



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 31 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL YONA JAOKO.....RESPONDENT

RULING

The accused, **DANIEL YONA JAOKO** has been charged with the offence of Murder.

1. He has pleaded “*Not Guilty*” and is now awaiting trial.
2. The accused has asked the Court to grant him Bond or Bail pending trial.
3. However, the Prosecution has asserted that there are compelling reasons which militate against the grant of Bond or Bail.
4. The alleged “*compelling reasons*” are contained in the affidavit of **DETECTIVE CONSTABLE ELIAB NJEHIA**, who is the Investigating Officer in the case.
5. The affidavit was sworn on 9th September 2019 and it indicated that the accused was yet to take plea in **Criminal Case No. 721 of 2019**, which was before the Magistrate’s Court at Winam.
6. In that case the accused was facing charged of **being in possession of a firearm without a Firearm Certificate**, Contrary to **Section 4(3) (b) of the Firearms Act**.
7. It was the considered opinion of the Investigating Officer that “*irritated members of the public*” were on the verge of taking revenge against the accused.
8. Therefore, the prosecution submitted that it was in the interests of justice, to have the accused remain in custody, in order to secure his own life.
9. The Investigating Officer also deponed that there were Intelligence Reports which indicate that the accused has other firearms which are not licenced.
10. As the said firearms were yet to be recovered by the police, the Investigating Officer expressed fear for the lives of the witnesses.
11. Furthermore, the witnesses were said to be close friends of the accused. Therefore, the prosecution felt that if the accused was granted Bond or Bail, he would interfere with the said witnesses.
12. In answer to the position taken by the prosecution, the accused first submitted the Directorate of Criminal Investigation was a stranger.
13. Mr. Nyamweya, the learned advocate for the accused, submitted that it was only the Director of Public Prosecution who could raise issues of compelling reasons.
14. Pursuant to **Article 49 (1) (h) of the Constitution**, an arrested person has the right to be released on Bond or Bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons why he should not be released.
15. There is no provision in the Constitution, which the accused has cited to back his contention that it was only the Director of Public Prosecution who had the mandate to raise issues of compelling reasons.

16. In any event, pursuant to **Article 157 (4)** of the Constitution, the Director of Public Prosecutions was clothed with power to direct the Inspector – General of the National Police Service to investigate any information or allegation of criminal conduct.

17. Furthermore, pursuant to **Article 157 (9)** of the Constitution;

“The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”

18. In effect, the Director of Public Prosecution does not have to take action personally. He has constitutional mandate to delegate his powers.

19. In so far as Detective Njehia is an Investigator, attached to the Directorate of Criminal Investigations, he is not a stranger to this case, because he is actually the Investigating Officer.

20. There is no merit in the contention that it is only the Director of Public Prosecution who has the requisite mandate to raise issues which demonstrate the existence of compelling reasons.

21. Indeed, it would be humanly impossible for the Director of Public Prosecution to discharge such a mandate, in all the criminal cases, throughout the country.

22. As regards the contention that the accused was yet to take plea in respect to other criminal charges, I hold the view that that fact alone does not constitute compelling reasons.

23. Of course, it would be more convenient to have an accused person take plea in more than one charge, if he was still in custody, rather than grant Bond or Bail in respect to one charge; and thereafter have the accused brought back for a plea in another or other charges.

24. However, convenience should not be confused with compelling reasons.

25. As regards the possibility that members of the public might want to harm the accused, by taking revenge upon him, I am in agreement with the accused, that he is entitled to security, which ought to be provided by the State.

26. The State cannot abdicate its responsibility of providing security to persons within the borders of Kenya.

27. But I am also alive to the fact that there might arise circumstances which were so volatile that, in real terms, an arrested person might be safer if he remained within a controlled place such as Police or Prison custody.

28. Nevertheless, I hold the view that, in general terms, the courts should be reluctant to accept the State’s pronouncement of its inability to provide security to arrested persons.

29. In this case, it is said that the police saved the accused from lynching by the members of the public.

30. The prosecution asserted that emotions were still running high on the ground.

31. In those circumstances, if the intelligence reports were accurate, the accused could be in danger, if he was granted Bond or Bail.

32. But the accused believes that the prosecution was being delusional, as there was no evidence either that he would be in danger or that he would interfere with witnesses.

33. Whilst the state has a duty to provide security to each of us, the reality is that it is not practically possible for each person to be accorded round-the-clock close security.

34. Therefore, whilst the State cannot abdicate the responsibility of providing security, when a person expresses the belief that it was delusional for the Investigating Officer to think that his life was in danger, it sounds like the person was ready to take risks.

35. By the date when the accused sought Bail or Bond, he had already been in custody for over 3 weeks.

36. By now, the prosecution ought to have obtained Witness Statements from the potential witnesses.

37. However, as the accused has said, it is perhaps only the Probation Officers who are best placed to provide the court with an objective assessment of the issues raised by the prosecution.

38. Accordingly, I direct that the Probation Officer do provide the Court with a detailed Pre-Bail Report within the next 7 days.

39. The Probation Officer will interview both the Investigating Officer and the accused, as well as all other relevant persons.

40. Shortly after receipt of the Probation Officer’s Report, the Court will make a determination on whether or not to grant Bond or Bail; and

if the accused were to be granted Bond or Bail, the Report would assist the Court in determining the most appropriate conditions to impose, in the interests of justice.

DATED, SIGNED and DELIVERED at KISUMU This 23rd day of September 2019

FRED A. OCHIENG

JUDGE