



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**Crim Misc Appli 32 of 2006**

**ISAAC ORAPA.....APPLICANT**

**VS**

**REPUBLIC.....RESPONDENT**

**RULING**

By an application by way of Notice of Motion, pursuant to the Provisions of section 187 (1) of the Children’s Act No.8 of 2001, Rule 9(1) and 12 (1) of the fifth (5) schedule of the Child Offender Rules, the applicant seeks orders:

- I. That the applicant be and is hereby granted bail pending hearing and determination of the Bungoma H.CR No.2 of 2006 on such terms as the court may think appropriate.
- II. That this suit be heard and determined expeditiously.

The application is based on the grounds:

- a. That the applicant is of tender age 12 years.
- b. That the orders sought are in the interest of the applicants welfare to:
  - (i) enable him to pursue his education.
  - (ii) protect him from company of hard core criminals.
- c. That the father of the applicant is ready and willing to provide security.
- d. That the law requires that cases involving younger offenders be heard and determined expeditiously.
- e. That the father of the applicant; the proposed surety, shall undertake to abide by the conditions laid down by this honourable court as regards bail.

The application is predicated upon the annexed affidavit of *Japheth Nyabola Isemeki* sworn on the 19<sup>th</sup> day of May, 2006.

For the applicant, it was argued that he is aged 12 years old as per exhibit “JN2” and a student in standard

7 at Okwobwait Primary School as per exhibit “JN1”.

That the applicant was arrested on 29<sup>th</sup> December 2005 and has been in custody since then on a charge of murder.

That hitherto, he has been of good conduct and should therefore be granted bail in view of the provisions of section 187 (1) of the Children’s Act No. 8 of 2001 as read together with Rules 9(1) and 12 (1) of the fifth (5<sup>th</sup>) schedule of the Child Offender Rules. That the applicant’s parents are willing to provide surety for his appearance in court as and when the court may require.

*Mr. Onderi* for the state, conceded to the application. He urged me to release the applicant on bail pending the hearing of his appeal and to order for priority hearing of the case. That the release should 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 children offender rules in the 5<sup>th</sup> schedule, to the Children 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’s 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, it is my finding 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 20th day of June 2006.**

**N.R.O. OMBIJA**

**JUDGE**