



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL CASE NO. 7 OF 2012**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**PHILLIP ONSARE OUNDU.....1<sup>ST</sup> ACCUSED**

**ASA OUNDU AGAI .....2<sup>ND</sup> ACCUSED**

**MILKA KWAMBOKA OUNDU .....3<sup>RD</sup> ACCUSED**

**RULING**

1. By information dated 20<sup>th</sup> January 2012, **Philip Onsare Oundu, Asa Oundu Agai and Milka Kwamboka Oundu** (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused respectively) were charged with murder contrary to Section 203 as read with Section 204 of the **Penal Code**. The particulars of the offence are that on the 14<sup>th</sup> day of January, 2012 at Sosera sub-location in Masaba South District within Kisii County in the Republic of Kenya jointly with others not before court murdered **Peterson Morumba Keruma**. When the plea was taken on 27<sup>th</sup> January, 2012, each of accused pleaded not guilty to the charge and was remanded in custody to await trial on 31<sup>st</sup> July, 2012.

2. On 10<sup>th</sup> February, 2012, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused filed a notice of motion under certificate of urgency seeking to be released on bail pending the trial. The application was premised on the following grounds:-

1. *That it is their constitutional right to be released on bond*
2. *That the 1<sup>st</sup> accused has 4 children of tender age and he is having persistent headache (sic!).*
3. *That the 2<sup>nd</sup> accused is 65 (sixty five) years old, asthmatic which is chronic, he is the treasurer of Ramasha Farmers Co-operation Society (sic!).*
4. *That the 3<sup>rd</sup> accused is taking care of her late co-wife's children and her kids who are of tender age (sic!).*
5. *The applicants are ready to abide by any court terms (sic!).*

3. The 1<sup>st</sup> accused swore an affidavit in support of the application to the effect that he suffers persistent headache and backache as a result of an accident suffered earlier; he is a manager of St. Philips School where he is required to undertake administrative actions including registration of standard 8 pupils for the

national examination; that he is married with four children of tender age and that he would abide by any bail terms as may be imposed by the court.

4. The second accused swore an affidavit in support of his application to the effect that he suffers chronic asthma and requires constant medical attention; he is the treasurer of Ramasha Farmers Co-operative Society; and that his first wife passed away leaving the children under his care and that he was ready to abide by any bond terms as may be imposed by the court.

5. On her part the 3<sup>rd</sup> accused swore an affidavit to the effect that she has responsibility over her young children, step children and grand children; that she is a member of the Women Guild Society SDA church and that she was willing to abide by any bond terms imposed by the court.

6. The application came before me on 23<sup>rd</sup> February, 2012. **Mr. Oundu** for the three accused sought leave of court to file a supplementary affidavit in response to the replying affidavit filed by the Investigating Officer one **PC Edward Nzau**. The leave was granted and pursuant to the leave the 2<sup>nd</sup> accused filed a further affidavit on 24<sup>th</sup> February, 2012 discounting the averments of the Investigating Officer to the effect that there was tension on the ground and that one **Nyachienga** who suffered violence was admitted at Tenwek Hospital and additional charges may be preferred against the accused in respect of the said **Nyachienga**.

7. At the hearing of the application on 29<sup>th</sup> February, 2012, **Mr. Oundu** for 3 accused placed reliance on the sworn affidavits and only emphasized that the 2<sup>nd</sup> accused was in ill health requiring urgent surgery and that the special circumstances for consideration in this case was that all the three accused were members of the same family. For authority he relied on **Republic –vs- Musili Dewrock Kithome and Simon Kikwai Merebu, Nairobi HCCRC No. 91 of 2011** .

8. **Mr. Mutuku** for the respondent did not oppose the application in respect of each applicant. He submitted to court that he had considered the further affidavit sworn by the 2<sup>nd</sup> accused and the prebail reports in respect of each applicant and agreed with the recommendations therein.

9. The probation report in respect of each accused was produced in court by Probation Officer, **Kirui Towett**. The report in respect of the 1<sup>st</sup> accused Philip **Onsare Oundu** demonstrates that the accused has hitherto been a law abiding citizen who runs a private school. The report in respect of the 2<sup>nd</sup> accused **Asa Oundu Agai** puts his age at 80 and describes him as suffering ill health and in need of specialized treatment. The report in respect of the 3<sup>rd</sup> accused **Milka Kwamboka** placed her age at 62 and describes her as having hitherto been a law abiding citizen.

All three reports recommend each of the accused as suitable for bail.

10. The law and practice on bail is now manifestly clear. Article 49(i) (h) of the Constitution 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 provision has removed the exceptions provided under the old Constitution and the current section 123 of the **Criminal Procedure Code (CPC)**. The CPC provision is however null and void to the extent of its inconsistency with the Constitution.

11. Bail is however not an absolute right and where there are compelling reasons not to admit an accused to bail, an application for bail must necessarily fail. It is left to the discretion of the court to consider the circumstances of each case. Some of the factors that a court must give due consideration when considering whether or not to grant bail include:-

- i. *Whether or not the accused is likely to abscond.*
- ii. *The likelihood of the accused interfering with investigations*

iii. *The likely impact that the release of the accused will have on the community and whether such release is likely to threaten peace in the community.*

iv. *The criminal record of the accused.*

12. I have considered these factors, the application, affidavits on record, submission by defence counsel and the social report in respect of each accused. I have also noted that the application is not opposed by the state. I therefore find no compelling reason to deny the accused bail. Accordingly I allow the application and order as follows:-

i. Each accused person shall pay cash bail of kshs. One million (kshs. 1,000,000) or in the alternative execute a personal bond of One million shillings (kshs.1,000,000) with two sureties of similar amounts to be approved by the Deputy Registrar of this court.

ii. Upon release each accused shall attend court for the mention of his/her case once a month until the case is heard and determined. The first such mention shall be on 7<sup>th</sup> May, 2012.

10. It is so ordered.

**Ruling dated, signed and delivered at Kisii this 7<sup>th</sup> day of March, 2012.**

**R. LAGAT-KORIR  
JUDGE**

***In the presence of:***

Edwin Mongare court clerk

..... Counsel for the three accused/Applicants

..... Counsel for the respondent

Philip Onsare Oundu - 1<sup>st</sup> accused

Asa Oundu Agai - 2<sup>nd</sup> accused

Milka Kwamboka Oundu - 3<sup>rd</sup> accused