

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. E065 OF 2021

REPUBLIC.....PROSECUTION

VERSUS

IBRAHIM ROTICH.....ACCUSED

RULING

1. The Application before Court seeks leave for this murder trial to proceed *in absentia* of the accused person as he has jumped bail and absconded.
2. The background of the case is that the accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 12/05/2021 at Rural Estate in Iten Township, Keiyo North sub-County within Elgeyo Marakwet County, he murdered one **Agnes Jebet Tirop**, a young, renowned and multiple award winning Kenyan international female athlete.
3. The accused took plea on 16/11/2021, denied the charge and a plea of guilty duly was entered. The defence then applied for his release on bail/bond but by the Ruling rendered on 11/05/2022, my brother **Nyakundi J** declined the Application upon finding the existence of compelling reasons for denying bail. The case was then allocated to this Court and the trial eventually commenced before me on 15/11/2023. To date, 11 witnesses have testified. Before the trial commenced however, defence Counsel, **Mr. Ngigi Mbugua**, on 18/05/2023, orally renewed the Application for bail, arguing that the circumstances had since changed from that prevailing when the earlier Application was denied. The Application was opposed by the Prosecution led by **Mr. Fedha**, and assisted by **Mr. Mugun** and **Ms. Okok**. **Mr. Warigi**, Counsel watching brief for the family of the deceased, too, opposed the same. After hearing the parties, and perusing their written Submissions, by my Ruling dated 15/11/2023, I allowed the Application and granted the accused bond/bail on conditions that this Court considered quite stringent. Among the conditions were that the accused was to deposit his passport with the Court in case the same had not already been confiscated from him, that he be reporting at the Eldoret Polic Station once every week, and that he was not at any time to leave Uasin Gishu County without the express approval of the Investigating Officer. The accused then posted bail and after about 2 ½ years in remand, eventually secured his release pending hearing and determination of the case.

4. As it were, it turned out that the accused never complied with the conditions referred to above, and for some reason, none of the supervisory or implementing agencies concerned, noticed such non-compliance. It is thus this “loophole” that the accused exploited to jump bail and disappear without trace.
5. The instant Application is supported by the Affidavit sworn by one **Corporal Philip Ndetto** said to be attached to the Directorate of Criminal Investigations (**DCI**) Headquarters, Nairobi. He deponed that upon arrest, the investigating team confiscated the accused’s passport along with his Identity Card, but that it was later discovered that the accused applied for another passport which is currently lying at Eldoret Immigration offices awaiting collection, and that the investigating team placed a red flag on the said passport to the effect that the accused be arrested should he turn up to collect it. He deponed further that the accused has since switched off his mobile phone since February 2025, and the handset has never been used or any other sim card inserted in it since, and his Identity card has never registered any other mobile phone line apart from his original line, which he has used ceased to use. He urged further that the investigating team has endeavoured to trace the accused in several Counties, including his rural home but with no success, that the investigating team has identified some persons of interest who have been communicating with the accused, and whose phone numbers were submitted to mobile subscribers to monitor the communication but also with no success. He deponed further that the accused has never attended Court ever since he jumped bail, and his Counsel confirmed that he, too, has not heard from the accused. He thus urged that based on the conduct of the accused, it is evident that he has waived his right to be present during the trial, and that the Court has unfettered discretion to grant the order for the trial to proceed *in absentia*.
6. When the Application came up for directions on 13/11/2025, Defence Counsel **Mr. Ngigi Mbugua** informed the Court that as he had not heard from the accused, he had no instructions on the Application, and would thus not file any response or make any submissions thereon.
7. The State then, through **Senior Assistant Director of Public Prosecutions Lucas Tanui**, filed the Submissions dated 3/11/2025. He observed that the fact that the accused applied for a new passport yet he knew that he had deposited the same in Court indicates that he had intentions to flee the jurisdiction of the Court, which seems to be the case now. He urged that bond is an agreement between the accused and the Court that binds the accused to attend Court when the matter is coming up for mention or hearing by posting security or cash bail, and that the accused was obligated to appear in Court as required but he failed to honour this

solemn duty hence the necessity of this Application. He submitted further that the Court has the duty to balance the interest of the parties equally and fairly, and that the victim's family deserves to demand justice for their kin whom the accused is alleged to have brutally murdered. He urged further that by absconding, the accused has made it impossible for the trial to proceed. He cited the case of **Sora vs Republic, Criminal Appeal No. E012/2025 [2024] KEHC 11477 KLR**, and also the case of **Republic Joshua Chacha Moronge [2019] eKLR**.

