

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL CASE NO. E012 OF 2024**

**REPUBLIC.....PROSECUTION  
COUNSEL**

**VERSUS**

**SAMWEL OTIENO OLWERO.....1<sup>ST</sup>  
ACCUSED**

**STEPHEN BIKO GUYA.....2<sup>ND</sup>  
ACCUSED**

**CALVINCE JONYO.....3<sup>RD</sup>  
ACCUSED**

**RULING**

1. The State, vide the Notice of Motion dated 10<sup>th</sup> January, 2026, expressed to be presented under *Article 50(2)(f)* and *Article 165(3)* of the *Constitution of Kenya* seeks the following orders:

a. THAT this Honourable Court be pleased to order that the proceedings herein do proceed against the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons in the absence of the 1<sup>st</sup> accused person, who is currently at large.

b. THAT this Honourable Court do find that the 1<sup>st</sup> accused person, having been granted bond in 2024 and having attended court proceedings in 2024 and early 2025 and thereafter having absconded court attendances on multiple occasions, specifically on 28<sup>th</sup>

January 2025, 6<sup>th</sup> February 2025, 24<sup>th</sup> June 2025, 14<sup>th</sup> July 2025, 29<sup>th</sup> July 2025, 23<sup>rd</sup> September 2025 and 27<sup>th</sup> October 2025, has by his deliberate and persistent conduct waived his constitutional right to be present during trial pursuant to *Article 50(2)(f)* of the *Constitution*.

- c. THAT this Honourable Court do issue any further or other orders it deems fit and just in the circumstances.
2. The grounds upon which the application is premised are in precis that the 1<sup>st</sup> accused was granted bond on 24<sup>th</sup> October, 2024 and was subsequently released and initially complied with the terms of bond by attending court until 21<sup>st</sup> January, 2025, whereafter he absconded and has not attended the subsequent court sessions numbering about 13, a period of over 1 year.
  3. The further ground presented by the State is that it has since come to light that the bond security documents that were presented by one **Stephen Onyango Awinda** - the 1<sup>st</sup> accused's surety - to secure the release of the 1<sup>st</sup> accused were forged and that the said surety is currently facing criminal prosecution in respect thereof in *Kisumu Chief Magistrate's Court Criminal Case No. E038 of 2025*.

4. The application is supported by the affidavit of the investigating officer, **Police Corporal Zablon Atubwa**.
5. In his affidavit, **Police Corporal Zablon Atubwa** deposes that in the instant matter which is a murder trial, three accused persons were all initially charged before this Court and were granted bond pending trial. He states that the 1<sup>st</sup> accused, **Samwel Otieno Olwero**, complied with bail conditions initially but began absconding from court proceedings in January, 2025 without explanation, resulting in multiple missed court appearances and delays.
6. **Corporal Atubwa** notes that this Court has issued multiple warrants for the 1<sup>st</sup> accused's arrest, but he remains at large despite diligent efforts by law enforcement. He adds that investigations have revealed that the surety documents used to secure his release on bond were fraudulent and the surety responsible has since been arrested and charged with forgery and aiding a prisoner to escape, with proceedings pending before the Magistrate's Court.
7. The investigating officer emphasizes in his affidavit that the 2<sup>nd</sup> and 3<sup>rd</sup> accused have remained in custody and have always been ready to proceed with trial, while the continued absence of the 1<sup>st</sup> accused has delayed the case. This delay, he states, violates the constitutional rights of the 2<sup>nd</sup> and 3<sup>rd</sup> accused to have criminal proceedings concluded without unreasonable

delay and also undermines the rights of witnesses and the victim's family.

