



**No. 6**  
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL CASE NO. 87 OF 2010**

**REPUBLIC ..... PROSECUTOR**  
**-VERSUS-**  
**JOSIAH OCHENGO MANDERE ..... ACCUSED**

**RULING**

The accused, **Josiah Ochengo Mandere** filed this application for bail on 14<sup>th</sup> April, 2011 seeking an order:

*“That this court be pleased to release the accused on bail on reasonable terms and conditions”.*

The application was supported by the affidavit of **Jeremiah Onsare Soire** learned counsel for the accused who deponed that he had explained to the accused his rights and/or any risks he stands to gain in case he is granted bail (sic!). The application is premised on Articles 19, 20, 21, 23, 24, 26 and 49 (b) of the Constitution. It was set for hearing before **Hon. Sitati J.** on 25<sup>th</sup> July, 2011. Making the application on that day learned counsel **Mr. Momanyi** holding brief for **Mr. Soire**, laid emphasis on Article 49(i) (h) of the Constitution. **Mr. Mutuku**, learned state counsel, prayed for time to reply to the application.

On 13<sup>th</sup> October, 2011 when the trial on the charge against the accused was set to commence before me, **Mr. Soire** prayed that the application for bail be disposed of before the trial. **Mr. Mutai** learned counsel for the state then sought an adjournment to enable him get a report from the investigating officer in Nyamira which report would enable him respond to the application for bail. The adjournment was granted to 7<sup>th</sup> November, 2011. On that day, **Mr. Mutai** told the court that he had not received the report from the investigating officer. He therefore left the matter to the court. That automatically left the application unopposed. What remained for the court to consider was the interests of the accused person vis-à-vis the community. To gauge this, the court moved *sue moto* to call for a probation officer’s report. In doing this, the court was minded that murder is an offence that excites extreme passion which may at times put the life of a suspect in danger. The court also took judicial notice of the fact that retaliatory attacks and lynching are not a remote possibility in the jurisdictional area of this court. This was the observation of my brother **Makhandia J.** in Kisii High Court Criminal Case No. 90 of 2010 in which he stated at pg 7 of his judgment that:

*“...This court takes judicial notice that this is a volatile area where suspects are routinely pursued, attacked and lynched by burning, by either relatives of the victims or self styled vigilantes. Thus this court must consider the safety of the applicant in the circumstances. It is in his paramount interest that he be safe as the families of the deceased are also bitter and could exact revenge, in the best way they know how, which may lead to a state of lawlessness...”.*

The probation officer's report in the present case was presented in court on 12<sup>th</sup> December, 2011. I will turn to the same later on in this judgment.

Turning now to the law and practice on bail, it is now settled law that bail is a Constitutional right provided under **Article 49(i)** of the **Constitution 2010** which provides that: "*an accused person has a right .... 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 Constitutional provision has changed the earlier law where under section 72 (5) of the old Constitution offences carrying a death penalty on conviction were not bailable. That provision was further statutorily provided for under **Section 123** of the **Criminal Procedure Code**. Although the **Criminal Procedure Code** has not been amended, that provision is now null and void to the extent that it is inconsistent with the Constitution which is the supreme law.

Since the promulgation of the Constitution (2010), murder suspects like other suspects have been admitted to bail. The whole purpose of bail is to secure the attendance of the accused at the trial. It is left to the court to set the terms and conditions that will encourage such attendance. In granting bail however, a court must weigh the competing interests of the accused vis-à-vis those of the victims and the wider society if the accused is released or not released. Factors to consider include whether or not the accused is likely to abscond or interfere with investigations. Another factor to consider as earlier stated is whether the victims of the crime may be incited to take the law into their hands and cause harm to the suspect upon his release. The court cannot totally ignore such a possibility.

The probation report on the accused, presented to court on 2<sup>nd</sup> December, 2011 sets out extensively the situation on the ground. In the report the accused's father one **Anderson Masira** is reported as having vouched for the accused as a person of good character and law abiding. On the other hand, the victim's wife, one **Recho Nzilani** as well as the local administration (no names are provided in the report) are reported to be completely opposed to the release of the suspect. To quote pg 3 of the report "*...They are opposed to his release as they say that he is a threat to the community. It is alleged that a vigilant group is planning to harm the offender should he be seen within his community...*".

The report also indicates that when interviewed, the accused's wife, one **Agnes Kerubo** told of the insecurity obtaining on the ground. She is reported to have stated that "*...after the incidence they were chased out of the home and their houses set ablaze by the deceased's family...*" The alleged crime is the subject of a pending criminal case at Nyamira Law Court, being Criminal Case No. 3330 of 2011. The conclusion of the report is that "*...The general mood of the community is so hostile and unwilling to have the accused back...*"

I have given consideration to the above report and while I cannot hold the allegations of the various parties interviewed to be the gospel truth, I am persuaded by the fact of burning of the applicant's house and displacement of his family that indeed the release of the suspect may neither be safe nor appropriate at this point in time.

It is my conviction that the release of the accused on bail is likely to lead to a further threat to peace within the community and possible retaliatory criminal acts. I therefore find that there exists a compelling reason not to admit the applicant to bail. Consequently I dismiss the application.

**Ruling dated signed and delivered** at Kisii this 23<sup>rd</sup> day of January, 2012.

**R. LAGAT KORIR**  
**JUDGE**

**Before:**

**Hon. R. Lagat Korir J.**

..... Court clerk

Prosecutor .....

Accused .....