Determination

8. The issue to be answered in this case is “**whether this murder trial should proceed in absentia, the accused person having jumped bail and absconded**”.
9. Section 206 (1) of the Criminal Procedure Code (CPC) permits trials *in absentia* “*if, the hearing is adjourned, the accused person does not appear before the court the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present,*”. Under Section 206(4) “*if the accused person is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court*. However, Section 206 aforesaid, as framed, applies in subordinate Courts. The CPC does not therefore seem to expressly address the situation, as herein, where the trial concerned is at the High Court.
10. However, S.N. Mutuku J, in the case of **Republic v Galma Abagaro Shano (2017) eKLR**, the Court allowed a murder trial to proceed in the absence of the accused who had absconded. The Court cited the Ugandan case of **Uganda v Gulindwa Paul and Tumusiime HCT-00-ACCM-005-2015**, in which it was held as follows

“In my view, a defendant of full age and sound mind, who is properly notified of his trial and chooses to absent himself, as a result violates his obligation to attend court, deprives himself of the right to be present, and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights. I hold this view because I do not think that one who voluntarily chooses not to exercise a right given to him by the constitution, cannot turn around and say he has lost the benefits he might have expected to enjoy had he exercised it.”

11. In the said case of **Republic - vs- Galma Abagaro Shano (supra)** itself, the Court held that:
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“it is my considered view that the trial against the accused person must proceed in the interest of justice. It has been pending since 14th October, 2015. The family of the deceased deserves justice and their rights must be considered. By absenting himself, the accused abrogated his constitutional right to be present during his trial. I therefore allow this application and direct parties to make final submissions notwithstanding the absence of the accused person to pave the way for judgment on the evidence on record.”

12. There is also the decision of **A.K. Ndungu J** made in the case of **Republic v Teteror (Criminal Case 2 of 2017) [2023] KEHC 18592 (KLR) (15 June 2023) (Ruling)**, in which, similarly, the accused person jumped bail after he had been put on his defence. The Judge found that that by absenting himself, the accused person had abrogated his Constitutional right to be present during trial. He stated as follows:

“20. In the instant case, the Accused person was present throughout the prosecution case. He however escaped from lawful custody when he was placed on his defence. The Accused is not in court due to his own fault of escaping from lawful custody and has thus waived his constitutional right to be present in court.”

13. On his part, **A. Mrima J**, in handling a similar situation in the case of **Republic v Joshua Chacha Moronge [2019] eKLR**, the Court held that:

“The aim of a criminal trial is to expeditiously accord justice to all parties. An accused person found guilty of an offence ought to be accordingly sentenced in line with the law otherwise one must be acquitted forthwith. It is that balance which a trial aims to achieve. Therefore, in a case where one of the parties makes the trial unable to proceed then such a party visits an injustice to the other. That being so, a Court of law is fully enabled to deal with such instances. On one hand if the delay is occasioned by the prosecution the Court has powers to even compel the hearing to proceed. On the other hand, if the delay is occasioned by the accused person Article 50(2)(f) of the *Constitution* comes to play. For a Court to take refuge in Article 50(2)(f) of the *Constitution* and proceed on with a trial in the absence of an accused person the Court must first be satisfied that such inability to proceed with the trial is caused by the deliberate conduct of the accused person. That therefore means if the Court forms the opinion that the delay is not caused by any deliberate conduct on the part of the accused person then the trial cannot legally proceed in the absence of the accused person. To reach any of the findings,

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a Court must carefully consider the particular circumstances of the case. In view of the foregone I now find and hold that Article 50(2)(f) of *Constitution* perfectly comes to play in this case and order that the trial shall proceed the absence of the accused person notwithstanding.”

