



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRC NO. E028 OF 2021**

**PROSECUTOR.....REPUBLIC**

**VERSUS**

**JOEL JUMA OLIEWO.....ACCUSED**

**RULING**

The accused, **JOEL JUMA OLIEWO**, has been charged with the offence of **Murder**, contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

1. The particulars of the offence were that on 8<sup>th</sup> October, 2021, at around 0030 hours, at Kadawa Village, Upper Kadongo Sub-location in Kisumu West Sub-County, the accused murdered **ERIC OCHIENG ATITO**.
2. On 27<sup>th</sup> October 2021 the accused pleaded “*Not Guilty*”. Immediately thereafter, Mr. Onsongo the learned advocate for the accused, asked the Court to grant bond to his client.
3. Ms Odumba, the learned Prosecuting Counsel indicated that the State would be opposing the grant of Bond or Bail.
4. In response, the Defence Counsel pointed out that the victim in this case, died whilst he was in Police custody. Therefore, the accused was of the view that the police were handling his case in a manner that would victimize the accused.
5. The prosecution indicated that it was a complete stranger to the assertions being fronted by the accused. In the circumstances, the prosecution requested the Court to call for a pre-bail Report, from the Probation.
6. Having given consideration to the views expressed by both sides, the Court expressed the view that **IPOA** would be best placed to handle the allegations made by the accused; which seemed to suggest that the police had a hand in the death of **ERIC OCHIENG ATITO**.
7. Meanwhile, in order to enable the Court make an informed decision on the application for pre-trial bond, I called for a pre-bail Report.
8. On 9<sup>th</sup> November 2021, the pre-bail Report was filed in Court. Therefore, it ought to have been possible for the Court to render its decision on the issue of pre-trial Bond.
9. However, on that date Mr. Nyamori advocate informed the Court that he had been instructed to hold a watching brief for the family of the victim.
10. Mr. Nyamori told the Court that the pre-bail Report did not reflect the factual position. He therefore sought an opportunity for a member of the victim’s family to file an affidavit.
11. Although the victim’s family indicated that it was ready to file the affidavit on that same morning, the accused protested against the request for a further opportunity.
12. It was the opinion of the accused that the family of the victim already had the opportunity to share their views with the Probation Officer.
13. In any event, the accused believes that if he were to interfere with any witness, the victim’s family could raise such issues with the Court.

14. After considering the points raised by all those concerned, I allowed the family of the victim to provide the information which they deemed crucial. However, they were allowed no more than an hour to do the needful.
15. When the case resumed, **PC PAUL MASIKA** had filed and served his affidavit. Mr. Masika said that he was one of the Investigating Officers in this case.
16. He deponed that the deceased, **ERICK OCHIENG**, had been a suspect in a case of Attempted Rape. Upon his arrest by one **ALFRED ALOO JUMA**, the deceased was handed over to the accused herein.
17. Mr. Masika further deponed that the accused, (who is the Assistant Chief in the area where the deceased had allegedly committed an offence) assaulted the deceased, seriously. According to Mr. Masika, the deceased succumbed to the injuries he had sustained at the hands of the accused herein.
18. Mr. Masika said that potential witnesses had been given warnings against recording statements with the police.
19. Some witnesses who had recorded statements, were allegedly prevailed upon to recant the same.
20. Therefore, the Investigating Officer expressed fear that if the accused was released on bond, there was a high likelihood that he may interfere with witnesses, through intimidation.
21. The Investigating Officer also revealed that Messrs **RICHARD ALARO; JULIUS AMOLLO ODAWA; and JOEL TUJU AGOO** had formed a WhatsApp group, for the purposes of raising money for use to bribe witnesses.
22. In response to the affidavit of PC Masika, the accused stated that there was nothing to demonstrate that the 3 named individuals were either his agents or were acting on his behalf.
23. I find that the actions complained about constitute criminal offences. Therefore, as the Investigating Officer is aware of the identity of persons who were allegedly subverting the course of Justice, this Court expects that such persons should already have been arrested and charged before a Court of law. It would be a great disservice to allow persons who are a threat to the course of justice, to continue to freely go about such activities.
24. Secondly, if the investigations establish a nexus between the said activities and the accused, the Director of Public Prosecutions must take appropriate action.
25. Assuming that the threats directed at the potential witnesses are real, it would appear that the said threats, or intimidation, or even bribery have not stopped just because the accused was in custody. I therefore reiterate that there is a definite need for the investigating officers and the Director of Public Prosecution to do much more, for the sake of Justice.
26. Ms Vitsengwa, the learned prosecuting counsel, drew the attention of the court to the alleged Love Triangle which was a factor in the murder.
27. Of course, if the said relationship was the basis of the motive for “*dealing with*” the deceased, for daring to have a go at raping the lady in whom the accused had shown interest, such evidence would be expected to be presented at the trial. In effect, at this stage in the proceedings, there is still no evidence before the court, upon which I could conclude that the accused had a motive for killing the deceased.
28. It would be premature to find that mens rea had been proved.
29. However, this Court cannot ignore the fact on 4<sup>th</sup> November 2021, there was a Report in the Occurrence Book (O.B) for Holo Police Post, that suggests that potential witnesses have been threatened.
30. On the other hand, the Pre-Bail Report dated 8<sup>th</sup> November 2021, indicated that the members of the victim’s family were interviewed, but they expressed no feeling of insecurity or threat, if the accused was granted bond.
31. In effect, the views expressed in the probation officer’s report is not consistent with what the Investigating Officer has told the Court, through his affidavit.
32. Considering that the probation officer indicated that, among the persons he had interviewed, were the investigating officers, it is disturbing that the Investigating Officer has now sworn an affidavit whose contents were at variance with the probation officer’s report.
33. In determining whether or not to grant Bond or Bail to an accused person, the Court is enjoined to derive guidance from **Article 49 (1) (h)** of the **Constitution of the Republic of Kenya**, which stipulates that;

