



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 115 OF 2008

REPUBLIC.....PROSECUTO
R
VERSUS
MILTON KABULIT.....1ST
ACCUSED
JAMES KAMAI.....2ND
ACCUSED
FRANCIS KARENGA.....3RD
ACCUSED
DAVID EIPA.....4TH
ACCUSED
JOSEPH CHACHA.....5TH
ACCUSED
JANATHAN MERIMUG.....6TH
ACCUSED
KOIKOI ENONI ENONO.....7TH
ACCUSED

RULING

By Notices of Motion dated 26th October 2010, and 23rd November 2010 and filed respectively on 26th October 2010, and 23rd November 2010, Joseph Chacha Mwita and Jonathan Merimug (*hereinafter collectively referred to as "the Applicants" and where appropriate as the "1st" or "2nd Applicant"*) the Applicants sought identical prayers, namely, *"release on bond or bail pending the finalization of the on-going trial."*

The applications were founded upon identical nine grounds, namely -

- (1) *that the applicants have been in remand custody since November, 2008,*
- (2) *that the right to be granted bail is guaranteed by Section 49(1)(h) of the Constitution;*
- (3) *that the mandate of the High Court is to ensure the existence of a society where justice, fairness, equality and equity is the foundation and hallmark of the daily lives of the citizen;*
- (4) *that bail is a vital aspect of every criminal justice, and that the applicants who are in custody are suffering the same dent on their respective liberties as if they were serving a sentence*

of imprisonment after conviction;

(5) *that the applicants' continued detention in custody until tried and convicted and sentenced dilutes the presumption of innocence until proved guilty;*

(6) *that recognition of the innocence dignity and of equal and inalienable rights of all members of the human family is paramount and is the foundation of freedom justice and peace in the world;*

(7) *Liberty (not liability) of a citizen is a cherished right, inalienable, indefeasible, and should not be curtailed ordinarily except on consideration of public interest.*

In addition to those grounds, the applications were respectively supported by the Affidavits of one Rosemary Achieng Owoko who described herself as the "*legally married wife of Joseph Chacha Mwita*" sworn on 26th October, 2010 and the Affidavit of Caroline Mawia Paul who also described herself as the "*legally married wife of Jonathan Merimug.*" Both deponents depone that they are respectively authorized to swear the affidavits on behalf of the respective applicants.

The applications were served upon the Provincial State Counsel on behalf of the Republic or the State. The State did not however file any affidavit in reply to the Affidavits in Support sworn by the Applicants' respective legally married wives. Both applications were however opposed by the State in subsequent hearing before me on 24th November 2010.

Both Mr. Ogola and Mr. Simiyu who urged the applications on behalf of the respective applicants followed the grounds set out on the faces of the respective applications, and the respective Supporting Affidavits.

Mr. Ogola learned counsel for the 1st Applicant argued that bail was a basic constitutional and inalienable right guaranteed under Section 49(1)(h) of the Constitution of the Second Republic, and that there were no compelling reasons for denying the Applicants that right, pending their trial.

Mr. Ogola's submissions may be summarized as these -

§ *the applicant has a property in Nairobi where he is easily traceable;*

§ *the applicant is a family man with children in a public university;*

§ *he had worked with the Kenya Armed Forces for a period of 24 years, and thereafter has worked as Head of Security with the Kenya Pipeline Company Ltd, Orange Telecom, and with the United Nations as National Security Officer. He had presented himself to the Police upon a telephone call. He has been in remand since November 2008, and his remand has been due to the fact that the law prohibited the grant of bail to an accused charged with the offence of murder, treason or other capital offences.*

§ *the deponent is in employment with a reputable organization the Kenya Red Cross.*

§ *however after the effective date of the Constitution, Section 49(1)(h) thereof permitted the release of an accused person charged with a capital offence, unless there are compelling reasons not to be so released.*

§ *the Constitution is supreme and binds all organs of State at all levels of government.*

§ *that the applicant has therefore an inalienable right to be released on bail, and that right can only be restricted by the court if there are compelling reasons not to be released on bail.*

*The criteria for grant of bail was set out by the Federal Supreme Court of Nigeria in the case of **ALHAJI MUHAHID DUBUKO ASARI VS. FEDERAL REPUBLIC OF NIGERIA** (Supreme Court of Nigeria (SC No. 208 of 2006) cited with approval of Ibrahim J. in the Mombasa H.C.Cr. Case No. 26 of 2008, (**REPUBLIC vs. DANSON NGUNYA & 4 OTHERS**)).*

§ the criteria in those cases is not exhaustive as the basic consideration in granting bail is whether the accused will attend court once granted bail.

§ The burden whether or not the accused should be granted bail lies upon the prosecution, and that the prosecution must give reasons why the accused should not be released on bail.

§ Counsel submitted that in the absence of an affidavit stating such facts there were no compelling reasons for denying the accused bail.

§ The mandate of the High Court is to ensure the existence of a society where justice, fairness, equality, equity is the foundation and hallmark of the daily lives of its citizens.

§ Section 49 of the Constitution donates mandate to the High Court, that an accused be tried within a reasonable time if the trial cannot be conducted within a reasonable time, then an accused be released on bail upon reasonable terms.

§ No one has the ability to identify the guilt of the offenders and that fairness, equality and equity can only be established through the impartial procedure of court, whether the suspicion of the detaining authority carries a higher degree of reliability so that pre-trial detention should not be ordered; in this regard counsel relied upon the dicta of Warsame J. in the case of REPUBLIC VS. MUNEER HARRON & OTHERS that pre-trial detention is an assault of liberty.

