REPUBLIC OF KENYA

IN THE HGH COURT OF KENYA

AT ELDORET

HC.CRC. NO. 36 OF 2008

REPUBLIC …… APPLICANT

=VERSUS=

1. **CALEB OLUOCH WERE …….…… 1ST RESPONDENT**
2. **RICHARD KIPKORIR YEBEI ….....……. 2ND RESPONDENT**
3. **EVANS KIPLAGAT SIGEI ……....……. 3RD RESPONDENT**

RULING

This ruling is in respect of two applications lodged by **Richard Kipkorir Yebei** (hereinafter referred to as "**the first applicant**") and **Caleb Oluoch Were** (hereinafter referred to as "**the 2nd applicant")** for bail/bond pending trial. The applications are based on similar grounds chief of which is that the applicants shall attend court whenever required to do so. The applications are brought mainly under the provisions of article 49(1) (h) of the Constitution and are supported by the applicants' affidavits. In the affidavits, they depose, *inter alia*, that they are Civil Servants and will abide by whatever conditions the court may impose.

The applications were canvassed before me on 9th February, 2011, by **M/s Chepkwony** and **Nyarotso,** learned counsel for the applicants and **Mr. Chirchir,** learned state counsel who represented the State. Counsel for the applicants emphasized that article 49(1)(h) of the Constitution, allows release of suspects on bond/bail unless there are compelling reasons not to do so and in this case no compelling reasons have been given.

Mr. Chirchir in opposing the applications argued that the propensity to abscond for the applicants is high given that on conviction they stand to suffer the ultimate sentence of death. The learned state counsel further submitted that the applicants, being police officers, are likely to intimidate witnesses and that the feelings of the kin of the deceased should be taken into account in considering the applications. It was counsel's further view that even the security of the applicants should be taken into account as there is tension at the locus *in quo.*

I have considered the applications, the supporting affidavits, the opposition thereto and counsel's submissions. Having done so, I take the following view of the matter. The starting point is article 49(1) (h) of the Constitution which reads as follows:

"49(1)(h): An arrested person has the 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."

The plain language of the article is that any arrested person has a Constitutional right to be released on bond or bail on reasonable terms pending charge or trial unless there are compelling reasons not to be so released (*emphasis supplied)*. The article makes no distinction between simple and serious offences or non-capital and capital offences. The Constitutional right should therefore be enjoyed by any arrested person irrespective of the reason for the arrest or charge. That is what the people of Kenya agreed, on 27th August, 2010, to be the law governing arrested persons pending charge or trial. The article is crystal clear that the right can only not be enjoyed if there are compelling reasons. In my judgment, it is the party who alleges that there are compelling reasons for denial of the right who has the burden of proving the same.

In the matter at hand, **Mr. Chirchir** did not file any replying affidavit. The factual position as presented by the applicants therefore remains unchallenged. Matters such as threat to security, concerns of the deceased's kin, likelihood of intimidation and safety of the applicants are matters which are best placed before the court in an affidavit. The applications herein were admittedly served upon the State in sufficient time for it to make some form of response. It could do so through the Investigating Officer who ordinarily is expected to be conversant with what **Mr. Chirchir** sought to state from the Bar. No response however was filed. The applications were therefore in reality not opposed.

The right to bail /bond for an an arrested person pending charge or trial is now a Constitutional right, which right ultimately must be enforced by the courts. The only caveat is the existence of compelling reasons. In my view, the mere assertion that the applicants stand to suffer death on conviction and therefore are likely to abscond if released on bail/bond pending their trial is not enough. I say so because, the framers of the Constitution in providing for the right were fully alive to the consequences of conviction on a capital charge. It is illustrative that the same Constitution in article 26 (3) provides as follows:-

"26 (3) A person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written law."
This article clearly recognizes that the right to life is not absolute and that a person may be deprived of his life if the Constitution or other written law permits.

The record herein indicates that the applicants were arraigned before this court on 13th November 2008 and pleaded not guilty. The case has thrice come up for hearing without taking off for one reason or another. It is now fixed for hearing on 4th October 2011. In all probability, even if the hearing commences then, it will not be concluded and will be adjourned for further hearing next year. The prosecution may or may not end in the conviction of the applicants. For now, they are constitutionally entitled to a fair hearing which right, as set out in article 50 (2), includes the right to be presumed innocent until the contrary is proved.

Considering the right enshrined in articles 50(2) of the Constitution and further that the State has not demonstrated compelling reasons why bail/bond should be denied, I see no impediment in releasing the applicants on bail/bond as sought. In the event if the fears expressed by the State come to pass, the state has the machinery, the means and the resources to take appropriate action even if the corrective action includes charging the applicants in the event of further violations of the Law of the Land. As my learned brother **Ibrahim J.** said **R-vrs- Danson Mgunya and Another [HC.Cr. Case No. 26 of 2008 – Mombasa] (UR),**

"We must interpret the Constitution in enhancing the rights and freedoms granted and enshrined rather than in any manner that curtails them."

The two applications are allowed as prayed. Each of the accused persons may be released on bond of Kshs one million (Kshs 1,000,000/=) with a surety each for a like sum.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF FEBRUARY 2011.

F. AZANGALALA
JUDGE

Read in the presence of:-

1. Mr. Nyarotso for the 1st accused,
2. Mr. Chepkwony for the 2nd Accused and
3. Mr. Kabaka holding brief for Chirchir for the State.

F. AZANGALALA
JUDGE
28/2/2011.