IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL NO. 112 OF 2010

JOSEPH MWENJI MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant, Joseph Mwenji Mwangi, is facing a charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code.**

Pending his trial he has brought the instant application for bail. The respondent through the investigating officer, Pius Omundo has opposed the application on the grounds that the applicant is likely to manipulate the witnesses who are his colleagues in the Administration Police; that the evidence against the applicant is overwhelming and the punishment being death sentence, the applicant may be tempted to abscond; that the affected parties may attack the applicant in revenge.

It is common ground that the applicant is entitled, by dint of **Article 49(1)(h)** of the **Constitution** to be released on bail or bond as a matter of right.

The court will, however, not release the applicant if the prosecution demonstrates that there are

compelling reasons for not releasing him. The paramount consideration in an application for bail pending trial is whether the applicant will attend his trial as ordered by the court, or if he is likely to interfere with the witnesses and the exhibits.

The applicant has deposed that he is an administration police officer, married with a family that depends on him; that he will maintain peace and harmony and will avail himself when and as required. The averment that the applicant may interfere with the witnesses through his colleagues has not been demonstrated how that would be possible.

The mere fact that the applicant has been charged with a serious offence cannot of itself be a compelling reason. To uphold such an argument has the effect of reverting to the repealed Constitution where bail was unavailable in capital offences. That is now part of history. The people of Kenya in passing the Constitution declared in no uncertain terms that bail/bond on reasonable terms will hence forth be available to all persons arrested or charged with any criminal offence only subject to there being no compelling reason.

It is the duty of this court to give effect to the wishes of the people expressed in the Supreme law, the Constitution. The applicant is presumed innocent by the law until the contrary is shown. Regarding the likely punishment, it is now settled that death is not the only punishment for the offence of murder.

See **Godfrey Ngotho Mutiso** Vs. **Republic**, Criminal Appeal No.17 of 2008. The Constitution does not differentiate between capital and non-capital offences.

Revenge attacks, otherwise known in Kenya as mob justice is not only primitive but also criminal. In a state based on the rule of law and respect for human rights and freedoms, it is unacceptable even to contemplate such barbaric conduct. It is unacceptable in this age and time to reintroduce the Code of Ammurabi of 1700 BC, based on revenge. It cannot be for the public to decide whether a suspect is guilty or innocent. This role is a preserve of the court.

Finally, the State is bound by **Articles 29(c)** and **238** to guarantee security and safety to all Kenyans. The inference that prison is the only safe place is misplaced.

For these reasons, the application succeeds. The applicant will be released on bail on the following terms:

i) upon executing a bond of Khs.500,000 with two sureties of similar sum

ii) if he holds a passport or any other traveling documents, to deposit the same in court

iii) he will present himself to this court once a month with effect from 28th February, 2011

iv) he will not leave the jurisdiction of this court without leave of the court

v) he will not have any contact with the prosecution witnesses

vi) if he violates any one of the foregoing terms, the bond shall be cancelled forthwith

Dated, Delivered and Signed at Nakuru this 28th day of January, 2011.

W. OUKO

JUDGE