REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 36 OF 2010

REPUBLIC ……..……...……...…….. PROSECUTOR

VERSUS

DORINE AOKO MBOGO ……...…….....1ST ACCUSED

BREDA ATIENO MBOGO ……..…….…….2ND ACCUSED

RULING

The applicant, **Brenda Atieno Mbogo** is charged with the offence of murder contrary to section 203 of the Penal Code *(Cap 63, Laws of Kenya).* The appellant has by an application dated 29th July 2010 applied to court for release on bail pending the hearing and determination of her trial along with her co-accused **– Dorine Aoko Mbogo.**

The application is supported by the affidavit of one **Winfred Nanzala Orieko** who claims to be the mother of the applicant, and the grounds on the face thereof. It was argued before me on 18th August, 2010 by Mr. Wambeyi and Mr. Nyakundi for respondent.

For the applicant Mr. Wambeyi argued that the applicant who is a child of tender age and is currently remanded in a Juvenile Remand Home has also been found to be several months pregnant; that she pleaded not guilty to the charge of murder, that is in the interest of the child's welfare the applicant be granted bail on terms which the mother is said to be ready and willing to provide for security, and that the current state of the applicant has subjected her to torture and impacting negatively on her and the remand home.

Mr. Wambeyi relied on the decisions of Hon. Mr. Justice Ombija in the case of **OI vs REPUBLIC [2006] eKLR** and Hon Lady Justice Wendoh in **REPUBLIC vs LKM *(a minor)* [2004] eKLR** where both learned judges granted bail to the accused *(minor)* applicants.

Mr. Nyakundi who appeared for the Republic opposed the application for bail. He argued that bail is not available for capital offences under Section 72(5) of the Constitution, and Section 123 of the Criminal Procedure Code, (Cap 75, Laws of Kenya), as the applicant is charged with the offence of murder.

In light of the promulgation of the new Constitution which I will for lack of a better word refer to as the Constitution of the Second Republic, *(the Constitution)* it is necessary to examine in some detail, the provisions in regard to grant of bail in the new and previous constitution, the Criminal Procedure

Code, and the Children Act 2001.

Like in the decisions referred to, the application herein is premised upon the provisions of the Section 187 (1) of the Children Act, 2001, Rules 9(1) and 12 (b) of the **Fifth Schedule** of the **Child Offenders Rules**. It will also be necessary to examine those provisions and draw appropriate conclusions.

The commencement point is I think, Section 165(1) (d) of the new Constitution. The said provision confers upon the High Court jurisdiction to hear and determine any question respecting the interpretation of the constitution including the determination of inter alia any question whether any law is inconsistent with or in contravention of the constitution.

Under Section 165 (4) thereof any matter certified by the court as raising a substantial question of law under sub-clause 3(b) ***(determination of any question whether a fundamental right in the Bill of Rights has been denied, violated, infringed or threatened),*** or sub-clause 3(d) ***(determination of any of the four question stated in that sub-clause)***, is to be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

The question raised here is one of bail pending the hearing of the applicant's case. As already stated, every accused person is, under section 49(1) (g) of the new Constitution, entitled to bond or bail on reasonable conditions pending a charge or trial, ***unless there are compelling reasons not to be released*** *(emphasis added).* This question to my mind raises two further issues.

Firstly, whether this is a question for determination of whether any law is inconsistent with the Constitution and **secondly,** whether this question raises a substantial question of law which may be certified as such for determination by an uneven number of judges appointed by the Chief Justice.

To answer both of these questions it is necessary to look at the law prevailing before the coming into force of the Constitution of the Second Republic, the law prevailing before the 27th August 2010 when the new Constitution came into force is found in Section 72(5) of the repealed Constitution and Section 123 of the Criminal Procedure Code *(Cap 75, Laws of Kenya).*

Section 72(5) of the repealed Constitution provided that if a person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time … he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

The provisions of Section 123 of the Criminal Procedure Code were complementary to Section 72(5) of the repealed Constitution and specifically denied the release on bond or bail, of any person who is accused of murder, treason, robbery with violence or attempted robbery with violence. Likewise section 123(4) prohibits the court from making any orders admitting to bail any person who is charged with the offence of murder or treason.

Under the new Constitution, the question which therefore readily comes to mind is what are the compelling reasons or circumstance why an accused person should not be admitted to bond or bail?

To my mind again, those compelling reasons are the very same ones spelt out in Section 72(5)of the repealed Constitution, and elaborated in Section 123 of the Criminal Procedure Code, namely, that the accused person, as the applicant in this case, is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity, *(taking of away another person's life, disloyalty to the state of one's nationality, or grievous assault and injury to another person or his property)* are offences which are by their repre-hensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kin or kith of the victim, to see a perpetrator of murder, treason or violent robbery *(committed or attempted)* walk to the street on bond or bail pending his trial. A charge of

murder, treason, robbery with violence *(committed or attempted)* would thus be a compelling reason for not granting an accused person bond or bail. It does not, in my further humble opinion raise a substantial question of law requiring certification by the court to the Chief Justice to raise a three judge bench to determine.

The issue for determination thus comes back. Should the applicant be or not, admitted to bond or bail?

