

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL NO. 4 OF 2019

THE REPUBLIC.....THE PROSECUTOR

=VRS=

CNO.....ACCUSED

RULING

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of the offence being that on 16th February 2019 in Borabu Sub-county within Nyamira County he murdered Shem Nyamwaya Ogega.

The accused was first arraigned in court on 28th February 2019 and being his first appearance was remanded at the Kisii Main GK Prison pending appearance before a Judge and so that an Advocate could be appointed to represent him. However, when he was brought before me on 5th March 2019 his Counsel requested for a mental assessment. This court obliged and made an order for him to be examined at the Kisii Teaching & Referral Hospital and deferred the plea to 27th March 2019. On the date fixed for plea this court was informed that the accused person had been adjudged mentally unstable and that he required treatment. Again this court postponed the plea and ordered that the accused be taken to a hospital for treatment initially Mathare Mental Hospital but also leaving it to the family to propose another facility. This court as it was proceeding on leave, left the matter to be mentioned before the High Court in Kisii on 1st April 2019. Thereafter an order was made that he would be taken to Kisii Teaching and Referral Hospital with a doctor required to furnish the court with a report in three months' time. It took quite a while for the report to be furnished to this court but finally on 17th September a report was filed indicating the accused was still undergoing treatment. It was not until 12th November 2019 that this court received a substantive report adjudging the accused to be insane. Following that report Mr. Majale, Learned Prosecution Counsel, applied to have the accused committed to an institution for treatment with a review at a period to be determined by this court taking into account the gravity of the offence.

Mr. Kaba, Learned Counsel for the accused on his part requested this court to release the accused to his mother who has undertaken to take care of him. He applied that the accused be granted bond as provided in **Section 162 of the Criminal Procedure Code**.

Mr. Majale relying on the case of **Republic v SOM [2018] eKLR** reiterated that whereas in the authority cited the accused was found guilty but insane the common issue here is insanity.

I have considered the submissions carefully. However, **Section 162 of the Criminal Procedure Code** is very clear on what a court should do in a case like this where the accused has been adjudged incapable of entering his defence. The case cited by Mr. Majale is distinguishable on the ground that there the accused had been found guilty and convicted of the offence while here the accused has been adjudged not fit to plead. **Section 162 (2) of the Criminal Procedure Code** requires this court to postpone further proceedings in the case and **Section 162 (3)** empowers this court to grant bond to the accused person if the case is one where bond may be taken. Murder is one of the offences where bond can be granted unless there are compelling reasons demonstrated. In my view it would be in the best interest of the accused person that he be committed to a member of his family rather than to commit him to a facility. Accordingly, and as no compelling reasons have been demonstrated, this court shall release the accused person on a bond of Kshs. 1 million with a surety of like amount, who is a family member and who shall commit to take him for treatment and produce him in this court together with a Psychiatrist's report after three months. In the event that no surety is forthcoming then he shall be detained at the GK Prison and a copy of this record shall then be transmitted to the relevant Minister in accordance with **Section 162 (4)** for the President's consideration as provided in **Section 162 (5) of the Criminal Code**. The case shall be mentioned again on 4th March 2020 when the court expects the accused to be produced and a report of his condition furnished to this court. It is so ordered.

Signed, dated and delivered in open court this 5th day of December 2019.

E. N. MAINA

JUDGE