



**REPUBLIC OF KENYA
E HIGH COURT OF KENYA
AT BUNGOMA**

Crim Misc Appli 36 of 2006

VITALIS OMBEKO OKIRU ::::::::::::::: APPLICANT

VS

REPUBLIC ::::::::::::::: RESPONDENT

RULING

By an application by way of Notice of Motion, under section 187 (1) of the Children's Act No.8 of 2001 Rules 9(1) of the 5th schedule of the children offenders rules, section 72(1) of the Kenyan Constitution and section 123 (1) of the Criminal Procedure code, the applicant seeks orders that:

- (1) *That this application be certified as urgent and the same be heard on priority basis.***
- (2) *The applicant be and is hereby granted bail/or admitted to bail pending the hearing and determination of Bungoma HCR No.3 of 2006 on such terms as the court may think appropriate.***
- (3) *That the above mentioned murder case be heard and determined expeditiously.***

The application is based on the following grounds:

- (a) *That the applicant is of tender age now 17 years.***
- (b) *That the orders sought are in the interest of the applicants welfare to;***
 - (i) *Enable him pursue his education.***
 - (ii) *Protect him from bad company of hard core criminals.***
- (c) *That brother-in-law of the applicant is ready and willing to provide sufficient security.***
- (d) *That the law requires that cases involving children offenders be heard and determined expeditiously.***

(e) That the brother-in-law of the applicant shall undertake to abide by the conditions laid down by this honourable court.

The application is predicated upon the annexed affidavit of one, Gilbert Arisa Wanyama, and other grounds advanced at the hearing.

For the applicant, it was argued that the applicant is 17 years old. As evidence of age, the applicant annexed certificate of birth exhibited as "GAW 11 (a)" and baptismal certificate exhibited as "GAW 2 (b)". As evidence of his education, the applicant has exhibited a letter from Rev. Okere Precious Academy marked "GAW 1 (a)".

That arising from the arrest and incarceration, the applicant may not sit for his KCPE unless bail pending trial is granted.

That being detained alongside hard core criminals, may turn the applicant into a criminal.

That his brother-in-law is willing to provide security for attendance at his trial or when asked if the court requires him.

Mr. Onderi, for the state did not oppose the application. However, he urged for the fixing of the hearing on a priority basis and that suitable sureties should be approved to secure the applicant's attendance at his trial.

I have analysed the evidence and appreciate fully the legal position. The accused is charged with murder contrary to section 203 as read together with section 204 of the Penal code.

The Penal code is an Act of Parliament which established a code of criminal law. The children's Act is equally an Act of Parliament whose preamble reads:

"An act of parliament to make provisions for parcathe responsibility, fostering, adoption, custody, maintenance, guardianship care and protection of children; to make provisions for the administration of Children's institutions, to give effect to the principles of the convention on the Rights of the Child and the Africa Charter on the rights and Welfare of the Child for corrected purposes."

Date of commencement of the Act was 1st March, 2002 vide Legal Notice No.23/2002.

The child offender rules, in the 5th schedule to the Children's Act make provisions for 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 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 reform the child of his right to apply for bail to the High Court."

The Penal Code is an earlier Act of parliament. The Children's Act is a later Act of Parliament. It is axiomatic that a later Act overrides inconsistent earlier Acts. So far as it is not tailored to repeal or amend expressly, the late Act does so by implication.

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 offender is concerned. In effect, when a person of less than 18 years is charged in a criminal court for the offence of murder, unless there are militating circumstances, bail should ordinarily be granted. Where bail is not granted the reasons for so doing 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 Homes until his/her case is heard and determined which in any event must be within 12 months from the date of plea.

Concerning the subject child, I have taken into consideration the evidence adduced by way of affidavit in support. I have also taken into account that the state has no objection to his being released on bail. Accordingly, I order that the subject child shall be admitted to bail pending his trial. The Deputy Registrar shall approve two sureties of Sh.150,000/= each in accordance with the law.

By way of directions, the prosecution is enjoined by law to have the case heard and determined within 12 months from the date of plea. Those are the orders I am capable of making in this application.

DATED and DELIVERED at Bungoma this 19th day of October, 2006.

N.R.O. OMBIJA

JUDGE

Mr. Wekesa Advocate for Mr. Situma Advocate for the applicant.