



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**

**Criminal Case 57 of 2005**

**VICTOR LUMBASI**

**MUGE.....APPLICANT**

**VS**

**REPUBLIC.....RESPONDENT**

**T**

**RULING**

By an application by way of Notice of Motion dated 25<sup>th</sup> April, 2006, under sections 22(1) and (2) of the Children's Act No.86 of 2001, Rules 9(1), 10(4) of the Child Offender Rules and sections 123 (3) and 124 of the Criminal Procedure Code. (Cap 75) Laws of Kenya the applicant seeks orders:

- (1) *That the honourable court be pleased to admit the accuse; being a child aged 16 years, on bail on terms as may be just.*
- (2) *That such further orders be made as the court may deem just, fit and expedient.*

The application is based on the grounds:

- (1) *That the applicant is a minor and a child in terms of the provisions of the Children's Act No.8/2001.*
- (2) *That the applicant ought to have been in form one but for this case.*
- (3) *That this applicant is being molested in the remand prison.*

The application is predicated upon the annexed affidavit of *Nicholas Gichana* – sworn on the 28<sup>th</sup> day of April, 2006 and a supplementary affidavit sworn on 12<sup>th</sup> day of May, 2006.

For the applicant, it was argued that the applicant was arrested and charged with a non – bailable offence to wit murder, on 24<sup>th</sup> January, 2006. That at that point in time the applicant was not only a minor but also a pupil at Chesire Primary School. A photocopy of his birth certificate No.92991 is exhibited as “OLM 1” in the supplementary affidavit aforesaid.

That the said minor-cum-pupil is remanded at Bungoma G. K. Prison flies in the face of Rules 9(1) and 10(4) of the Child Offender Rules. That according to the fifth schedule thereto, the maximum period of remand is six (6) months. That the case has been fixed for hearing on 28<sup>th</sup> September, 2006.

Mr. Onderi for the state conceded to the application. He urged me to release the applicant on bail pending his trial and to order that the case be tried on priority basis since the law enjoins that such hearing must be completed within 12 months. That the release of the applicant should, however, be conditioned on his parents standing surety to secure his attendance at the hearing.

I have carefully analysed and appreciated the legal issues raised in this application. The charge facing the accused is one of murder. Murder is an offence under the provisions of section 203 as read together with section 204 of the Penal Code.

The Penal Code is an Act of parliament whose preamble reads:

*“An act of Parliament to establish a code of criminal law”.*

I have been urged to make a finding that the Child Offender Rules in the 5<sup>th</sup> schedule, to the Children’s Act No.8 of 2001, make provisions for bail of a child offender. That the Children’s Act is a specific Act enacted on a later date than the Penal Code. That a specific Act overrides the General Act. That the later Act is presumed to have amended the earlier one unless specifically stated.

It is axiomatic that an Act of Parliament is a law made by Parliament. The child offender rules, in the 5<sup>th</sup> schedule, to the Children’s Act makes provisions for bail of a child offender. Section 194 (1) of the Children’s Act provides:

*“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.”*

Rule 9 of the Child Offender Rules in the fifth schedule provides:

*“9 (1) where a child is brought before a court and charged with an offence, the court shall enquire into the case and may release the child on bail on such terms as the court may deem appropriate.*

*9(2) where bail is not granted the court shall record the reasons for such refusal and shall inform the child of his right to apply for bail to the High court.”*

The law is now well settled. An Act of Parliament is law made by Parliament and passed. An Act takes its place as part of the *corpus-juris*, on body of existing law. Modern Acts spell out what their effect is on existing rules of law. This spelling effect is not necessary for legal operation, however, with or without it, the overriding effect of a new Act follows as a consequence of the fact that the Act expresses the sovereign will of Parliament.

Accordingly, when a further Act on the subject is passed, a later Act overrides inconsistent earlier Acts. So far as it is not tailored to repeal or amend these expressly, the later Act does so by implication (e.g. in contracts, the action for breach of promise of marriage was abolished in 1970 in England. This was done by saying that for future such a promise should “not have effect as a contract giving rise to legal rights”). See *FRANCIS BENNION, STATUTORY INTERPRETATION, 2<sup>ND</sup> EDITION pp 152 – 154.*

On the premises, I find and hold that the Children’s Act, No.8 of 2001 overrides the Penal Code; so far as the issue of bail to a child charged in a criminal court is concerned. In effect when a child is charged with the offence of murder unless there are militating circumstances, bail should ordinarily be granted. Where bail is not granted the reason for the refusal shall be recorded.

Where a child is not released on bail the court may make an order for his/her detention in a Children’s Remand Home until his/her case is heard and determined which in any event must be within 12 months from the date of the plea.

In respect of the subject child, I have taken into consideration all the factors brought to my attention. There seems, to me, to be no militating circumstances disclosed. Accordingly, I order that the subject

child shall be admitted to bail. There shall be sureties of Sh.100,000/= each to be approved by the Deputy Registrar of this court.

The prosecution is enjoined by law to have the case heard and determined within 12 months from the date of plea (24 the January 2006). It is so ordered.

DATED and DELIVERED at BUNGOMA this 22<sup>nd</sup> day of May 2006.

N.R.O. OMBIJA

JUDGE

MR. ANGIMA for Gichana for the applicant

Mr. ONDERI for the Republic