14. Another case worth citing is the decision of J.N. Njagi J made in the case of *Sora v Republic (Criminal Appeal E012 of 2023) [2024] KEHC 11477 (KLR) (18 September 2024) (Judgment)*, in which he found as follows

“It is clear from the above authorities that where an accused person absconds from the jurisdiction of the court, the trial court can proceed with the case in the absence of the accused. The appellant in this case was jointly charged with two other people. It would have been unfair to the appellant’s co-accused and against the tenets of fair trial for the case to be kept in abeyance indefinitely until when the appellant was apprehended or when he decided to turn up in court. The appellant deliberately failed to turn up in court. He cannot turn around and complain of infringement of his constitutional rights on fair trial when it is him who in the first place decided not to turn up in court for trial. His conduct made it impossible for the trial to proceed. By absenting himself from the court the appellant waived his right under Article 52 (2) (f) of the *Constitution*. I find no substance on the argument that the trial court was in error in proceeding with the case in the absence of the appellant.”

15. A review the above authorities reveals that trials *in absentia* (in the absence of the accused) are generally not allowed, as the Constitution guarantees the right of an accused to be present as one of the fundamental tenets of the right to a fair trial. However, Courts possess the powers to make the decision to proceed *in absentia*, in appropriate circumstances, such as where the accused person intentionally absents himself from the trial or absconds, or escapes from lawful custody, or becomes unruly during Court hearings. As it is oft stated, the Court has the duty and obligation to balance the rights of an accused person with the need to prevent criminals from escaping accountability. By absenting himself, an accused person sends the very strong signal that he has voluntarily chosen to waive his right to be present during his trial. While therefore the Constitution protects the right of an accused person to be present during his trial, a trial in *absentia* is permissible where the accused's own conduct or actions, in this case, absconding or jumping bail, obstructs continuance of the trial. There is however no bar against the accused emerging subsequently and applying

for setting aside of a conviction arising from a trial *in absentia*, and to grant such Application if the absence is well explained and justified.

16. In view thereof, I agree entirely with **Senior Assistant Director of Public Prosecutions Lucas Tanui**, that the fact that the accused applied for a new passport while very much aware that he had deposited the same with the investigating team, which passport the team is still holding, is clear confirmation that the accused had the obvious intention to flee from the jurisdiction of the Court, and thus permanently abscond. That action, besides being in blatant breach of the bail/bond terms upon which he was released from custody, has also made it impossible for the trial to proceed. Although the investigating team, and by extension even the Prosecution, cannot escape part of the blame for “sleeping on the job” and thus contributing to creation of the loophole which the accused exploited to abscond, the investigating team has presented before the Court an exhaustive narrative of the efforts it has made to trace the accused, which narrative demonstrates that the accused had very carefully and meticulously planned his escape, and also ensured that “nabbing” him would be a very difficult and arduous endeavour. Indeed, the issuance of successive warrants of arrest by this Court has not borne fruit, and even the accused person’s Counsel, **Mr. Ngigi Mbugua** has on several occasions informed the Court that he, too, has no information whatsoever on the whereabouts of the accused as the accused has never contacted him since absconding.

17. I thus agree that the Court has the duty to balance the interest of the parties equally and fairly, and that the victim’s family in this matter also has the right to demand justice for their deceased kin. 11 Prosecution witnesses had already testified by the time the accused jumped bail, and the trial has remained in limbo since the 11th witness testified on 5/11/2024, more than 1 year now.

Final Orders

18. In the end, I rule and order as follows:

- i) The Notice of Motion dated 9/10/2025 is allowed, and consequently, an order is hereby issued that the trial in this murder case shall now proceed *in absentia* of the accused person, that is without the necessity of the presence of the accused person.
- ii) The trial shall now therefore proceed from the point or stage from where it stopped, and the Prosecution is therefore allowed to prosecute the case in the absence of the accused person.

iii) A date for further hearing of the Prosecution case shall be now be fixed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 17TH DAY OF DECEMBER 2025

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WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Accused absent

N/A for Advocate for the Accused (*who had however already earlier withdrawn from acting*)

Ms. Muriithi for the State

Mr. Warigi watching brief for the family of the deceased

C/A: Brian Kimathi