Again, in my humble opinion, the phrases in Section 49(1)(h) *(unless there are compelling reasons for not releasing the accused)* could also be looked at and applied positively, that there are, or could be compelling reasons for granting an accused, bond or bail. In my view, there could be no greater reason for granting bond or bail, than those of a child. Under Section 53(2) of the Constitution – a child's best interests are of paramount importance in every matter concerning the child:-

Section 26(3) of the Constitution provides that a person shall not be deprived of his life intentionally, and Section 51(3) thereof provides that Parliament shall enact legislation for the humane treatment of persons detained, held in custody, or imprisoned. Until Parliament enacts such law, the law will remain that a person will be deprived of his life in execution of a sentence by a competent court in respect of an offence under the law of Kenya of which he has been convicted *(and of which an appeal process, if any)* has been exhausted.

Although Section 26(3) of the Constitution does not abolish the death penalty *(a person shall not be deprived of his life intentionally except to the extent authorized by this constitution or other written law)*, Section 190(2) of the Children Act provides that no child shall be sentenced to death. This being the position of a child found guilty of a capital offence, the applicant herein, while undergoing trial is deemed innocent until the contrary is proved, and even if the contrary were proved, and even if she was convicted, the maximum punishment the applicant would suffer is not death, but any of those punishments prescribed under Section 191 of the Children Act.

It is both noted and observed that the Children Act 2001 (No. 8 of 2001) was enacted when Sections 203 and 204 of the Penal Code, *(which respectively relate to murder and punishment therefor)*, were in existence Halsbury's Laws, 4th Edn. Vol 44(1) Para 1290 states that a new statute is deemed to amend and repeal an existing statute on the same similar subject matter. Section 190(2) of the Children Act *(which prohibits the imposition of a death penalty upon a child)* is therefore deemed to have made a variation, and an exception to death penalty in respect of the punishment of a child found liable for an offence of murder or robbery with violence.

In light of the discussion above of the provisions of Section 72(5) of the repealed Constitution, Section 123 of the Criminal Procedure Code, Section 49(1) of the new Constitution, and the further reasons which will be apparent from the following passages of this ruling, the answer to the question posed above, must be that the accused or appellant being a minor is a compelling reason, and the fact that she is also pregnant is also equally a compelling factor in considering the grant or otherwise of bond or bail to her.

Firstly, the application herein is premised upon the provisions of Section 187(1) of the Children Act 2001. That Section enjoins every court in dealing with a child who is brought before it to have regard to the best interests of the child and that in a proper case to take steps for removing him from undesirable surroundings and for securing of that proper provision be made for his maintenance, education and training. Section 187(2) of the same Act requires any child in remand who is ill, or who complains of illness *(physical or mental)* shall be examined properly and be treated by a qualified medical practitioner.

Secondly, Section 194(1) of the said Act provides that proceedings in respect of a child accused of having infringed any law shall be conducted in accordance with the rules set out in the Fifth Schedule. Rules 9(1) and 12(1) are relevant.

Rule 9(c) provides that every case involving a child shall be handled expeditiously and without

unnecessary delay:-

(a) be completed within 3 months where the case is before a Children's Court, or else it shall be dismissed, and the child shall not be liable to further prosecution for the same offence (rule12(2)).

(b) Where owing to the seriousness of the offence a case is heard by a court superior to the Children's Court, the maximum period for remand is six months, after which the child shall be admitted to bail.

(c) The case shall be completed within twelve months after plea has been taken and if it is not so completed the case shall be dismissed and the child be discharged and shall not be liable to further proceedings for the same offence.

Thirdly, Section 22 of the Sixth Schedule (Transitional Provisions) of the Constitution of the Second Republic, provides that all judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or corresponding court established under this constitution or as directed by the Chief Justice or the Registrar of the High Court. It is therefore expected that the proceedings herein shall be completed within twelve months from the date of taking plea.

Fourthly, by the time the next hearing commences, the applicant would have been remanded for a period of just over six months and under Rules, the maximum period of remand for a child is six months after which a child be granted bail as a matter of right, except where there are compelling reasons for denial of bail – under Section 49(1) of the new Constitution grave offences such are murder, treason, robbery with violence or attempted robbery with violence.

Fifthly, though the applicant is not a child of tender years *(who is by definition, a child of the age of ten years),* the applicant is said to be under the age of 15 years at the time of commission of the offence, the applicant being under 18 years of age is still a child.

Sixthly, and taking into account:

(a) that no death penalty may be imposed upon a child such as the applicant,

(b) the fact that there is no information from the juvenile remand home that the applicants condition (pregnancy) is the first one and that the home has any capacity or experience to deal with juvenile with a pregnancy

(c) That the juvenile remand home has a statutory duty to maintain the health, education and training of the applicant,

(d) That the applicant's mother is willing to stand surety and ensure the applicant's attendance before court when required to do so,

I would allow the application on the following terms:

(1) *the applicant and her mother do execute a bond of Kshs.100,000/- to attend court on 10th November 2010 and on every other day when required to do so,*

(2) The applicant and her mother do report to the Assistant Chief of Ebagudi every Thursday of the week,

(3) The applicant and her mother do report to the nearest Police Station every two weeks,

(4) In the event of failure to do so, the bond herein shall stand cancelled and the warrants of arrest shall issue for both the applicant and the surety.

There shall be orders accordingly.

Dated signed and delivered at Nakuru this 30th day of September 2010

M. J. ANYARA EMUKULE
JUDGE