§ Bail is a vital element of every criminal justice system, and an accused in custody pending trial is suffering the same dent on his liberty as the person serving a term after conviction.

§ such detention pending trial, limits the presumption of innocence until proved guilty.

§ the liberty of a citizen is a cherished right, inalienable and should not be curtailed except on grounds of public interest.

§ the grant of bail mitigates the alienation of the rights of the accused.

§ Economic hardship violates his personal and private life.

Counsel relied on the decision of Warsame J in the case of the REPUBLIC VS. MUNEER HARRON ISMAIL & 4 OTHERS [2010] eKLR, and Ibrahim J in REPUBLIC VS. DANSON NGUNYA & ANOTHER [2010] eKLR where the courts granted bail pending trial.

Mr. Simiyu who urged the application dated 23.11.2010 on behalf of Jonathan Merimug the 2nd Applicant relied upon the Supporting Affidavit of his wife, Caroline Mawia Paul. He associated himself fully with the submissions of Mr. Ogola, Counsel for the 1st Applicant, Mr. Chacha and in addition urged the court to note that -

§ The applicant served in the Kenya Army for 13 years and rose to the rank of Captain.

§ He worked with the UN until the time he was arrested, and has been in detention since October, 2008.

§ He is a family man with a wife and one child, and the wife works with the Pipeline and Water Corporation.

§ The court should take judicial notice of the fact that the applicant was a member of the disciplined forces and will abide by any reasonable conditions of bail. In this regard the court should be guided by Sections 21 and 60 of the Evidence Act (Cap. 80, Laws of Kenya).

§ The applicant is suffering from poor health, and that no prejudice shall be suffered by the Republic if the applicant is released on bail.

§ The discretion to grant bail lies with the court.

For those reasons counsel urged that the applicant be granted bail on reasonable terms and conditions.

Mr. Nyakundi learned State Counsel opposed both applications and argued that there were exceptional circumstances why the accused should not be released on bail. Mr. Nyakundi submitted that -

§ the applicants are facing a charge of murder for which the only punishment if convicted is death;

§ because of the severity of the offence the applicants are likely to abscond and fail to attend the trial; the fact that the applicants are facing the charge of murder is itself a compelling reason why bail should be denied. Counsel relied on the decision of this court in REPUBLIC vs. DORINE AOKO MBOGO & BRENDA ATIENO MBOGO (Nakuru H.C. Cr. Case No. 36 of 2010). Counsel also relied on the case of FEDWECK MVAHE VS. REPUBLIC (Malawi Supreme Court of Appeal/Misc. Cr. Appeal No. 25 of 2005, and CLIVE MCHOLOWE VS. REPUBLIC (Malawi High Court Misc. Cr. Application No. 171 of 2004).

§ Justice would not be seen to have been done to the deceased if the applicants were granted bail and then absconded.

§ This case is a matter of great public and international interest, the deceased was a foreigner, the international community has been following the case with interest and the deceased's colleagues have been attending court consistently.

§ Some of the evidence so far adduced has been incriminating against the applicants and the temptation to leave the jurisdiction is real.

§ Public interest therefore demands that they be kept in custody pending the determination of the case.

§ The court should also consider the safety of the applicants, it is in their paramount interest, as the families of the deceased are also bitter and could exact revenge, which leads to lawlessness. It is in the best interest of the applicants that they remain in custody.

§ This matter has been given priority by this court. It will be expeditiously disposed.

§ Section 49(1)(h) of the Constitution is not mandatory. It is subject to qualification, an accused cannot be released on bail if there are compelling reasons. This is a murder charge. That is a compelling reason.

In his short reply to the State Counsel's submissions, Mr. Ogola, counsel for the 1st applicant submitted that -

§ The people of Kenya knew that the punishment for murder was death, and yet allowed provision for bail for any offence.

§ Sentence should not be a factor for consideration in the granting of bail,

§ The fact of murder is itself not a compelling reason, as the offence is the cause of the arraignment and detention and cannot be the reason for continued detention;

§ Indeed justice would not have been seen to be done to the family of the deceased, if the applicant

absconded, the same way, the family of the applicant who believe he is innocent until the contrary is established, by the court.

§ *No facts have been laid before court to suggest that the applicant would abscond.*

§ *The safety of the applicant is not an issue as the family of the deceased live in Zambia, the chances of revenge attack are remote, the same situation would prevail if the applicant were released.*

Again for those reasons, Mr. Ogola urged the court to allow the application for bail.

Mr. Simiyu counsel for the 2nd Applicant associated himself with the submissions of Mr. Ogola. Counsel submitted that the fact that the offence is murder is not a reason for denying bail. This is rebutted by the presumption of innocence. "Some people grow up - other people are brought up." The applicants have been brought up in the Disciplined Forces, and that discipline will bring them back to court.

Again Mr. Simiyu urged the court to allow the application for bail.

THE ISSUES AND ANALYSIS OF THE SUBMISSIONS, THE LAW AND THE AUTHORITIES

I have deliberately set out *in extenso* the submissions of counsel for both the Applicants including their responses to submissions by State Counsel. I have similarly set out the submissions by the State Counsel.

Some background to the applications will be in order at this stage. The applicants are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (*Cap. 63, Laws of Kenya*). The case against the two applicants along with five (5) other accused is that they on 7th day of May 2008 at Lokichogio Township in Turkana North District of the Rift Valley Province, jointly murdered SILENCE CHIRARA (*the deceased*).

