IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.107 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

SIMON MBUTHIA KIMUNYA.....ACCUSED

RULING

The applicant is facing a charge of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code.**

Pending his trial, he has applied to be admitted to bail under the provisions of **Article 49(1)(h)** of the **Constitution**. **Article 49(1)(h)** aforesaid provides that:

"49 (i) (h) An arrested person has the right –

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."
(Emphasis supplied)

Contrast this provision which came into effect on the promulgation of the present Constitution on 27th August, 2010 with the provision of **section 72(5)** of the repealed **Constitution** which stipulated as follows:

"(5) If a person arrested or detained as mentioned in sub-section (3)(b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either conditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."
(Emphasis are mine)

Consider also **section 123(4)** of the **Criminal Procedure Code** which provides that:

"123.(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence, is arrested or detained without warrant by an officer in-charge of a police station, or appears or is brought before a court and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court

to give bail, that person may be admitted to bail." (Emphasis supplied)

The provision of **Article 49(1)(h)** of the Current **Constitution** is a clear departure from the repealed Constitution and the Criminal Procedure Code with the result that as a general rule all offences are now bailable unless there are compelling reasons.. To the extent therefore that **section 123(1)** of the **Criminal Procedure Code** limits bailable offences, it is inconsistent with the Constitution and in terms of **Article 2(4)** of the **Constitution** void.

Chapter four of the Constitution contains an ambitious Bill of Rights, which has propelled Kenya to join the big league of the developed jurisdictions such as the United States of America, Canada and England as well as a few African jurisdictions in the fulfillment of **Articles 11** and **7(1)(b)** of the **1948 Universal Declaration of Human Rights** and the **African Charter** on Human and Peoples' Rights respectively. The latter declared that:

"Article 11.(l) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

The **African Charter** makes similar declaration.

Turning to the application before me, in terms of **Article 49(1)(h),** right to bail/bond is not absolute. It is subject to there being no compelling reasons to deny bail. That is also why **Article 25** does not list right to bail/bond among the rights that may not be limited.

Learned counsel for the applicant relied on the **Wikipedia Encyclopedia** from the internet, which gives a summary of the law on bail from Canada, England and Wales and the United State of America. Counsel argued that there were no local cases. Learned counsel for the respondent relied, also only on foreign authorities, namely, the House of Lords opinion in **R (on the application of O)** Vs. **Crown Court at Harrow Re O (habeas corpus)** (2006) UKHL 42, the Malawian Supreme Court of Appeal's decision in **Fadweck Mvahe** consolidated with **Richard Chigeza** Vs. **Republic** and **Roy Mangame** Vs. **Republic,** Msc A Criminal Appeal Nos.25, 26 and 27 of 2005 and the Nigerian Supreme Court judgment in **Alhaji Mujahid Dokubo-Asari** Vs. **Federal Republic of Nigeria**, S.C. 208/2006. I need to point out here that at the time this application was argued, I was aware of at least four (4) decisions of this court, Emukule, J in **Republic** Vs. **Dorine Aoko Mbogo and Another**, Nkr. H.C.CR.C. No.36 of 2010, Ibrahim, J in **Republic** Vs. **John Kahindi & 2 others**, Msa H.C.CR.C. No.23 of 2010, **Republic** Vs. **Danson Ngunya & Another**, Msa, H.C.CR.C.No.26 of 20-08 as well as Ochieng, J's decision in **Republic** Vs. **Taiko Kitende Muiya** Nbi. HCCCR. Case No.65 of 2010.

In addition to these authorities, I have also read the decision of the Supreme Court of Canada in **Republic** Vs. **Morales** (1992) 3 S.C.R. 711.

I reiterate that the right of an accused person to be admitted to bail in Kenya under **Article 49(1)(h)** is subject to there being no compelling reasons not to be so released.

According to **section 11** of the **Canadian Charter of Rights and Freedoms,** reasonablebail is granted unless there is just cause. The **Bail Act, 1976** of the **U.K.** ordinarily guarantees the right to bail unless there are substantial grounds to believe that the defendant if released on bail may fail to attend, or commit an offence while on bail or interfere with witnesses.

Bail laws in the United States of America vary somewhat from state to state as is typical of the United States of America's jurisprudence. But generally speaking, a person charged with a non-capital offence is entitled to be granted bail. But in some states, there are statutes that permit the grant of pre-trial bail to persons charged with serious violent offences, unless it can be demonstrated that the accused person is a "flight risk" or a danger to the community.

Under **section 42(2)(e)** of the **Malawian Constitution**, bail will be granted unless the interest of justice requires otherwise.

That will suffice for comparative analysis of various bail provisions. The following principles emerge from the case law, relevant statutes and the constitutions considered in the foregoing paragraphs:

1. Bail is not an absolute right

2. Whether or not to grant bail is a matter of absolute judicial discretion.

3. Bail will be granted irrespective of the gravity of the offence so long as the conditions for the granting of bail have been satisfied.

4. The burden of showing *"compelling reasons"* (Kenya), *"just cause"* (Canada), *"substantial grounds*"/"*sufficient reason"* (U.K.) likelihood of *"flight risk"* (U.S.A.) is upon the party opposing the grant of bail.

5. An accused person who qualifies for bail will be granted reasonable bail.

6. A person accused of committing a crime is presumed innocent until proven guilty by a court of competent jurisdiction.

7. In considering whether or not to grant bail, the court will consider the following:

- the chances of the accused person absconding

- the likelihood of the accused person committing further offences while on bail

- the likelihood of his interference with witnesses or obstructing the course of justice (or tampering with the evidence)

- the accused person's own safety, security and protection

- whether the accused person is already serving a custodial sentence for another offence

- if the accused person is likely to pose public danger by being released on bail

- if by releasing the accused on bail, the public confidence in the administration of justice will be diminished

The court will also consider:

- the nature and seriousness of the offence and the gravity of the punishment likely to be imposed

- the character, antecedents, associations and community ties of the accused person

- the health of the accused person

These criteria are not exhaustive as there may be other relevant factors. Discretion in matters of bail ought to be exercised with specific limits which is why there is urgent need to either enact, like other jurisdictions have done, bail law or simply make rules under the Criminal Procedure Code. This latter proposal will of course be preceded with the amendment of the code to make provision, like the Civil Procedure Act, for the Rules Committee to make such rules. Applying these principles to the case before me, it has been deposed on behalf of the applicant that he is a teacher by profession, employed by

the government of Kenya; that in view of that he risked losing his job if he absents himself from work for more than 14 days; that he is a person of fixed abode and that he is ready and willing to abide by any bail conditions that may be imposed.

The respondent, through Ag. I.P. Henry Wesonga of Subukia Police Station has deposed in a replying affidavit that in view of the charge and the likely sentence, the applicant may be tempted to abscond; that being a teacher and the witnesses being his pupils, he is likely, working in cahoot with fellow teachers, to manipulate and intimate these witnesses; that the applicant hails from the same area as the deceased which fact poses great danger to his security and that anarchy may ensue in the area; that upon the death of the deceased, there was a report of threats to lynch the applicant.

I have considered these arguments. The offence is alleged to have been committed only last month – October, 2010. The deceased was the applicant's pupil. That they hail from the same locality. It is also deposed that threats have been issued.

In view of all these factors and considering that the emotions may still be high, I am of the considered view that it is in the best interest of the applicant to remain in custody.

For that reason, the application fails and is dismissed. It, however ought to be remembered that the applicant can always renew his application for bail should there be change in the circumstances.

Dated, Signed and Delivered at Nakuru this 25th day of November, 2010.

W. OUKO

JUDGE