8. **Corporal Atubwa** contends in his affidavit that the conduct of the 1<sup>st</sup> accused demonstrates a deliberate attempt to evade justice, effectively waiving his right to be present during trial. He therefore submits that it is in the interests of justice for the trial to proceed in the absence of the 1<sup>st</sup> accused.
9. The officer concludes that allowing the trial to continue in the absence of the 1<sup>st</sup> accused is necessary to uphold the rule of law, protect the rights of all parties involved and serve the interests of justice.
10. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, through their Counsel, **Ms. Omollo**, support the State's application.
11. Having considered the Notice of Motion dated 10th January, 2026, the grounds advanced, the supporting affidavit and the authorities placed before the Court, the issues for determination in this application are:
  - a. Whether the 1<sup>st</sup> accused's persistent absence from trial, when considered together with the allegations of fraud surrounding the bond documents and his surety's misconduct, constitutes conduct that makes it impossible for the trial to proceed in his presence,

such that the trial may lawfully proceed in his absence under *Article 50(2)(f)* of the *Constitution*.

- b. Whether, in all the circumstances, it is in the interests of justice to allow the trial against the three accused to proceed in the absence of the 1<sup>st</sup> accused.
12. These issues require the Court not only to consider the constitutional scope of the right to be present at trial and its waiver by conduct, but also to assess whether the circumstances surrounding the 1<sup>st</sup> accused's release on bond, including the alleged forgery of bond security documents presented by the surety, undermine any basis for expecting the 1<sup>st</sup> accused's attendance and fortify the inference that his absence is deliberate.
  13. With regard to the first issue for determination, *Article 50(2)(f)* of the *Constitution* provides:

**“Every accused person has the right to a fair trial, which includes the right—to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.”**

14. In the case of ***Benard Omondi Mumbo v Republic [2022] KEHC 2816 (KLR), Criminal Appeal E022 of 2020***, the High Court explained this provision, stating that:

***“A plain reading of Article 50(2)(f) shows that every accused person has a right to a fair trial which includes the right to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed... an accused’s conduct that may deny him the enjoyment of the right to be present in court during his trial include ... where he deliberately absents himself or absconds.”***

15. With respect to the second issue for determination, which is whether, in all the circumstances, it is in the interests of justice to allow the trial against the 3 accused persons to proceed in the absence of the 1<sup>st</sup> accused, jurisprudence that emerges from our courts is that where an accused voluntarily and persistently absents himself from trial proceedings of which he has notice, his conduct may amount to a waiver of the constitutional right to be present at trial.

16. In the case of ***Republic v Galma Abagaro Shano [2017]eKLR***, the High Court ruled on a murder trial where the accused had absconded after release on bond. The Court observed as follows:

***“This court has in a detailed manner determined and ruled that this trial would proceed in the absence of the accused who has waived his right to a fair trial in regard to being present during the trial by absconding and removing himself from the jurisdiction of this court...”***

***where an accused person... absconds, then he has waived his right to be present when being tried and the court therefore can proceed to hear and conclude the trial in his absence.”***

17. In ***Republic v Teteror [2023] eKLR***, the High Court found that an accused who escaped from lawful custody after being in court had waived his right to be present. The Court observed as follows:

***“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... and has thus waived his constitutional right to be present in court.”***

18. In ***Republic v Rotich [2025] eKLR***, the Court emphasized that where an accused has absconded and not returned, the right to be present may be relinquished. The Court stated as follows:

***“...by absconding himself, the accused abrogated his constitutional right to be present during his trial... I therefore allow this application and direct parties to... pave the way for judgment on the evidence on record.”***

19. Lastly, in the case of ***Sora v Republic [2024] eKLR***, the Court stated:

***“It is clear... 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 deliberately failed to turn up in court. He cannot turn around and complain of infringement of his constitutional rights... His conduct made it impossible for the trial to proceed. By absenting himself... the appellant waived his right.”***

20. These authorities confirm that persistent and deliberate absence, where the trial court has taken reasonable steps to secure attendance, may constitute a waiver of the right to be present and allow the trial to proceed in absentia.

21. The affidavit of **Corporal Atubwa** deposes that the bond security documents presented to this Court on behalf of the 1<sup>st</sup> accused’s purported surety, **Stephen Onyango Awinda**, have since been revealed through investigation to be forged. The surety is currently facing prosecution in Kisumu Chief Magistrate’s Court for, *inter alia*, forgery and aiding a prisoner to escape.

