REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 21 OF 2010

REPUBLIC.....PROSECUTOR

-VS-

KARISA NZAI MKUTANO
ARNOLD KITSAO KAHINDI.....ACCUSED

RULING

Karisa Nzai Mkutano (1st accused) and Arnold Kitsao Kahindi (2nd accused) are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code.

The accuseds have denied the charge. When the matter came up for plea, their Counsel Mr. Okuto and Mr. Gekanana applied for their release on bond citing Article 49(1) (h) of the Constitution which now recognizes that all offences are bailable. Mr. Okuto in making his submissions to court stated that the accuseds are presumed innocent until proved guilty as is provided by Article 50(2) of the Constitution.

He also submitted that section 123 of the Criminal Procedure Code is inconsistent with the provisions of the Constitution and the court should declare the same null and void for being in breach of Article 2 (4) of the Constitution which is the Supreme Law.
Section 123 Criminal Procedure Code reads:

"When person, other than a person accused of murder, …is arrested or detained…or is brought before court,… that person may be admitted to bail…"

In response, Mr. Kemo for the State submits that section 123 Criminal Procedure Code is not unconstitutional as right to bail has always existed in the Statutes and provides that the High Court may direct the accuseds be admitted to bail or even reduce bail terms in any case.

His argument is that, all what Article 49 (1) (h) does is to give the right to bail a constitutional force hitherto not provided for under the old Constitution. He further points out that although Article 49(1) (h) provides for bail, it is not absolute and may be refused if there are compelling reasons. It is his contention that the offences enumerated under section 123 are by nature very serious and attract the death penalty, and for such offense if an accused is released on bail, their chances of absconding trial are real, given the nature of the penalty. His submission is that no exceptional or compelling circumstances have been

demonstrated to warrant this court exercising its discretion to grant bail.

He points out that the offence charged attracts the highest penalty in the laws of the country and bearing in mind that witness statements are now provided to accused persons – the accuseds get to know the identity of their witnesses and nature of evidence the witness intends to give, there is possibility of accuseds coming into contact with the witnesses and causing a danger to them.

Mr. Kemo urged this court to take Judicial Notice that even releasing the suspects to the community poses a real danger to their lives from the relatives of the victim. He refers to the (Commonwealth decisions) **Macholowe v Republic High Court Misc. 171 of 2004 (Malawi High Court)** and urged this court to be persuaded by the decision.

The decision held that the Constitutional right to bail is not absolute and the court may refuse bail if satisfied that some compelling reasons exist to refuse bail and one must weigh the interest of justice and court should exercise granting of bail judiciously. He also drew from a decision by Uganda High Court, i.e **Malibano Abdul and Anor v Uganda Misc. Cr. Appl. No. 5 of 2008** which recognized that no general rule can be laid down and each case must turn on its own merits when it comes to consideration for bail.

Mr. Kemo's argument is that the accused ought to demonstrate the exceptional circumstances which would qualify as being so compelling as to warrant granting the accuseds bail.

He points out that the risk of flight if released on bail is real citing a South African decision of **Mazumbuko and Anor v South Africa** at page 19 which stated:

"For the circumstances to qualify as sufficiently exceptional to justify the accused's release on bail, it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling"

Closer home Mr. Kemo cited **HCC No.2 3 of 2008 R v Joseph Wambua Mutungi and 3 others** where the accuseds faced a charge of murder and were denied bail on the basis of being a real flight risk in view of the penalty and the same approach was adopted by the High Court sitting in Nairobi in **CRC HCCC No. 23 of 2004 R v Ndikira Mvunta Kizundi and others**. Mr. Kemo swore an affidavit to point out that prosecution witnesses had seen the accuseds stab the deceased and prosecution will be relying on the evidence of eye witnesses and recovery of the murder weapons, so the weight of the evidence is certain to secure a conviction, and with this kind of knowledge there is great fear in the minds of the accuseds making the possibility of their absconding very likely.

The affidavit sworn by Mr. Kemo states that the evidence in the file records that Furaha Mkoba, Karisa Katana and Karicho David witnessed the incident which occurred in broad daylight and the prosecution witnesses recognized the accused as the assailants and based on what he terms as overwhelming evidence likely to secure a conviction against the accuseds, then their release on bond may result in them absconding trial.

This is the approach which was adopted in the case of **Alhaji Muhajid Dombo Asari v Federal Republic of Nigeria.**

Let me start from the beginning -
Section 123 Criminal Procedure Code outrightly provided for offences which were unbailable – there is no secret about that and there isn't a single day in the history of Kenya prior to 2010, that persons charged with the offences enumerated under section 23 Criminal Procedure Code were ever released on bail awaiting trial. And it is precisely because of this, that the Constitution made a very specific provision in Article 49(1) (h) of the newly promulgated Constitution 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 o be released"

With all due respect to Mr. Kemo he has got his reasoning in the converse – it is not the accused to demonstrate compelling reason why he should be released – that is a right already guaranteed by the Constitution, the compelling reasons would be offered by the prosecution to demonstrate why the person charged should not be released on bond or bail – that is the guiding principle in the current Constitution.

In fact even the cited **Malawian case** which drew from that country's Constitution recognizes just like the Kenyan situation, that the onus is on the State to demonstrate that the interest of justice require the accuseds' continued incarceration. What I understand from this is that the right to bail is not absolute and can be refused if there are compelling reasons.

The Malawi case of **Fadweck Mvahe v The Republic MSCA CR Appeal No. 25 of 2005** offers very useful insight as to what a court should consider when weighing out what would constitute "compelling reasons" or as in the Malawi situation, "interest of justice" – and these are deemed to include:

a) The likelihood of accused attending his trial.

b) The risk that if he is released on bail, he may interfere with the prosecution witnesses or tamper with evidence.

c) The likelihood of committing another offence

d) The risk to the accused, that if granted bail he returns to his community or usual environment, the deceased's relatives may harm him.

e) Gravity of the offence

f) The punishment likely to be imposed

g) The accused is a sickly person

Mr. Kemo has sworn an affidavit to demonstrate the reasons why the accused should not be released on bail – given the background of what he depones, would the accuseds if released on bail voluntarily attend court having the weight of the evidence prosecution is armed with (i.e the strength of the evidence) and even of conviction? – I don't think so, in the name of self preservation flight is likely. I called for a pre-bail report so as to get clear indication as to what the community's reaction or reception would be like in the event of accuseds being released on bond, and in view of the contents of Mr. Kemo's affidavit.

The Report – shows that information was obtained and from the court file, the accuseds themselves, the prosecution, the defence Counsel, accuseds' family members, the area chief, the victims' family, and the probation officer's professional judgment.

The report indicated that the victims' families expressed an extreme sense of bitterness, they are still in the mourning phase and there was a likelihood of retaliation by the victim's family or friends. The 1st accused also told the probation officer that he did not feel safe to go back to the area and said he would have to relocate if granted bail. Relocation might not be the solution especially at this time when

emotions are still running high and one cannot rule out the possibility of deceased's friends and family members tracing the accuseds for retaliation – unless the accuseds were to take on a completely new identity – which they have not suggested doing.

My finding from the aforegoing is that there are compelling reasons to decline releasing the accused persons on bond and thus the application is disallowed.

Delivered and dated this **14th** day of **December 2010** at Malindi

H A OMONDI
JUDGE

Mr. Kemo for State
Mr. Mayaka holding brief for Mr. Okuto and Gekanana for accuseds