



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Aol & another (Criminal Case E014 of 2025)
[2025] KEHC 7525 (KLR) (19 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E014 OF 2025**

OA SEWE, J

MAY 19, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

ELIJAH OGWEL AOL 1ST ACCUSED

STEVE OMONDI OGAL ALIAS BOLE 2ND ACCUSED

RULING

1. Before the Court for determination is the Notice of Motion dated 30th April 2025. It was filed on behalf of the two accused persons by the law firm of Kipkenda & Company Advocates for orders that;
 - (a) Spent
 - (b) The Court be pleased to defer the plea slated for 7th May 2025;
 - (b) The accused persons be released on bail pending their formal charge and/or trial.
 - (c) The Court be pleased to issue any other orders it deems fit to grant.
 - (e) The costs of the application be provided for.
2. The application was brought under Articles 49(1)(h), 50(2)(a) and 51(1) of the *Constitution* of Kenya and all enabling provisions of the law. It was premised on the grounds that, on the 18th April 2025 at around 02.00 a.m. officers from the Directorate of Criminal Investigations Office in Oyugis arrested the two accused persons from their respective houses on allegations of being involved in the murder of Robert Odiwuor Ndege. They further contended that they were never presented to court within 24 hours after their arrest as dictated in Article 49(1)(f) of the *Constitution* but were unlawfully held at Oyugis Police Station until 23rd April 2025 when they were finally presented to court for directions pertaining to mental assessment.



3. The accused persons further averred that the intended charge against them will be a miscarriage of justice and an abuse of the court process as there are conflicting findings on the cause of death of Robert Odiwuor Ndege. They made reference to Oyugis Chief Magistrates Miscellaneous Criminal Application No. E049 of 2024: Office of the Director of Public Prosecutions, Oyugis Through DCI Rachuonyo South v Juma Kevin Okoth & 3 others in which an order was made by the Magistrate's Court for a second postmortem examination to be conducted to establish the actual cause of death. Hence, it was the contention of the accused persons that there is an urgent need for the Office of the Directorate of Criminal Investigations to be directed to carry out further and proper investigations to establish the real cause of death of Robert Odiwuor to rule out the possibility of suicide.
4. The accused further averred that their continued detention infringes on their constitutional right to fair hearing; and that it is in the interest of justice that they be released from custody pending trial in the event the Prosecution decides to proceed with the impugned charges. They added that they have fixed abode in Oyugis and are therefore not a flight risk.
5. The grounds were explicated in the respective Supporting Affidavits sworn by the two accused persons. At paragraph 10 of his affidavit, the 1st accused deposed that he is suffering from a medical condition that requires regular medical check-ups to manage. He therefore averred that it is only fair that he be released on bail to enable him access the much needed medical check-ups.
6. In support of his averments the 1st accused annexed medical documents to his Affidavit, attributed to Matata Hospital. He also stated that he is ready and willing to abide by whatever conditions the Court may impose to ensure his attendance.
7. The 2nd accused made more or less similar averments in his Supporting Affidavit. He annexed a copy of the Order issued in Oyugis Miscellaneous Criminal Application No. E049 of 2024 as well as copies of the Postmortem Reports, though the documents are not only faint but are also, in the main, illegible.
8. In their submissions, the accused persons reiterated the alleged abuse of process in that they were arrested on 18th April 2025 and were detained at Oyugis police station up to 23rd April 2025. They also contended that, since the Information is based on two conflicting reports, the trial is a non-starter. They relied on the case of Masikini v Republic, Criminal Appeal No. 176 of 2018 for the proposition that if the cause of death cannot be ascertained then it would be difficult to apportion blame. Accordingly, the accused persons urged for deferral of plea pending a review by the DPP in accordance with the National Prosecution Policy Guidelines, 2019.
9. The respondent filed a response by way of an affidavit sworn by Detective Constable Wesley Sigei. The affiant conceded that the accused persons were arrested on 18th April 2025; and that the file was promptly presented to the Office of the Director of Public Prosecution for registration of the Information in readiness for the arraignment of the accused persons before the Court but that due to power outage the Prosecution's Uadilifu System could not be accessed to facilitate the e-filing of the Information. Thus, the respondent conceded that it was not until 23rd April 2025 that the accused persons were arraigned before Court.
10. The respondent therefore contended that the delay was occasioned by circumstances beyond their control. They urged the Court to find that the application is a delaying tactic and a gimmick tailor-made by the accused persons with the sole aim of circumventing the ends of justice.
11. The averments were expounded on by counsel for the respondent. She explained that the accused persons were arrested on Good Friday and were to be arraigned in court immediately but for the power outage. Counsel explained that since the arrest fell during the Easter Weekend, the next working day was



22nd April 2025. The delay was therefore only in respect of the 22nd April 2025 when they experienced power failure.

12. According to the respondent the accused persons were presented before court as soon as was practically possible in terms of Art. 49(i)&(ii) Constitution of Kenya.
13. I have considered the submissions made herein by counsel for the accused persons as well as the response made thereto by the respondent and have no hesitation in rejecting the application for 2 reasons. First and foremost, violation of a constitutional right, including the right to be presented before court within 24 hours of arrest, is no bar to arraignment or prosecution. The Court of Appeal made this clear in *Evans Wamalwa Simiyu v Republic* [2016] KECA 555 (KLR)

“(23) This issue has been the subject of several decisions of this Court. The correct position in law was set out in *Julius Kamau Mbugua v Republic* (2010) eKLR, where the Court stated that the violation of the appellant’s right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. On this basis, we do not consider the issue fatal to the prosecution even if proved.”
14. Secondly, the issue of conflicting post mortem reports as to the cause of death is a matter of evidence and has therefore been raised prematurely. The conflicting reports are yet to be produced before the court by the makers thereof. It is not judicious for the Court to rule, at this early stage of the proceedings that one or the other report is misleading. Ultimately, the Court will take into account, not just one piece of evidence presented by one witness, but the overall picture presented by the Prosecution through their various witnesses.
15. The accused persons also pointed out that they have applied for review of their cases. That is an administrative aspect within the domain of the Director of Public Prosecutions and, as pointed out by counsel for the respondent, the duty can be performed at any stage in the course of a trial. As for bond, that is a right and will be considered after plea in the usual manner.
16. It is therefore my finding that the Notice of Motion dated 30th April 2025 is devoid of merits. The same is accordingly dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT HOMABAY THIS 19TH DAY OF MAY 2025.

OLGA SEWE
JUDGE

