



**REPUBLIC OF KENYA**

**High Court at Meru**

**Criminal Miscellaneous Application 43 of 2012**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**MOULID JALDESA.....1<sup>ST</sup> ACCUSED**

**IBRAHIM JALDESA .....2<sup>ND</sup> ACCUSED**

**RULING**

Mr. Ndubi Advocate made an application for bail for both accused persons before Hon. Apondi J on 3<sup>rd</sup> July, 2012. The learned trial Judge also heard the response from the state made by Mr. Jackson Motende learned State Counsel. The learned trial Judge then called for a pre-bail probation report on both accused persons. The learned trial Judge did not deliver his ruling and since he is no longer sitting I have now taken over the matter for purposes of writing this ruling.

From the proceedings Mr. Ndubi for the accused persons urged that the two accused persons were young men aged between 17 and 18½ years old and they were brother and permanent residents of Kina Division Gurba Tula District. He narrated that the 1<sup>st</sup> accused dropped out of Std. 3 Primary School and prior to his arrest he was taking muslim religious studies. He urged that the 1<sup>st</sup> accused is of ill health and suffers a deformity to his right leg which is incompatible with prison atmosphere.

In regard to the 2<sup>nd</sup> accused Mr. Ndubi urged that he was a form four graduate who attained a grade of D+ in 2011 and who has intentions to proceed with his studies. Mr. Ndubi urged that the two accused persons require an atmosphere that will enable them achieve their dreams particularly in accordance with Articles 53, 54 and 55. Mr. Ndubi urged that both accused persons have given an assurance that if released on bond they would abide by any conditions imposed by the court.

Mr. Jackson Motende learned State Counsel left the court to determine the issue making reference to the pre-bail report by the probation officer. Mr. Ndubi in response to pre-bail probation reports urged that they were favourable to the accused person and urged the court to find in favour of the accused in light of the constitutional provisions under Article 49(1)(h), 53, 54 and 55. These Articles provide as follows:

**“49. (1) 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.**

**53. (1) Every child has the right—  
(a) to a name and nationality from birth;**

**54. (1) A person with any disability is entitled—**

**(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;**

**(b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;**

**(c) to reasonable access to all places, public transport and information;**

**(d) to use Sign language, Braille or other appropriate means of communication; and**

**(e) to access materials and devices to overcome constraints arising from the person's disability.**

**(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.**

**55. The State shall take measures, including affirmative action programmes, to ensure that the youth—**

**(a) access relevant education and training;**

**(b) have opportunities to associate, be represented and**

**participate in political, social, economic and other spheres**

**of life;**

**(c) access employment; and**

**(d) are protected from harmful cultural practices and exploitation.”**

In answer to the submissions in regard to Articles 53, 54 and 55 of the Constitution a child who is in conflict with the law and has been arrested for of a criminal offence is tried in accordance to the provisions under the children's Act. The Children's Act has various provisions which dictate how a child who is in conflict with the law should be tried and also how and for how long they may be held in custody of the authorities. The provisions cited by counsel for the accused are general provisions which give application of rights and fundamental freedoms to children persons with disabilities and the youth. When applying this rights and freedoms the overriding principle is that the child's best interest are of paramount importance in every matter concerning the child. For instance section 12 of the children act provides that a disabled child shall have the right to be treated with dignity and to be accorded appropriate medical treatment, special care, education and training. This is what is embodied under Article 53, 54 and 55 on the Constitution which counsel for the accused cited. These provisions do not say that the child offender or one who has been arrested for an offence should not be held in custody. Neither is it suggested that to hold a child in custody is an inhuman or treatment without dignity and respect or any such thing. Once a child is arrested for an offence, especially an offence which is serious such as murder then he should be considered for bail but the court must be guided by what is in the best interest of the child while considering bail or bond.

In this particular case the circumstances of this offence the community attitude the attitude of the family of the deceased and also that of the accused are summarized briefly in the pre-bail report by the probation officer Mr. Kamau of Isiolo Office. It is very clear from this report that it would be exposing both accused persons to danger if they are released on bond. Not only is the victim's family strongly opposed to the accused being released on bail. The accused family feels that their lives will also be in danger if the accused are released on bail especially their sister who is the key witness in this case. The Probation Officer is very clear that there is a real danger of a revenge attack or retaliation against the accused

persons.

After carefully considering this application, I find that it is in the best interest of the accused persons that they be held in custody as the only safe avenue that they have for now. In the circumstances I decline to grant them bail.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>th</sup> DAY OF MARCH, 2013.**

**LESIT, J.  
JUDGE**