The deceased was at the time of his violent killing an international civil servant working for the United Nations World Food Programme (WFP) based in Lokichogio Turkana North District in the North West of Kenya. The trial of his suspected killers (*who include the two applicants*) has therefore a significant element of interest of the United Nations, or international community.

Although the number of witnesses is not indicated in the Information, (*as I think it should*), the prosecution has so far called fifteen witnesses, and one can safely say that the trial of the applicants along with the five others is substantially advanced. The number of witnesses remaining or outstanding to testify is not clear.

The mandate donated to the High Court by Section 50(2) of the Constitution is that an accused be tried within a reasonable time, and if the trial cannot be conducted within a reasonable time, then an accused be released on bail upon reasonable terms under Section 49(1)(h).

The history of the right to bail or bond was summarized in the case of **Republic vs. Danson Ngunya & Another** (*supra*). Prior to 1987, all offences were bailable. However by amendments to Section 123 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*), Parliament created non-bailable offences, namely murder, robbery with violence and attempted robbery with violence. Because no constitutional amendments with regard to bail were made, the Constitutional Court in **MARGARET NGUI -VS- REPUBLIC [1985] KLR** held *the said Section to be inconsistent with the constitution and declared it null and void*. Subsequently Section 72(5) of the previous Constitution was amended to prohibit the grant of bail to offences punishable by death.

Under Section 123 of the Criminal Procedure Code, these capital offences include murder, treason, robbery with violence and attempted robbery with violence, and related offences punishable by

life imprisonment such as manslaughter, infanticide, suicide pacts, concealment of treason, treachery, dissuasion from enlistment, inciting to mutiny, inducing desertion, inducing prisoners of war to escape.

The law prior to the promulgation of the Constitution of the Second Republic on 27th August 2010 prohibited the grant of bail to accused on capital charges. That was provided for in Section 72(5) of the repealed Constitution. In addition Section 123 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*) expressly prohibited the court from granting bail to any accused facing the specified capital charges including treason. Those were specific constitutional and statutory prohibitions. All this however changed with coming into force of the new Constitution which took away the prohibition, and granted discretion to the courts in very clear terms under Section 49(1)(b) of the Constitution, to grant bail in all cases where an accused is charged with an offence punishable by fine alone, or imprisonment for a period not exceeding six months and in all other cases, an accused will be released on bond or bail, on reasonable conditions pending a charge or trial, *unless there are compelling reasons not to be released*.

The question or issue in this matter or similar cases is whether there are compelling reasons why the applicants should not be released on bond or bail and what are those compelling reasons. Along with this, is the twin issue of who carries the burden of giving compelling reasons, and whether such compelling reasons should be contained in an affidavit.

Mr. Ogola, learned counsel for the 1st applicant relied upon the Malawian case of **LUNGUZI vs. REPUBLIC (infra)** for the proposition that the burden lies upon the state or the prosecuting authority. This is indeed so, and such compelling reasons may be adduced orally in court, and not necessarily by way of affidavit. In my view however, whether or not an accused should be admitted to bail, is largely a matter of discretion to be exercised by the court in terms of the Constitution, the law applicable, taking into account the gravity of the offence, the sentence which the offence carries and the overriding circumstances of the case.

In the case of **REPUBLIC VS DORINE AOKO** (*Nakuru H.C. Cr. Case No. 36 of 2010*) after referring to Section 72(5) of the repealed Constitution and Section 123 of the Criminal Procedure Code, I said at p. 5:-

"To my mind again, those compelling reasons are the very same ones spelt out in Section 72(5) of the repealed Constitution, and elaborated in Section 123 of the Criminal Procedure Code, namely, that the accused person, as the applicant in this case, is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity, (taking of away another person's life, disloyalty to the state of one's nationality, or grievous assault and injury to another person or his property) are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kin or kith of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk to the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail."

I would reiterate the same opinion in this matter.

The case of **REPUBLIC vs. MUNEER HARRON ISMAIL & 4 OTHERS** related to charges of possession of government stores and munitions contrary to Section 324(3) of the Penal Code, and Section 4(2) of the Firearms Act, (*Cap. 114 of the Laws of Kenya*). Under said Section 324(3) keeping or having in possession stores, which is property of the disciplined forces is a misdemeanor for which the punishment is 2 years if convicted. The minimum punishment if convicted under Section 4(2) of the Firearms Act is seven years and, depending on the circumstances, fifteen years.

These are lesser offences than either murder, treason or robbery with violence or allied offences, and bail was granted accordingly.

Bail pending trial was granted in the case of **REPUBLIC VS. DANSON NGUNYA &**

ANOTHER (supra) on the alleged principle that "**bail**" is an "**unalienable right**". With respect, I do not agree that bail is an inalienable right, nor do I agree with the contention that the paramount consideration in bail application is whether the accused will turn up for his trial **WATIRO VS. REPUBLIC [1991] KLR 220, at 283.**

Although Section 72(5) of the repealed Constitution is no longer law, it did not say that the paramount consideration for the grant of bail is that the accused will turn up for trial or the proceedings preliminary to trial. What the Section provided, and which is now reproduced in Section 49(1) (h) of the Constitution is that *conditions set for bail will be such that will be reasonably necessary to ensure that the accused will appear at a later date for his trial.*

Firstly, bail is not an inalienable right. The Constitution does not say so. Nor does the *International Covenant on Civil and Political Rights* say so (**Article 9(1)**), nor does *the African Charter on Human and Peoples Rights* say so (**Article 6(1)**), nor *the American Convention on Human Rights (Article 7)*, nor *the European Convention on Human Rights (Article 5)*. What is inalienable is the right to life. As Andrei Gromyko a long serving former Soviet Foreign Minister says in his "Memoirs" "**Without life no other right is enjoyed**" or as Jeremy Bentham said - "**Liberty without life is nonsense on stilts.**" **Rights must be balanced** as Immanuel Kant said - "**with imperfect obligations.**" And yet, life is alienated through the death penalty - S. 26(3) of the Constitution. The only rights and fundamental freedoms which cannot be alienated are those prescribed under Section 25 of the Constitution, freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery or, the right to a fair trial and the right to an order of *habeas corpus*. All other rights and fundamental freedoms may be limited under S. 24 of the Constitution.

