



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL CASE NO. E005 OF 2021**

STATE.....PROSECUTOR

VERSUS

LUCAS ONYANGO WALO.....ACCUSED

**RULING ON BAIL PENDING TRIAL**

1. The accused herein is Lucas Onyango Walo. He is charged with the information of **Murder Contrary to Section 203 as read with 204 of the Penal Code**. Particulars of the information dated 5<sup>th</sup> March 2021, signed by G.M. Kakoi Senior Principal Prosecution Counsel, Siaya County, on behalf of the Director of Public Prosecutions. Particulars of the Offence are that on the 1<sup>st</sup> and 2<sup>nd</sup> day of January 2020, at unknown time at Bar-Kalare Village, Lihanda Sub-Location, East Gem Location within Gem Sub-County in Siaya County, jointly with others not before Court, Murdered Maurice Omondi. The accused, according to the court records, was only arrested on 23.2.2021 one year after the alleged offence of murder. He was mentally examined on 2.3.2021 and found to be mentally sound and fit to stand trial.

2. On 8.3.2021, the accused took plea and pleaded not guilty to the charge of murder. It is then that the court appointed advocate, Mr. Mirembe, prayed for a Prebail Assessment Report on the suitability of the accused person being released on bail pending trial and this court did Order for the said report and set the matter for mention on 29.3.2021. On the latter date, the accused had instructed his own private advocate Mr. Agina hence Mr. Mirembe Advocate was discharged from the pauper brief.

3. As at the said date and time when the matter was being mentioned, the Prebail Assessment Report had not been filed so the court directed that the advocate for the accused could file an application for bail/bond for consideration. Later the same day, the prebail report was filed signed by David O. Odumba Probation Officer Siaya, Sub-County. The court then fixed a hearing date for 20.7.2021 which unfortunately became a gazetted Public Holiday-Idd-ul-adha hence the matter was mentioned on 21.7.2021 to fix a fresh hearing date. The court fixed a hearing date for 12.10.2021 and gave a mention date for today to consider the prebail assessment report.

4. Mr. Agina Advocate has filed an application by way of Notice of Motion dated 22.7.2021 asking the court to vary, set aside or rescind its *suo motu* Order condemning the accused to Judicial custody until the hearing and determination of this application and admit him to bail forthwith. He further prays that the court do admit the applicant/accused to bail/bond on such terms as it deems fair and expedient to grant in the circumstances of the case.

5. In the grounds supporting the application, Mr Agina states that bail is a constitutional right enshrined in **Article 49 of the Constitution of Kenya** and not amendable by a Court of Law. Secondly, that an accused is entitled to a fair and expeditious hearing upon being arraigned in court of law and not be subjected to detention by a Judicial Officer for an inordinate period. Third, that Kenyan Law does not provide for an accused person to be condemned without hearing for an application for bail/bond. Further, that this court lacks Judicial Authority to *suo motu* detain an accused person for inordinate period without according him a hearing.

6. The Office of Director of Public Prosecutions filed their grounds of Objection on 29.7.2021 contending that bail/bond is not an absolute right and that the same can be limited in the following circumstances:

*(i) If the accused is a flight risk and is likely to abscond court.*

*(ii) If the accused is danger or may interfere with witnesses and*

*(iii) interference with investigations.*

7. According to the Office of Director of Public Prosecutions, the offence was committed on 1.1.2020 and the accused went at large until his arrest on 23.2.2021 and that in the Prebail Assessment Report of 29.3.2021, it states that the accused ran away and went into hiding in Nairobi, where he avoided arrest for a whole year, that he used to sneak back home at night and go away before dawn and that this time when he came back home, one of the witnesses got the information and alerted the police officers at Kalare who went and arrested him in his house at night.

8. Counsel therefore contends that this is not the conduct of a person who can be trusted to be released on bond/bail pending trial. The prosecution further contends that the said prebail assessment report states that if the accused is released on bond then even the witnesses who have recorded statements and are willing to testify may not appear in court to give testimony due to fear.

9. Further, that the Victim's mother and wife relocated to Kisumu for fear of being killed and the wife of the Victim only returned upon hearing of the arrest of the accused person.

10. Further contention is that the accused is alleged to have acted in concert with others and killed the deceased so if he is released on bond, he will interfere with ongoing investigations to arrest and arraign the other suspects who are still at large. The state urges the court to find that there are enough grounds in the prebail assessment report to warrant denial of bond/bail.

## **DETERMINATION**

11. I have considered the application for bail pending trial, the grounds, thereof and supporting affidavit by Mr. Ojwang Agina Advocate for the accused person reiterating the grounds in support thereof. I have also considered the grounds of opposition filed by the Office of Director of Public Prosecutions which lifts verbatim the contents of the prebail assessment report filed on 29.3.2021 by Mr. David O. Odumba, Probation Officer, Siaya. The only issue for determination is whether this court should release the accused person on bail/bond, pending trial, and if so, on what conditions.

12. According to Mr. Agina Counsel for the accused, this court *suo moto* condemned the accused person to detention without a hearing.

13. As I have stated earlier on in these proceedings this court had, on application by Mr. Mirembe Advocate, ordered for a prebail assessment report on the accused person which report was not available as at 29.3.2021 hence the court directed that an application could be filed formally in writing. This would give the prosecution an opportunity to substantively respond to the application for bail. The court in making that order was alive to the facts on record that the accused had been arrested on 23.2.2021 yet the offence was allegedly committed on 1<sup>st</sup> and 2<sup>nd</sup> January 2020, and that over one year had lapsed.

