REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL CASE NO.54 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

GODFREY OKEMBA OLU.....ACCUSED

R U L I N G

The accused person **Godfrey Okembo Olu** was charged with the Offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. He first appeared before court on the 19th of December, 2008. The particulars of the offence are that on the 8th of December, 2009 at Kaduong village in Kajimbo Sub-Location, Nyando District within Nyanza Province jointly with another person he murdered one **Enock Odenyo**

At time the accused was charged the offence was not bailable. The position has since the passage of the new Constitution become obsolete and inapplicable in law. The provision of the new Constitution is what gave rise to the application made by the accused person through **Mr. P.J.O. Otieno** holding brief for the accused counsel **Mr. Yogo** the accused seeks for bail pending trial.

Mr. P.J.O. Otieno submitted that the accused person has committed himself to attend court if released on bail, further that if admitted to bail the accused can raise the necessary bond.

On his part learned Assistant Deputy Director of Prosecution **Mr. Gumo** objected to the application stating that the accused has not demonstrated any compelling reason why he should be given bail that the offence facing the accused is heinous and serious such that the court should exercise its discretion with caution. He referred the court to **Mvahe Versus Republic: Miscellaneous Criminal Appeal No.25 of 2005 –** A Malawian case.

In response to the submissions by learned State Counsel the defence counsel urgued that it was up to the State to show compelling reasons why the accused should not be admitted to bail and none has been cited. Further that the gravity of the offence cannot be a reason to deny the accused bail.

Article 49)1)(h) of the current Constitution provides as follows:-

"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 above provision of the new Constitution does not distinguish a capital offence from the others. All accused persons are now admissible to bail unless there are compelling reasons not to do so. The court has jurisdiction and discretion to consider a bail application for an accused person charged with a capital offence such as murder and to deny the same only if there are compelling reasons as the right is not absolute. This court held else where in Kisumu High Court Murder Case No.38 Republic versus Caleb Odhiambo Okumu of 2010 that the court must of necessity consider certain factors in exercising its discretion in an application such as the one before court. The factors for consideration are:

(1) The likelihood of the accused to attend his trial;

(2) The risk and likelihood of the accused to interfere with the witnesses or tamper with evidence;

(3) The likelihood of the accused committing another crime;

(4) The risk the accused person is likely to face if he returns to his village/home;

(5) The gravity of the offence and likely punishment to be imposed.

In his submissions the learned State Counsel did not allude to the likelihood of interference with witnesses or the evidence or even commission of another crime by the accused. The court has no reasons therefore in this matter to take the said factors into consideration. The defence counsel gave an assurance on behalf of the accused that the accused will attend trial however the learned State Counsel urged the court to be cautious due to the seriousness of the charge.

In the case of **Republic versus John Kahindi Karisa & 2 others Mombasa High Court Criminal Case No.23 of 2010** a persuasive authority. **Ibrahim J** stated as follows:

"Balancing and considering all the facts and circumstances of this case and bearing in mind the applicants Constitutional right to bail and their respective presumption of innocence. I am still not convinced that the two accused here have given the court sufficient comfort and assurance that they will be available to attend court from time to time and for the trial.

I think that an accused person should have made some effort to show or give court some reason to dispel the apprehension that he would not abscond."…….

The court went further to say:

"of course the court could release them on bail on terms including sureties. However, in a serious case of murder, monetary or property security should not be the only consideration."

The court concurs with the sentiments of **Ibrahim J.** The offence facing the accused is serious, if found guilty the accused may be handed a death sentence, chances of absconding cannot therefore be overruled. The court also agrees with the learned State Counsel that a court in allowing bail in a case of murder should be cautious.

The granting of bail is predicated on the assumption that an accused will attend trial, the court therefore must be convinced that the accused will attend trial if released on bail. In **Matoro** versus **Republic [1991] KLR 220** which **Ibrahim J** adopted in **Republic** versus **John Kahindi Karisa & 20 others** [supra] **Porter J** addressed this issue as follows:

"The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion.

If the presumption of innocence were to be applied in full, there would never be a remand in custody…..

What I think is important for the court to bear in mind, and the reason for the caution to remember the presumption of innocence, is that it would be wrong to leap to the conclusion that the accused was guilty merely because he had been charged and decide the bail application on that basis. Nevertheless the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not out of question.

It has happened before and in similar cases. I do not mean to say that because other people have decided to leave business, family and friends or other crimes, rather than to face prosecution, this applicant will do so, that decision depends on all prevailing circumstances of the applicant. All I mean to say is that the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction.

Pursuaded by the two cases cited above this court is of the view that the offence facing the accused in this matter is serious. The penalty or sentence is likely to be grave. Even with the offer of a surety the court has been left with doubt with whether the accused person if released on bail will attend trial. The court finds the offence facing the accused, sentence likely to be meted out if found guilty and the doubt in the mind of the court to be compelling reasons for this court to deny the accused bail pending trial.

Orders accordingly.

Dated and delivered at Kisumu this 26th November 2010

ALI-ARONI

J U D G E

In the presence of:

…….counsel for State

…….counsel for Accused