Secondly the right to bail is alienable except in those circumstances clearly prescribed by the Constitution in respect of petty offences. The Constitution donates to the court the discretionary power to alienate the right to bail where there are compelling reasons. The question or issue as stated above, is whether there are compelling reasons.

In the case of **Republic vs. Danson Ngunya & Another (supra)**, the court declared that Section 123 of the Criminal Procedure Code is inconsistent with Section 2(1) of the Constitution, the supreme law, and under which all state organs which includes Judges and Magistrates are bound by the Constitution. Section 2(4) thereof declares that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.

Prima facie therefore, Section 123 of the Criminal Procedure Code may no longer be good law since the effective date of the new Constitution which replaced in its entirety, Section 72(5) of the former Constitution upon which Section 123 aforesaid was anchored. That means that on the question of bail pending trial, (*as in this case*) and pending appeal - (*for which there is no equivalent provision in the Constitution and therefore depends upon the court's inherent jurisdiction under Sections 23 and 165 of the Constitution*), all offences as earlier observed including capital and allied offences are bailable.

Under Section 50(2)(e) of the Constitution, and the international instruments cited above (*which are a source of our law under Section 2(5) of the Constitution*) a person detained in a criminal charge has the right to trial within a reasonable time or to release pending trial. Under the said instruments, the *reasonableness* of the *pre-trial detention* is assessed in the light of all the circumstances of the particular case, such as:-

- ***the gravity of the offence,***
- ***the risk of absconding,***
- ***the risk of influencing witnesses and of collusion with co- defendants; the detainee's behavior,***

- *the conduct of the domestic authorities (i.e. the prosecution of authorities),*
- *the complexity of investigations,*
- *whenever feasible, release should be granted pending trial, if necessary by ordering guarantees that the accused person will appear at his or her trial,*
- *throughout the detention the right to presumption of innocence must be guaranteed.*

Section 49(1)(h) the relevant provision of the Constitution says -

49(1) An arrested person has the right -

(a) - (g)

(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.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only; or by imprisonment of not more than six months.

My understanding of Section 49(1)(g)(h) is **firstly** that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. **Secondly**, the only accused entitled to a right of an automatic bond or bail, are those charged with offences (*which may be referred to as "petty offences"*) the punishment of which (*if found guilty and convicted*) is either a fine only, or imprisonment for a term of less than six months. Such offences are spread throughout the Penal Code, and other statutes containing penalty for breach thereof.

This means that the right to bond or bail is only automatic or cannot be taken away (*alienated*) in respect of what I have referred to as petty offences within Section 49(2) of the Constitution. The right to bond or bail is, like all rights, limited. It would not therefore be either correct or accurate as a matter of Constitutional Law, for me to say that the right to bond or bail is "*inalienable*" in the sense that it cannot be denied, because it can be denied under the Constitution.

I also say so **firstly** because under Section 24(1)(d), 24(2) and 24(4) of the Constitution rights and fundamental freedoms may be limited by law ... to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors including -

- (a) *the nature of the right or fundamental freedom;*
- (b) *the importance of the purpose of the limitation;*
- (c) *the nature and extent of the limitation;*
- (d) *the need to ensure that the enjoyment of the rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others, and*
- (e) *the relation between the limitation and its purpose and whether there are other less restrictive means to achieve the purpose.*

The European Convention on Human Rights is the only treaty that specifically enumerates the grounds which can lawfully justify a deprivation of liberty in the Contracting States. According to the **Boumar Case** Eur. Court HR, judgment of 29th February 1988, Series A No. 129 p. 19 (para. 43) this list

is exhaustive and "must be interpreted strictly". The first paragraph of its Article 5 reads -

"(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure prescribed by law;

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before a competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest and detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

The most common legitimate ground for deprivation of liberty is no doubt that the person is reasonably suspected of having committed an offence Article 5(1)(c) the European Convention, (Article 29(a) of the Constitution). Suspicion does not however justify indefinite detention. Both Section 50(1)(c) of the **Constitution**, Article 9(3) of the **Covenant on Civil and Political Rights** and Articles 7(5) and 5(3) of the **American and European Conventions**, respectively. The suspect has a right to be tried "**within a reasonable time or to release**" pending trial.

Liberty is the rule, to which detention must be the exception. Indeed as stated in Rule 61 of the United Nations Standard Minimum Rules for non-custodial measures, the so called "**Tokyo Rules**" "**pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for protection of society and the victim.**"

The European Court has held that Article 5(1)(c) (supra) of the European Convention "**permits deprivation of liberty only in connection with criminal proceedings.**" (Eur. Court H.R. (**Giella Case vs. Italy**, judgment of 22nd February 1989, Series A, No. 148, p.16 at para. 36).

