REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 42 OF 2009

REPUBLIC …….....…… PROSECUTION

VERSUS

DANIEL MUSYOKA MUASYA

PAUL MUTUA MUASYA ::: ACCUSED

WALTER OTIENO OJWANG

RULING

The three accused persons were jointly charged with the offence of **MURDER CONTRARY TO SECTION 203** as read with **SECTION 204 OF THE PENAL CODE**. Through their advocates **MR. MAGOLO** and **MR. ADHOCH** the three accused persons have applied to be released on bond pending the hearing and final determination of their case. In making this application counsel have cited Article 49(1) (h) of the Constitution of Kenya 2010 which grants to all accused persons the right to be released on bail. Article 49() (h) provides as follows –

"49(1) 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."

This provision is therefore very clear and unambiguous. It allows to **all** accused persons the right to be released on bail, the only proviso being that this right may be curtailed where ***'compelling reasons'*** are found to exist to deny the accused person bail. This provision appears to contradict S. 123(2) of the Criminal Procedure Code which denies bail to persons who were charged with ***'murder, treason, robbery with violence, attempted robbery with violence and any related offence ….'*** However this apparent contradiction is clearly resolved by the provisions of Article 2 of the Constitution which proclaims the constitution as the supreme law. Indeed Article 2 (4) clearly provides

"(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is invalid"

Therefore S. 123(2) cannot be used as a basis to deny any suspect bail because the Constitution which is the supreme law has guaranteed to **ALL** accused persons the right to bail. The Constitution of Kenya 2010 was promulgated with much excitement, pomp and grandeur by the people of Kenya on 27th August 2010. This Constitution which reflects the wishes hopes and aspirations of the Kenyan people and which was widely debated before it was passed in the historic referendum vote on 4th August 2010 is now the bedrock upon which all other laws in the country are based. It is a matter of public knowledge that during the intense debate leading up to the referendum vote, several contentious issues did arise and were

debated vigorously by various different individuals and groups. At no time did the right to bail for capital offenders emerge as a contentious issue nor was it subject to any public debate. The assumption therefore is that the majority of Kenyans had no problem or reservations about the provisions of Article 49(1)(h). In other words by voting Yes in the Referendum the people of Kenya were saying – let **all** suspects including capital offenders be guaranteed the right to bail pending trial of their cases. As courts we are duty bound to give life and effect to these wishes of the Kenyan people as have been clearly laid out in the Constitution. This Constitution is a step forward and is a break with S. 123(1) of the Criminal Procedure Code. As courts we too should embrace and give life to these new freedoms and rights which have been guaranteed in this new Constitution.

Having said that the courts do have a duty to act judiciously when giving effect to any right or duty guaranteed by law. In considering whether it is appropriate to allow bail, each case must be considered on an individual basis because no two cases are the same. Nevertheless there are certain crucial considerations that courts not only in Kenya but worldwide, must bear in mind when determining whether or not to allow bail in any case before them. This include but are not limited to –

(i) The nature of the charge
(ii) The gravity of the punishment in the event of a conviction
(iii) The likelihood that the accused may interfere with witnesses or that he may interfere with evidence to be adduced against him
(iv) The likelihood that the accused may not surrender himself for trial if released on bond

On point numbers (i) and (ii) there can be no doubt that murder is a very serious charge because it involves the loss of a human life. A person who is convicted of murder faces a possible death penalty. It has been argued that this possibility of a death penalty is of itself sufficient reason to cause a suspect to abscond from trial, therefore denial of bond would be the prudent route to take. In my view this is not necessarily the case. Whilst an accused who knows he is guilty may indeed be tempted to abscond, there are equally those accused persons who are convinced of their innocence and who are determined to prove this innocence and seek to clear their names through the trial process. Such an accused obviously will faithfully attend trial even if released on bail with these goals in mind. It is common knowledge that in other western jurisdictions, even in countries like America where the death penalty still exists, murder suspects are routinely released on bail and many do faithfully continue to attend court for their trials. Why should the situation be any different in this country? The courts have the discretion to impose whatever bond terms they deem necessary or appropriate including the use of sureties to ensure that an accused does not abscond from trial. Even in the event of a conviction upon a murder trial, the death penalty is not a certainty. In the case of **GODFREY NGOTHO MUTISO –VS- REPUBLIC CRIMINAL APPEAL NO. 17 of 2007**, the Court of Appeal held that S. 204 of the Penal Code which provides for a mandatory death penalty is unconstitutional as it violates the constitutional provisions protecting citizens against inhuman or degrading punishment or treatment. Therefore a court is not under an obligation to impose the death penalty upon convicting an accused on a charge of murder. The court is required to consider mitigation presented and all antecedents before deciding whether or not the death penalty is appropriate. Therefore the argument that a conviction on a charge of murder will attract a certain death penalty becomes less convincing.

The conditions No. (3) & (4) listed above tie in with the constitutional provision that bail may be denied where "***compelling reasons"*** are shown to exist. Some of such compelling reasons would be the likelihood that an accused may interfere with witnesses, or destroy evidence if released on bail or the likelihood that an accused will not surrender himself for trial if released on bail. The question then arises as to how such compelling reasons are to brought to the attention of the court. Certainly it would be very unlikely that the accused himself would alert the court of any compelling reason why he should be denied bail. The onus must lie on the State who are the investigator and prosecutors of criminal cases to inform the court if any compelling reason exists to deny the accused bail. This can be done by way of an affidavit by the investigating officer or in some other such appropriate manner.

In this case **MR. ONSERIO** for the State has only asked court to deny the accused persons bail on

the grounds that they pose a high flight risk. As I have demonstrated in my earlier arguments the mere fact that a suspect has been charged with murder and faces a **possible** (as opposed to a certain) death sentence if convicted, does not in my view amount to sufficient compelling reasons to deny him bail. The two accuseds are Kenyan citizens who live and work for gain in this country. No allegation has been made that they attempted to evade arrest by the police over this matter. No allegation has been made that they have in any way interfered with or intimated witnesses. I do agree with defence counsel that mere speculation and suppositions do not constitute ***'compelling reasons'***. The State have failed to show any compelling reason why these three accused persons should be denied bail. Therefore I do hereby admit all three accused persons to bail in the sum of Kshs.2.0 million each plus two (2) Kenyan sureties of equal sum. Further if released on bond each accused must report to the Investigating Officer at Central Police Station in Mombasa every Monday pending further orders of the court.

Dated and Delivered in Mombasa this 1st day of December 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Mwakireti holding brief for Mr. Adhoch
Mr. Onserio for State

M. ODERO
JUDGE

1/12/2010