



REPUBLIC OF KENYA



**Kirwa v Republic (Criminal Revision 308 (E191) of 2022)  
[2023] KEHC 1286 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1286 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL REVISION 308 (E191) OF 2022  
CW GITHUA, J  
FEBRUARY 23, 2023**

**BETWEEN**

**JAMES NYANGERESI KIRWA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Arising from Kisii Sexual Offences Case No 8 of 2018.)*

**RULING**

1. This ruling is in respect of an application for revision made in letter dated December 16, 2022 and filed in court on even date. The application was filed by the firm of Aboki Begi & Associates on behalf of Mr James Nyangaresi Kirwa (hereinafter the applicant) seeking revision of the orders issued by the lower court in Kisii Sexual Offences Case No 8 of 2018 directing that the applicant be remanded in custody for failing to produce the accused person in court.
2. The background against which the application was filed is that the applicant stood surety for one Erick Kirwa who was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. In the course of the trial and after the accused person was placed on his defence, he absconded and a warrant for his arrest was issued.
3. The applicant was summoned to attend court to explain the whereabouts of the accused. He attended the court on November 24, 2022 and sought to be given time to trace the accused. He was given a months' time and on December 15, 2022 he went back to court without the accused and gave an explanation for the accused's absence which the court found to be unsatisfactory. Subsequently, the learned trial magistrate ordered that the applicant be remanded in custody and fixed the case for mention on December 20, 2022. The record reveals that on the mention date, the surety was discharged from custody.



4. Turning now to the application, the grounds on which it is anchored reveals that the crux of the applicant's complaint is that the learned trial magistrate erred in remanding the applicant in custody as this violated the procedure outlined in Section 131 of the *Criminal Procedure Code* which provides for the procedure to be followed by courts in dealing with sureties who fail to comply with the terms of their recognizance.
5. The application was filed before the applicant was released from custody which explains the prayer therein requesting the court to make appropriate orders to facilitate his release. The applicant also prayed for an order that the criminal case be allocated to another magistrate for hearing and determination other than Hon PK Mutai.
6. When the application came up for directions on December 23, 2022, learned counsel Mr Begi informed the court that though the applicant had been released from custody, he still wanted to pursue his application to enable the court determine the legality of the learned trial magistrate's decision.
7. After considering the nature of the orders sought in the application and the point of law involved, I decided to deal with it without hearing any party in the exercise of the court's powers under Section 365 of the *Criminal Procedure Code*.
8. At the outset, I wish to point out that this application invokes the revisional jurisdiction of this court which is donated by Section 362 as read with Section 364 of the Criminal Procedure Code which empowers this court to call for and examine the record of a subordinate court to satisfy itself as to the correctness, legality or propriety of the proceedings and orders made therein.
9. As stated earlier, Section 131 of the *Criminal Procedure Code* (CPC) is the law that governs the procedure to be followed by courts when dealing with a surety who had defaulted in his/her obligation of ensuring that an accused person attends the court whenever required. The provision is in the following terms:
  1. Whenever it is proved to the satisfaction of a court by which a recognizance under this Code has been taken, or, when the recognizance is for appearance before a court, to the satisfaction of that court, that the recognizance has been forfeited, the court shall record the grounds of proof, and may call upon any person bound by the recognizance to pay the penalty thereof, or to show cause why it should not be paid.
  2. If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover it by issuing a warrant for the attachment and sale of the movable property belonging to that person, or his estate if he is dead.
  3. A warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorize the attachment and sale of the movable property belonging to the person without those limits, when endorsed by a magistrate within the local limits of whose jurisdiction the property is found.
  4. If the penalty is not paid and cannot be recovered by attachment and sale, the person so bound shall be liable, by order of the court which issued the warrant, to imprisonment for a term not exceeding six months
  5. The court may remit a portion of the penalty mentioned and enforce payment in part only.



6. When a person who has furnished security is convicted of an offence the commission of which constitutes a breach of the condition of recognizance, a certified copy of the judgment of the court by which he was convicted may be used as evidence in proceedings under this section against his surety or sureties, and, if the certified copy is so used, the court shall presume that the offence was committed by him unless the contrary is proved.”

10. From the above provision, it is clear that under Section 131 of the CPC, the court has two options namely;

- i. To call upon any person bound by a recognizance to pay the penalty thereof; or
- ii. Call upon the person to show cause why the cognizance should not be paid.

If sufficient cause is not shown and the penalty is not paid, the penalty should be recovered by attachment and sale of the moveable properties belonging to the surety or his estate if he was dead. It is only if and when the penalty is not paid and cannot be recovered as a civil debt that a court can order imprisonment of the surety for a term not exceeding six (6) months.

11. From the foregoing, it is very clear that the learned trial magistrate erred in law when he failed to comply with the procedures enumerated under Section 131 of the Criminal Procedure Code. Although the trial court summoned the applicant to show cause why he should not produce the accused, there is nothing on record to show that he was ordered to pay the recognizance or any part thereof and he was unable to pay.

12. Even if the applicant had been ordered to pay the recognizance and he was unable to do so, the next option for the trial court would have been to order for attachment of his moveable properties under Section 131 (2) of the CPC. Instead, the trial court bypassed these procedural steps and proceeded to unlawfully detain the applicant in remand custody which was not even one of the options provided for by the law. Under Section 131 (4), if a surety failed to pay the penalty ordered by the court and the same could not be recovered by attachment, such a surety was liable to imprisonment for a term not exceeding six months and not to detention in remand facilities.

13. In my view, the trial court’s decision besides being arbitrary and illegal was most unfortunate because it violated the applicants constitutional right to liberty for the period he was in custody without any legal justification.

14. As the court record confirms that the applicant was released from custody on December 20, 2022, the prayer requesting the court to make orders to facilitate his release has been overtaken by events and cannot be granted.

15. Regarding the prayer seeking transfer of the case from Hon P.K Mutai to any other magistrate, I find that no good reason has been given to warrant the issuance of such an order. It is also pertinent to note that the trial is at its tail end since it is at the defence hearing stage. I therefore decline to grant the aforesaid prayer.

16. In view of the foregoing, I direct the Hon Deputy Registrar to return the original lower court file to the trial court for continuation with the trial when the warrant of arrest against the accused is executed and in the event that it is not, the trial court should re-summon the applicant and deal with him in accordance with the law.

It is so ordered.



**DATED, DELIVERED AND SIGNED AT KISII THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023.**

**C. W. GITHUA**

**JUDGE**

**In the Presence of:**

No Appearance by the Applicant

No Appearance by the Respondent

Ms. Aphline Court Assistant