The Supreme Court of Nigeria in the case of **Alhaji Mahahid Dukubo-Asari vs. Federal Republic of Nigeria** (supra), cited the following considerations as compelling reasons for declining to grant bail or bond -

(i) the nature of the offence,

(ii) the strength of the evidence which supports the charge,

(iii) the gravity of the punishment in the event of conviction,

(iv) the previous criminal record of the applicant,

(v) the probability that the accused may not present or surrender himself for trial,

(vi) the likelihood of further charges being brought against the accused,

(vii) the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him,

- (viii) *the probability of finding the applicant guilty as charged,*
- (ix) *the detention for the protection of the accused,*
- (x) *the necessity to procure medical or social report pending final disposal of the case.*

Considering these criteria in the case of **R vs. Danson Ngunya & Another** (*supra*) Ibrahim J. opined that criteria (ii) (*regarding the strength of the evidence which supports the charge*) should not be adopted or considered in granting bail, unless the accused/applicant has been put on his defence, (*although the learned judge hastens to add that this criteria is inconsistent*) with the principle of innocence until the contrary is established.

The decision in the Nigerian case was on appeal, and clearly, I think criteria (ii) (*strength of evidence*) criteria (iv) (*the previous criminal record of the applicant*) and (x) (*the necessity to procure a medical or social report pending final disposal of the case*) are factors for consideration more on appeal, and less upon an application for bail pending trial.

Criteria (viii) (*the probability of finding the accused guilty*) is always in issue and applications for bail pending trial should ordinarily be made at the earliest opportunity before any evidence is taken. Where an application for bail is made after substantial evidence has been preferred as in this case, bail, should, I think, not be granted, until the close of the prosecution's case and the court has summed up the evidence and made a finding whether or not an accused be put on his defence, and in which event the accused may either be acquitted or be put on his defence, and therefore remain in detention.

Similarly criteria (x) (*relating to filing of a medical or social report*) usually relates to the nature of the sentence to be imposed upon the accused when he has been found guilty, and is of little relevance on an application for bail pending trial, unless the applicant is a recidivist.

The **second** reason why I say that bond or bail can be denied or curtailed is consideration of public interest (*which is candidly acknowledged by the applicants in ground 7 of the grounds of the Applications*).

It is also useful at this stage to make reference to Section 24(2) of the Constitution which provides that despite clause (1) (*i.e. 24(1) supra*), a provision in legislation limiting a right or fundamental freedom

- (a) (*relates to new legislation*),
- (b) *shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation,*
- (c) *shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*

All that this provision (24(2)) means is that any legislation, existing or enacted after the effective date of the Constitution (27.08.2010), and limiting any right or fundamental freedom must be construed in line with and not in derogation from the factors set out in Section 24(1) of the Constitution.

Before turning to the main issue in this application whether or not to grant bail to the applicants, I also wish to make two further observations, **firstly** the purpose of bail, and **secondly** the conditions or terms for the grant of bail.

I understand the principal purpose for the grant of bond or bail is to reinforce cardinal principle of

the criminal law procedure as is enshrined in Section 40(2)(a) of the Constitution that an accused is presumed innocent until the contrary is proved, and unless there are compelling reasons for not doing so, (S. 49(1)(h)), pending such trial to be released on bond or bail.

Secondly, Section 72(5) of the previous Constitution established that the main condition or term for the grant of bond or bail was to be such that it would ensure the accused appears at a later date for trial or proceedings preliminary to trial. There is no similar provision in the new Constitution. It is now left entirely to the discretion of the court in granting bail to impose conditions which are reasonable enough to ensure such attendance.

Having made those observations I now turn to the core issue in these applications whether or not to grant bail to the applicants.

Under the Constitution of Kenya, any right or fundamental freedom may be limited, **firstly** generally on any of the grounds set out in or similar to those set out in Section 24(1) of the Constitution. **Secondly** and specifically a right to bail or bond may be limited on the grounds of **gravity** of the offence for which an accused is charged. **Thirdly**, a right or fundamental freedom may also be limited if it is so provided for in an existing written law (*Section 24(2)(b)*) or a future law (*S. 24(2)(a)*).

In the case of **Republic vs. Danson Ngunya & Another** (*supra*) Mr. Justice Ibrahim, cited with approval, the procedure stated by Justice J. Katsala in the Malawi case **M. LUNGUZI VS. REPUBLIC, (MS CA APPEAL NO. 1 OF 1995)** (*unreported*) where the state objects to the release of an accused on bail. The learned judge stated as follows-

"... In my judgment - the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to be released from detention. The burden should be on the State and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the State to prove when the court should make such an order."

Whereas this statement is a fair and proper principle of law so far as the burden upon the state to show why the right or fundamental freedom should be curtailed, Section 24(1) of the Kenyan Constitution gives five wide grounds for curtailment or limitation of the right or fundamental freedom - which Section 42(2) of the Constitution of Malawi, encapsulates in one phrase - "*interests of justice*". Section 49(1)(b) of the Kenya Constitution categorizes offences in respect of which the courts are bound to grant bail, and these are petty offences, and other offences (the grave offences) of which the courts have wide discretion within Section 24(1), keeping in mind the limitation of that discretion, by Section 24(2) thereof to grant or not to grant bail.

One of the major grounds for consideration in granting bail or otherwise, is the gravity of the offence. On that question **Thomas Hobbes** in his Tome, **LEVIATHAN** written way back in 1642, (as edited by Professor Brough Macpherson (1978 Edn), stated as follows: -

"Of facts against the Law done to private men, the greater the crime, is that where damage in the common opinion of men, is not sensible. And therefore -

To kill against the law is a greater crime than any injury, life preserved;

And to kill with Torment - greater than simply to kill, And mutilation of limb, greater than spoiling a man of his goods.

