



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 18 OF 2018

PROSECUTOR.....REPUBLIC

VERSUS

DOJ.....ACCUSED

RULING

The accused, **DOJ**, was charged with the offence of **MURDER** Contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

1. On 26th September 2018 the charge was read and explained to him, and he pleaded “*Not Guilty*”. He thereafter applied to be released on bail pending trial.
2. Mr. Karanja, the learned advocate for the accused, informed the Court that his client was a minor at the time when the offence was allegedly committed.
3. In that regard, Counsel applied for the accused to undergo an Age assessment. The reason why it was deemed necessary for the Age assessment was that the accused had allegedly lost his Identity Card in a house fire. In the circumstances, he did not have any document which could help him prove his actual age.
4. Miss Barasa, learned State Counsel, had no objection to the release of the accused on Bond, pending his trial.
5. However, in order to facilitate the Age assessment of the accused, the prosecution asked the Court to have the accused held in custody until after his age had been assessed.
6. At that stage, (on 26th September 2018) the Court directed that the accused should undergo the process of Age assessment at the Jaramogi Oginga Odinga Teaching & Referral Hospital (**JOOTRH**), Kisumu.
7. The Court further directed the Probation Office to provide a pre-bail Report on the accused. The said Report was intended to provide appropriate information on the accused, which would enable the Court make an informed decision on the terms upon which the accused was to be granted bail or bond.
8. On 18th October 2018, a Bail Assessment Report was filed in Court. The said Report indicated that the accused had run away from his home area, in Ndhiwa, after he had allegedly committed a crime there.
9. The accused came to Kisumu, in search of employment. He was earning his livelihood through casual work, which he did.
10. Whilst in Kisumu, the accused was arrested and charged with the offence of Assault. The case was still pending at the Principal Magistrate’s Court, Winam.
11. The Report indicates that the accused had jumped bail, whilst awaiting trial at the Winam Court.
12. In the face of the report which did not support the application for the grant of bail, his advocate sought and was granted an opportunity to file an affidavit to respond to the issues of fact, which had been raised in the report.
13. After 3 weeks, Mr. Karanja advocate informed the Court that the accused had decided not to file any affidavit. He added that he had found nothing which could controvert the facts cited in the Bail Assessment Report.

14. It was the position of the accused that he had explained the reasons why he had failed to attend Court, when he was expected to be there for the case of assault.

15. His explanation was that he had failed to raise fare to enable him travel to Kisumu at the material time.

16. Miss Kimani, learned State Counsel asked the Court to rely upon the pre-bail Report, as the accused had chosen not to challenge the contents of the said report.

17. In determining this application for bail pending trial, I first note that the prosecution did not, in principle, have any objection to the grant of bail or bond. That would imply that the prosecution did not make any attempts to provide the Court with compelling reasons, which would ordinarily be the foundation for rejecting the grant of bail or bond.

18. **Article 49(1)(h) of the Constitution of Kenya** 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.”

19. In this case, the Bail Assessment Report provides the Court with useful information, which will guide the Court in making an appropriate determination.

20. I note that the Probation Officer interviewed the accused, as well as the mother of the accused; the victim’s wife and other community members.

21. The family of the victim expressed bitterness towards the accused.

22. More significantly, the family of the victim expressed the view that the accused could attack them if he were granted bail. Their said fear emanated from the fact that some of them are witnesses who are expected to testify against the accused.

23. Secondly, members of the community felt that the accused could either abscond or interfere with the witnesses. The said feeling was informed by the fact that the accused was facing a charge of murder.

24. Considering that the accused already had a history of absconding, when he was on trial for a charge of assault, I hold the considered view that the possibility that he would abscond when on trial for murder, is real.

25. Furthermore, the accused lacks family or other Community Support Systems, which would render it more conducive for him to be granted bail or bond.

26. Thirdly, there is a possibility that the accused could be attacked by some neighbours, who might wish to avenge the killing of **MICHAEL OWINO ODONGO**, as well as the alleged demolition of a part of the rental dwelling room where the deceased was killed.

27. In regard to the possibility that neighbours could met out revenge against the accused, the Court wishes to emphasize that the accused is entitled to protection by Law enforcement personnel. The law presumes that the accused is innocent until and unless the prosecution prove otherwise.

28. But even if it were assumed that the accused was guilty, he would still be entitled to appropriate protection from those who might want to cause him harm.

29. Nevertheless, the Court cannot ignore the possibility of vengefulness.

30. Having taken into account all the prevailing circumstances, I find compelling reasons which militate against the grant of bail or bond at this stage. Accordingly, the application by the accused, for bail pending trial is dismissed.

DATED, SIGNED and DELIVERED at KISUMU this 21st day of November 2018.

FRED A. OCHIENG

JUDGE