abscond. If they were worried by the possibility of being charged with murder, why did they not run away after the incident? Why continue with their lives and duties? To me, this shows that they have no fear of being charged or facing the same, and they are unlikely to run away. "

Furthermore, by the time the accused were granted bail;

"There are 10 witnesses who have testified. I am told that the only remaining witnesses are formal witnesses (3-4). As a result, all the ordinary wananchi witnesses have testified. The police and doctor and investigation officer cannot be threatened or interfered with, in my view."

By necessary inference, the learned Judge must be deemed to have been of the view that there was possibility of the accused persons interfering with the ordinary man or woman if any such witness was yet to testify.

Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in REPUBLIC Vs DORINE AOKO MBOGO & ANOTHER, CRIMINAL CASE NO. 36 of 2010; His Lordship expressed the view that;

"Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person's life, disloyalty to the state of one's nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail."

Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial.

In any event, if that had been what the learned Judge intended to say, I would, respectfully beg to disagree with him, as that would negate the spirit and tenor of the express wording of Article 49 (1) (h) of the Constitution of Kenya, 2010.

In that case, the applicant was 17 years old; She was thus a child, within the meaning prescribed by the Children Act, 2001. She was said to have been under the age of 15, by the date when the offence of murder was allegedly committed.

By the time she was applying for bail, she was pregnant!

Bearing in mind the fact that the law prohibits the imposition of the death sentence on a child, and because the Juvenile Remand Home where the applicant was being held did not have capacity or experience to handle a juvenile who was pregnant, the court granted her bail pending trial. From the aforegoing decisions, it is evident that the Judiciary does not have a policy of refusing to grant bail to persons accused of murder. The suggestion by the applicant herein, that the Judiciary may have such a policy is thus without foundation.

However, having taken into account the gravity of the offence with which the accused has been charged; and bearing in mind the fact that if he were convicted he could be sentenced to death, I find that there is a real possibility of the applicant being tempted to abscond from jurisdiction.

Secondly, because the applicant is an Administration Police Officer, who would have access to a gun if he were released on bail pending trial, I hold the considered view that his release would cause the civilian witnesses to be genuinely apprehensive of their safety. The said apprehension is real because the applicant already has not only the names of the potential witnesses but he also has copies of their statements.

I find that those are compelling reasons to warrant the rejection of the application for bail pending trial.

The application is thus dismissed.

Dated, Signed and Delivered at Nairobi this 8th day of November, 2010

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FRED A. OCHIENG
JUDGE