And the spoiling of a man of his goods, by terror of death, or wound, than by clandestine surreption;

And by clandestine surreption than by consent fraudulently obtained,

And the violation of chastity by Force, greater than by flattery.

And of a Woman Married, than of a woman not married.

For all these things are commonly so valued, though some men are more, and some less sensible of the same offence. But the law regarded not the particular, but the general inclination of mankind.

Also a crime against a private man, is much aggravated by the person, time and place. For to kill one's parent, is a greater crime, than to kill another; for the parent ought to have the honour of a sovereign (even if he has surrendered it to the civil authority - Central Government), because he had it originally by nature. And to rob a poor man, is a greater crime, than to rob a rich man, because it is to the poor a more severe damage.

And a crime committed in the time, or the place appointed for devotion, is greater, than if committed at another time and place, for it proceeds from a greater contempt of the law."

I will give an example of a disaffected intelligence officer, in times of crisis or war who leaks information to a foreign enemy power, which leads to slaughter of his troops. The offence of treason or treachery would be so grave that if he were granted bail, whatever the terms, the temptation to spirit or be spirited away would be real. A Slayer of unarmed Police Officers on duty being released on bail is the very anti-thesis of the rule of law; as such offender has only contempt for law and order.

Hobbes gives other cases or situations so that the list of such cases is not exhaustive, because in almost all crimes there is injury done not only to the private or injured person, but (*to the entire civil body called the population*), hence though the private citizen has a right to institute a private prosecution, the bulk of the prosecutions are conducted on his behalf by the State to which he has collectively surrendered that right.

So coming back to our Constitution, Section 49(1)(h) clearly established that bond or bail is automatic in respect of offences (crimes) punishable by a fine only, or punishable by imprisonment for less than six months. For other offences, which following the comment by Hobbes in LEVIATHAN the bail will ordinarily not be automatically granted, because of the gravity of the crime.

In the history of Kenya's Criminal Procedure Code, and the Constitution, these grave offences were established by eight (8) Acts (Nos. 22 of 1959 (S. 13), 6 of 1976/Sch) 13 of 1978 (Sch), 19 of 1984 (Sch), 19 of 1985 (Sch), 7 of 1990 (Sch), 14 of 1991 (Sch), and 5 of 2003 (S.7)). Those grave offences are murder, treason, robbery with violence, attempted robbery with violence, and related offences - except for these grave offences bail is liberally but conditionally granted to ensure the attendance of court by the accused.

It was argued by Mr. Ogola and Mr. Simiyu that the applicants are former members of the Kenya Army, the first applicant was a Colonel, while the 2nd applicant was a Captain, both commissioned officers, and therefore disciplined men of honour, and would abide by any reasonable conditions set by the court for the grant of bail.

It was argued on behalf of the State that bail should not be granted on account of the gravity of the offence whose punishment if convicted, was death, and therefore a real incentive for any accused to jump bail and abscond. I agree with this submission, even if both applicants are men of honour. The temptation cannot be wished away.

In addition because of their status as former members of the armed forces their reach is great. There is a grave danger of interfering with remaining witnesses.

In summary therefore, Section 49(1)(h) of the Constitution clearly delineates the gravity of

offences. The petty offences are those punishable by either fines only or by imprisonment for a term not exceeding six months. Courts are bound to grant bond or bail on petty offences because the Constitution says so.

On the corollary offences punishable by a combination of fines and imprisonment, or imprisonment in excess of six months, and of course capital offences, are grave offences, and as Hobbes argued over six centuries ago, even grave offences have different degrees of gravity, that is, that crimes are not equal in the perception of the ordinary common man. That common man in my view means the rural man or woman who ekes a living in the slopes of Mt. Kenya, the shores of Lake Victoria, or in the unforgiving dry lands or poor soils of the North, and North Rift of the country, and includes the **lumpen proletariat**, the **hoi polloi** who foot every morning to find a day's wage in the industries and building sites of the **novae rich** in the cities and towns of Kenya. It hurts their sense of righteousness that a suspected patricide, matricide, fratricide, a rabid rapist, a defiler of children of tender age, slayers of law enforcement agents, organizers of mass murder for whatever cause drug barons, (*if caught*) should be granted bond or bail because he or they can meet and muster the tough conditions of bail - for instance a cash bail of millions of shillings for a suspected murderer or violent robber.

Only the well endowed and peddlers of influence would meet such conditions. Once out on bail the court has no control over him. He already has access through his Advocate to all the witness statements. To impose a condition that he is not to contact witnesses is futile and of no effect to him. He can do that through other means. He has friends, he has agents. The opportunity to intimidate and terrorize witnesses becomes real.

The poor man who charged with such a grave offence, will be unable to meet the tough conditions of bail. The grant of bail to him becomes pyrrhic. His right of equality before the law, equal protection and benefit of the law envisaged under Article 27(1) of the Constitution are equally meaningless. But if he were to meet the conditions and be set free on bail, the temptation to melt away in some nook of the county or country or even out of jurisdiction is real. Cases abound where accomplices in crime have simply melted away.

"Justice is life. It is where we find fairness, and it is where we sort out our issues. It is a human sanctuary."

These words were spoken by **Hon. Tharcisse Karugarama**, the Minister for Justice of Rwanda while launching **Rwanda's 7-year Judicial Reforms Programme**, (*as reported by the East African, December 27, 2010-January 2, 2011*).