22. This evidence raises a live and credible inference that the 1<sup>st</sup> accused and his surety may have colluded in the

preparation or presentation of forged bond documents to secure his release and/or escape from lawful custody. If so, that conduct strikes at the very foundation of the bail regime, one of trust and accountability and suggests that the 1<sup>st</sup> accused was never genuinely intending to attend trial in accordance with the bond conditions.

23. The possibility of such collusion is supported by the fact that the 1<sup>st</sup> accused complied with the terms of bond only briefly before abruptly absconding and his abscondment followed almost immediately after a period during which the surety's bond documents were material to his release - when the trial was about to commence. The same surety is now facing criminal prosecution for offences intimately connected to those bond documents and the 1<sup>st</sup> accused's abscondment.

24. In such circumstances, it cannot be said that the accused's absence is accidental, inadvertent or due to circumstances beyond his control. Instead, the accused's absence, reinforced by the alleged fraud involving his surety, strongly points to a deliberate design to evade the judicial process. This is conceptually analogous to the reasoning in the cases of ***Sora*** and ***Galma*** that where absence is not merely random or inadvertent but is a product of deliberate behaviour, the accused may not later rely on his absence to interrupt proceedings.

25. In *Sora*, the High Court held that:

***“...the Appellant deliberately failed to turn up in court... His conduct made it impossible for the trial to proceed. By absenting himself... the appellant waived his right to be present.”***

26. Here too, the cumulative effect of the 1<sup>st</sup> accused’s absence and the circumstances surrounding his release and flight makes it impossible for trial to proceed in his presence.

27. The continued absence of the 1<sup>st</sup> accused has impeded the progress of this murder trial, causing repeated deferrals of hearings and undermining the rights of the 2<sup>nd</sup> and 3<sup>rd</sup> accused to have their case concluded without unreasonable delay, as guaranteed under *Article 50(2)(e)* of the *Constitution*. Moreover, the victim’s family and witnesses have also been denied closure, compounding the prejudice arising from the 1<sup>st</sup> accused’s conduct.

28. Prolonged absence is inconsistent with the efficient administration of justice. The delay here is of constitutional import, not only delaying justice for the two co-accused and the State, but also eroding public confidence in the administration of criminal justice where the 1<sup>st</sup> accused’s misconduct enables the repeated postponement of a serious trial.

29. For the reasons set out above, this Court finds that the conduct of the 1<sup>st</sup> accused in absconding from the instant court proceedings, remaining at large despite knowledge of the subsistence of this matter and in circumstances where the bond documents upon which his release was secured are alleged to be forged, has made it impossible for this trial to proceed in his presence and amounts to a waiver of his right to be present at trial under *Article 50(2)(f) of the Constitution*.
30. It is in the interests of justice, balancing the rights of the co-accused, the need for expeditious determination of this matter and the rights of the victim's family and the witnesses, that the trial continues in the absence of the 1<sup>st</sup> accused.
31. Accordingly, the State's application dated 10<sup>th</sup> January, 2026 is allowed. The proceedings shall continue in the absence of the 1<sup>st</sup> accused, who is deemed to have waived his right to be present.
32. The trial will proceed on 20<sup>th</sup> and 21<sup>st</sup> of July, 2026.
33. The warrant of arrest issued against the 1<sup>st</sup> accused will remain in force.
34. It is so ordered.

DELIVERED, DATED and SIGNED this 17<sup>th</sup> day of February,  
2026.

**JOE M. OMIDO**  
**JUDGE**

1<sup>ST</sup> ACCUSED: No appearance.

2<sup>ND</sup> & 3<sup>RD</sup> ACCUSED: Both present.

PROSECUTION COUNSEL: **Ms. Muema.**

DEFENCE COUNSEL: **Ms. Omollo.**

COURT ASSISTANTS: **Mr. Ngoge & Mr. Juma.**