*“An arrested person has the right –*

*(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.”*

34. In the light of the inconsistent information provided by the probation officer, (on the one hand) and the investigating officer, (on the other hand) I find that there is lack of reliable factual information upon which I can conclude that there are compelling reasons which would warrant the denial of bond or bail.

35. But I am also alive to the fact that the accused is an Assistant Chief within the area where the incident took place.

36. Not only is he currently serving as an Assistant Chief, but he has held that position for the last 20 years.

37. The accused has lived in the same community for the better part of his life. As he is currently 53 years old, it implies that he was first appointed as an Assistant Chief at the age of about 33.

38. In the circumstances, I hold the considered view that the accused is a very influential person within the community. He is so well-grounded that it is therefore deemed to be improbable that he could be a flight risk.

39. However, the social standing and official capacity of the accused could, if not contained, be capable of instilling fear in potential witnesses.

40. The probation officer's report dated 8<sup>th</sup> November 2021 made reference to the need for;

***“..... plausible suggestions which may enable the court arrive at best terms and conditions of bail, that does not compromise on safety of victims and the accused person, or integrity of the justice process .....*”**

41. In the Criminal Procedure Bench Book, it is indicated that the following constitute examples of compelling reasons;

***(i) The likelihood that the accused may fail to attend court;***

***(ii) The likelihood that the accused may commit or abet the commission of a serious offence;***

***(iii) The need to protect the accused person;***

***(iv) Interference with either witnesses or the evidence;***

***(v) Endangering the life, or security or the property of the victim;***

***(vi) Endangering Public Safety or National Security.***

42. Even though I have come to the conclusion that the prosecution did not provide proof of compelling reasons to warrant a denial of Bond to the accused, I find that the integrity of the justice process can only be safeguarded if the witnesses feel safe and secure.

43. If a witness had a legitimate reason to fear that either he or his family or friends would be at risk, because of the fact that the witness would be giving evidence which might lead to the conviction of the accused person, it is likely that such a witness might either opt to stay away, or might hold back some evidence.

44. It is therefore notable that the Investigating Officer herein has indicated that he was organizing for the vulnerable witnesses to be accorded the requisite Witness Protection.

45. The very fact that there is a felt need to provide Witness Protection, points at a likelihood that unless the witnesses and their respective families feel sufficiently safe, there could arise a subversion of justice.

46. After giving the consideration to the circumstances of the case; and in order to ensure that the constitutional rights of the accused are safeguarded, whilst also securing the integrity of the justice process, I now order as follows;

***(a) The Accused is granted a Personal Bond of Kshs 2,000,000/=; with TWO (2) sureties of like sum.***

***(b) The Accused shall not make contact with the family of the victim, whether directly or by proxy.***

***(c) The accused shall not make any contact, whether directly or by proxy, with the witnesses or their families.***

***(d) The accused shall, at all times, stay at least 10 kilometres away from the home of the victim's family: the said distance will be observed from all directions, in relation to the home of the victim.***

***(e) The accused shall not mention or discuss anything pertaining to the case, with the media or at any meeting or gathering.***

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF NOVEMBER 2021**

**FRED A. OCHIENG**

**JUDGE**