For the hurting and grieving relatives, there would already be clear signals that if you are rich or otherwise endowed, you can always buy your way in court by way of cash bail. The old adage, "**that justice must not only be done but be seen to be done**" becomes meaningless to such relatives. Their interest, and not merely of the accused must be taken into the balance in considering the grant of bail in grave offences.

In addition, whereas one can see the logic behind the rule that petty offenders be released on bond or bail, so as to decongest the prisons, there is no legal or moral logic in removing the provision for denying bail to perpetrators of grave and capital offences. The perpetrator of such offences is clearly a danger to the commonwealth of a free and democratic society. In this regard, the observations of the judicious **Blackstone** in reference to tyranny are well worthy of recital -

"To bereave a man of life, or by violence, to confiscate his estate without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation." (Blackstone Commentaries Chapter 1, p. 136).

Or again as **Professor H.L. A. Hart**, observes at p. 183 of his book the "**Concept of Law**,"

(Oxford Press), 1967 Edn.), while discussing the question of **Law and Morals** at p. 183,

"On theoretical view, the only difference between the law of gravity and the Ten Commandments - God's Law for Man - was, as Blackstone asserted, the relatively minor one that men alone of created things, were endowed with reason and a free will, and so unlike other things, would discover and disobey the divine prescriptions."

Goethe the German poet and writer in his piece - "**Truth and Poetry**" wrote -

"The highest problem of every art is, by means of appearances, to produce an illusion of a loftier reality."

Fredrick B. Hayek in his book, **Law Legislation and Liberty, Vol. 2 "The Mirage of Social Justice**, Chapter Eight, "**The Quest for Justice**" refers to P. Vinogradoff's **Common Sense in Law 1914** says at p. 70:

"Every single legal rule may be thought of as one of the bulwarks or boundaries accepted by society in order that its walkers shall not collide with each other in their actions."

And earlier at p. 46 Vinogradoff says -

"The problem consists in allowing such exercise of each personal will as is compatible with the exercise of other wills. A law is a limitation of one's freedom of action for the sake of avoiding collision with others ... In social life, as we know, men have not only to avoid collisions, but to arrange co-operation in all sorts of ways, and the one common feature of all these forms of co-operation is the limitation of individual wills in order to achieve a common purpose."

Hans Kelsen, in his book "**What is Justice?** California 1957, pp. 1 says -

"Justice is primarily a possible but not a necessary quality of social order regulating the mutual relations of men. Only secondarily it is a virtue of man, since a man is just, if his behavior conforms to the norms of a social order supposed to be just ... justice is social happiness. It is happiness guaranteed by a social order."

The question before me then becomes, is it proper for me as a court of law, a court of equity, a court of justice, a court of common sense, a human sanctuary, to ignore the commonwealth's sense of values, sense of fairness and justice and grant a suspected perpetrator of a grave offence refuge by releasing him on bail because he can meet or satisfy the tough conditions and terms of bail. What justice and whose values would a court be promoting and giving effect - those of the suspect or those of the commonwealth in a democratic society? I doubt that the court would be promoting national values and principles of governance as envisaged in Article 10(2)(b) in particular of the Constitution, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the more marginalized.

The justification for bail or bond cited and relied upon by counsel is section 50(2)(a) of the Constitution that every accused is presumed innocent until the contrary is proved. The right to be presumed innocent until proved guilty is a principle which conditions or regulates the treatment to which an accused person is subjected throughout the period of criminal investigations and trial proceedings, upto and including the end of the final appeal. Article 14(2) of the International Covenant on Civil and Political Rights provides that-

"everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Article 7(1)(b) of the African Chapter on Human Rights, and Article 8(2) of the American Convention on Human Rights and Article 6(2) of the European Convention on Human

Rights all also guarantee the right to presumption of innocence, and Article 11(1) of the Universal Declaration of Human Rights safeguards the same right for everyone, "charged with penal offence ... until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

More recently, the principle of presumption of innocence has in particular been included in Article 20(3) of the **Statute of International Criminal Tribunal for Rwanda**, Article 21(3) of the **Statute of the International Tribunal for the former Yugoslavia** and Article 66(1) of the **Statute of the International Criminal Court**.

As noted by the Human Rights Committee in General Comment No. 13, the principle of presumption of innocence means that-

"the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore a duty for all public authorities to refrain from prejudicing the outcome of a trial."
(General Assembly Comment No. 13 (Article 14) in UN compilation of General Comments p. 124, para. 7).

The principle of presumption of innocence does not however mean that one may commit grave offences at will, and brag that he is innocent until the contrary is proved. To my mind all that the principle means is that the accused shall be subjected to due process of law before he is condemned or more appropriately, he is on the evidence found guilty, convicted and sentenced or punished according to law.

In my view further the release of suspects on grave charges such as murder for which the petitioners are charged offends both legal as well as public policy. Legal policy is not confined to exploration of legislative texts but applies throughout the law. It consists of principles which judges consider the law has a general duty to uphold. It is akin to public policy, and may be regarded as its legal aspect.

Article 259(3) of the Constitution provides that every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, Legal policy is not static, and in some areas it may change drastically over a period in response to the perceived view of public needs and attitudes. For instance Lord Devlin, in his piece, **the Judge** 1979, at p. 15 refers to certain aspects of mid-nineteenth century legal policy as "**Victorian Bill of rights**" favouring (*subject to the observance of the accepted standards of morality*), the liberty of the individual, the freedom of contract, and the sacredness of property, and which was highly suspicious of taxation. Such a description would (*perhaps*) not fit the legal policy of today.

And Lord Hailsham in **D vs. NSPCC [1977] 1 ALL ER. 589 at 605** - says -

"The categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop."