14. Albeit Bail is a Constitutional Imperative, it is **not** absolute and the court is under a duty to inquire into the social circumstances of an accused person, on whether he is suitable for release on bail or he may abscond, thereby rendering the proceedings an academic exercise as well as whether he is likely to interfere with witnesses or whether his own life is at risk.

15. Where an accused person's abode is not fixed, even if he is released on bail pending trial, then the court releasing such accused must be prepared to wait forever for the trial to be concluded. Justice is for both parties in any case. The victim of the offence and the accused person. Where the trial is delayed or does not take off because the accused has absconded then no justice is guaranteed for the victim of an offence. As correctly stated by Mr. Kakoi Senior Principal Prosecution Counsel in his grounds of opposition, although Bail/Bond is a right guaranteed under the Constitution, the same is not absolute. The court may limit the right to bail/bond

pending trial owing to certain compelling facts among them, if the accused is a flight risk, and if he is likely to interfere with witnesses and additionally, if his own life is at risk such that the victim's family may revenge against such accused.

16. In the instant case, there was no condemnation of the accused to judicial detention. He is in lawful custody pending trial and pending hearing of his application for bail pending trial. A hearing date is already fixed in this case which is a 2021 case and this court inherently, does not delay any cases before it. It balances expeditious justice and fair hearing /fair trial very well. As this court had no prebail assessment report on record before rising on 29.3.2021, it could not *suo moto* release the accused on bail without inquiring into his suitability to be released and/or appreciating the circumstances under which he was arrested.

17. Accordingly, there is nothing to be reviewed or set aside or varied by this court. Prayer No. 1 of the Notice of Motion dated 22.7.2021 is accordingly declined and dismissed.

18. On whether the accused should be released on bail pending trial, **Article 49(1)(h) of the Constitution** guarantees an arrested person the right to be released on bond or/bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. That being the case, it is not true as asserted and deposed by Mr. Ojwang Agina Counsel for the accused person that this court has no jurisdiction to deny an accused person bail or bond or that the right as guaranteed under the Constitution is absolute and not subject to be limited by this court.

19. On the sweeping allegations by Mr Agina Advocate that this court has no jurisdiction to detain the accused person, this court derives its jurisdiction and powers from the people who speak through the constitutional and statutory provisions. Albeit Mr. Agina has used very strong language in his application and deposition in his affidavit, this court finds no substance in that strong language which is merely provocative of the court. No court of law should be moved by strong language or intimidation by any party or person as it is expected to render its decisions devoid of emotions, fear or favour and irrespective of status. Furthermore, all parties before a court of law are entitled to justice, fairness and expedition in their quest for justice. This is a 2021 case and this court has already fixed a hearing date which will be barely three weeks after the recess which ends on 15.9.2021 and the court has fixed other older cases between 16<sup>th</sup> September and October 2021. For that reason, expeditious justice and fair trial as well as fair hearing for the accused person in this case as is for all other parties before this court is assured.

20. On whether the Orders for release of the accused person herein on bail/bond pending trial is merited, I have already stated that bail/bond is a constitutional imperative for arrested persons but that right is not absolute where there are compelling reasons to limit the right.

21. The Prebail Assessment Report filed on 29.3.2021 paints the accused person as a flight risk and one who is likely to interfere with witnesses among them, the mother and wife to the victim of the offence. The said report answers the question as to why the accused was arrested on 23.2.2021 over one year after the alleged offence. It discloses that the accused went at large immediately after the alleged offence and has been in hiding in Nairobi and could only return at night and return to Nakuru in the wee hours until one of the witnesses spotted him and notified the investigators who arrested him from his house at night.

22. In addition, the report states that the Victim's mother and wife had relocated from home for fear of being killed by the accused who was at large and that they only got relieved when they learnt that he had been arrested. It is claimed by the said victim's wife and mother that the accused threatened them after the death of the deceased, telling them that he was not yet done with his mission until he eliminates them.

23. Witnesses in this case are also said to be fearful of the accused and may not attend court if the accused person is released on bail/bond as the other suspects who allegedly committed the offence of murder in the company of the accused have not been arrested. The accused person has not controverted those allegations by the Probation Officer who is an independent person from the prosecution. In addition, the accused person has not given any undertaking in his application on oath that if released on bond, he will attend court as and when required and neither has he indicated his place of abode upon being released on bond/bail, since the probation report states that he was hibernating in Nairobi for over one year and only appears at his rural home at night once in a while and vanishes at dawn. He has only assumed that because bail/bond is a right, no court of law can limit it.

24. In my humble view, justice is better served in these kind of cases if both parties that is, the victim and the accused get justice. The Victim's justice in this case can only be served if the accused person goes through a fair hearing and fair trial and witnesses are enabled to attend court to testify on the truth of what they know, saw, or heard. If an accused person is likely to abscond, then the

court will be doing an injustice to the victim of the offence if it releases him on bond only for him to make the trial impossible.

25. I reiterate that the accused before this court is assured of a fair hearing and a fair trial. He remains innocent until proven guilty as no evidence has been placed before this court yet on his culpability.

26. However, as there is sufficient information which this court believes from the probation officer's prebail assessment report that the accused person is likely to abscond if released on bond/bail, and as the victim's mother and wife claim that the accused claimed that his mission is not yet over until he kills them, and that some witnesses have not recorded statements because they fear as some of the suspects are yet to be arrested, I find that the accused person is not suitable for release on bail/bond pending trial.

27. Accordingly, I decline to grant the prayer for release of the accused person Lucas Onyango Walo on bail/bond pending trial and dismiss the application. The accused shall remain in custody until the hearing date which is 12.10.2021.

28. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 30<sup>TH</sup> DAY OF JULY, 2021**

**R.E. ABURILI**

**JUDGE**



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