



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE NO. 5 OF 2017

BETWEEN

REPUBLIC PROSECUTOR

AND

P O ACCUSED

RULING

1. P O (“the Child”) is aged 16 years old. He was charged with the offence of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The incident took place on 23rd March 2017 in Nyakach District Kisumu County. He is alleged to have stabbed Raymond Otieno, a child aged 5 years.

2. After the child was arraigned in court on 30th March 2017, the court directed that he be remanded at the Kisumu Childrens Remand Home pending trial. The court also ordered that he be taken for mental examination and a social inquiry be conducted regarding the social circumstances of the child. Dr Edwin Nyaura, a Consultant Psychiatrist at Jaramogi Odinga Oginga Teaching and Referral Hospital, examined the Child on 24th March 2017. He concluded that the Child was not fit to plead to the charges against him.

3. The Social Inquiry Report prepared by the Children’s Officer, Kisumu East Sub-County revealed that the child was an orphan and was living with his grandmother at the time of the incident. He is the last born of five other siblings. Although there is indication that he was going school, the report states that he was having difficulties learning and that he had run away from school from time to time.

4. In order to ascertain the Child’s mental condition, I summoned Dr Nyaura to testify on 31st January 2018. He explained that after talking to the Child and examining his physical features, he concluded that the Child was suffering from Mongolism or Downs Syndrome. He informed that court that this was a genetic impairment which could not be remedied or treated and that it would be impossible to put the Child through a trial.

5. **Section 162** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* deals with an accused of sound mind who is unable to plead to the charges or making his defence. It provides as follows:

162(1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone the proceedings in the case.

(3) If the case is one in which bail may be taken, the court may release the accused on sufficient security being given that he will be properly be taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.

(4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the court record or a certified copy thereof to the Minister for consideration by the President.

(5) Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164.

6. Ordinarily, under the provisions I have cited, an accused where possible would be released on bail or committed to safe custody and the trial would only commence if he or she is fit to plead and understand the case. It is clear from the medical opinion that this is a case where the trial may never commence due to the fact that the Child suffers from a permanent mental condition and in order to determine whether the Child may be released, I called for a further social inquiry report to assess the options available in dealing with the Child.

7. The report prepared by the Kisumu East, Sub-County Children Officer and filed on 6th February 2018 disclosed the following:

- While in remand, the Child has undergone extensive counselling and has shown a lot of improvement.
- The Child's family members have visited him and this has helped him understand his situation and circumstances.
- The Child has a ready sponsor; the Island of Hope Humanist Centre in Rusinga which has a primary and secondary school and is willing to accommodate the Child. The sponsor has already paid the necessary fees to ensure admission and continued study.
- The Child's family is willing to facilitate transition of the Child to the Centre.
- Prior to the incident, Mrs M A O, the Headteacher of [particulars withheld] Primary School was coordinating sponsorship for the Child.

8. The Children's Officer recommends that in the event the Child is released, he should be under supervision of the Department of Children's Services and Probation and After Care Services office in the area. Both counsel for the prosecution and the Child accept the recommendation of the Children's Officer. They urge the court to be guided by the best interests of the child in light of the unique circumstances of the case.

9. I agree that this case presents unique circumstances and in so far as the case concerns a child, I am guided by the principle that the best interests of a child are paramount as provided in **Article 53(2)** of the **Constitution** which states that, "A child's best interests are of paramount importance in every matter concerning the child." The other pertinent law is the **Children Act No. 8 of 2001** and in particular **section 4(3)** thereof which reiterates the general principal.

10. Given that the Child may never be able to stand trial due to his mental incapacity, I find and hold that it is in his best interests to be released in an environment where he will receive care and attention. I accept the recommendation of the Children's Officer that placing the Child at Island of Hope Humanist Centre

will serve the Child's best interest as it will ensure that the Child will receive counselling, support, rehabilitation and training. Committal to the remand home indefinitely will not be in the Child's best interests.

11. I therefore order as follows:

- a. I appoint **M A O** to be the guardian of **P O** until he reaches the age of majority.
- b. **P O** shall be released to the custody and care of **ISLAND OF HOPE HUMANIST CENTRE**, Rusinga, Mbita, Homa Bay County.
- c. The Child is released subject to the supervision of the Department of Children's Services and the Probation and After Care Service who are at liberty to apply for any further and other orders in relation to the Child in any court.

DATED and DELIVERED at KISUMU this 7th day of February 2018.

D.S. MAJANJA

JUDGE

Mr M. M. Omondi, Advocate for the Child.

Mr Muia, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.