For example in England, the judicial development of the extent of judicial review which began in the 1970s required broadening of the concept of **locus standi**. The speeches of their Lordships in **R vs. H M TREASURY, ex parte Smedley [1985] 1 ALL 589**, at 595, (CA) per Slade L. J., **R vs. IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd [1981] 2 ALL ER 93(HL)**, well illustrate there, what Lord Roskill has described at pp. 656 and 116, as "**Change in Legal Policy**" which has in recent years greatly relaxed the rules as to "*locus standi*."

In Kenya (for instance) the rule regarding "locus standi" was relaxed by Section 3 of the National Environment Management and Control Act - which provision was incorporated verbatim into Section 22 of the Constitution of the Second Republic giving any person the right to institute action for enforcement of any right or fundamental freedom under the Bill of Rights, (Chapter Four).

It is also a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not be taken as intending to change either the common law or statute law otherwise than by measured and considered provisions.

In NATIONAL ASSISTANCE BOARD VS. WILKINSON [1952] 2 ALL E.R. 255 at 260; Devlin LJ said-

"It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion."

In his famous treatise, the **Nature of the Judicial Process Lecture IV, Adherence to Precedent the Subconscious Element in the Judicial Process**" Benjamin Cardozo, the Associate Justice of the United States Supreme Court refers at pp. 193-4 to the French Jurist "Geny" where the latter wrote -

"We must recognize the truth that the will (la volante) which inspires a statute - "extends only over a domain of concrete facts, very narrow and very limited. Almost always, a statute has only a simple point in view. All history demonstrates that legislation intervenes only when a definite abuse has disclosed itself, through the excess of which public feeling has finally been aroused. When the legislator interposes, it is to put an end to such and such facts, very clearly determined, which have provoked his decision. And if, to reach his goal, he thinks it proper to proceed along the path of general ideas and abstract formulas, the principles that he announces have value, in his thought, only in the measure in which they are applicable to the evils which it was his effort to destroy and to similar conditions which would tend to spring from them. As for other logical consequences to be deduced from these principles, the legislator has not suspected them; some, perhaps many, if he had foreseen he would not have hesitated to repudiate. In consecrating them, no one can claim either to be following his will, or to be bowing to his judgment. All that one does thereby is to develop a principle, henceforth isolated and independent of the will which created it, to transform it into a new entity, which in turn develops itself, and to give it an independent life, regardless of the will of the legislator, and most often in despite of it."

In the present case, we are not concerned with an ordinary statute, but the Constitution, the supreme law of the land which voids and nullifies any law which is inconsistent with it (SS. 2 of the Constitution). No provision of the Constitution is greater or lesser than the other. The Constitution was drawn and approved by the people of Kenya in a referendum when Section 123 of the Criminal Procedure Code which prohibited the grant of bail to accused charged with offences of which the punishment was death was in existence.

Section 24(2) of the Constitution provides that a provision in legislation limiting a right or fundamental freedom shall not be construed as limiting the right or fundamental freedom **unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation.**

Section 123 of the Criminal Procedure Code is both clear and specific about the right to be limited. The right to be limited is bail. The extent for its limitation is clear, until the charges against the accused have been heard and determined. It therefore seems to me that Section 123 was saved by Section 24(2) (b) of the Constitution, and is still good law. In addition, I am also of the view that the grant of bail to accused on a capital charge (*except in circumstances of minors*) is not justifiable in an open and democratic society based on human dignity, equality and freedom. Dignity extends to the dead - we honour them as heroes (*and award them medals*), if they die in war in the service of their country. We do not give them medals if they died as ordinary mortals but we still honour them.

In conclusion, I think I have demonstrated by argument in the major body of this ruling that capital offences and other acts of mass murder and destruction of property for whatever reason, ideological or religious bigotry are universally condemned, and because of inconsistency of judicial opinion, call for legislation on bail. I have also argued that it is against the public interest, both local and

international, that it is against legal and public policy, that it is not justifiable in an open and democratic society based on human dignity equality and freedom, that perpetrators of capital crimes be granted bail merely because they are able to meet the tough financial or other conditions and terms of bail.

In summary therefore, these are the **compelling reasons** which deny admission of petitioners to bail -

- (1) *that the mandate of the High Court is to ensure the existence of a society where justice, fairness, equality and equity is the foundation and hallmark of the daily lives of the citizen;*
- (2) *the offence murder is grave,*
- (3) *the sentence if found guilty is the ultimate penalty death (and not a fine or six or more months of imprisonment)*
- (4) *there is no clear change in legal policy that suspects on capital offences be left off at liberty to access and tamper with witnesses.*
- (5) *a legal policy otherwise is an abuse of the values and mores of the people of Kenya, and more so of the surviving relations of the deceased, and the memory of the deceased,*
- (6) *a change of such legal policy is not justifiable in a free and open and democratic society, and may encourage calls for self-help and revenge and thus worsened a potentially volatile situation;*
- (7) *public interest considerations militate against the grant of bail of pending their trial, in capital offences.*
- (8) *there are no compelling or exceptional circumstances for the release of the petitioners on bail. The principle of innocence until proof to the contrary is established is a principle in support of due process in conformity with the principle of human dignity as envisaged under 24(1) of the Constitution.*

For those reasons, I decline to grant the prayers sought in the Notices of Motion dated 26th October, 2010 and 23rd November 2010 and dismiss the same.

I direct that the trial of the Applicants and the other co-accused shall proceed as scheduled.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 4th day of March 2011

M. J. ANYARA EMUKULE
JUDGE