



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Republic (Criminal Revision E010 of 2023)
[2023] KEHC 22760 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL REVISION E010 OF 2023
HM NYAGA, J
SEPTEMBER 28, 2023**

BETWEEN

ANDREW CHEGE WAINAINA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with rape contrary to Section 3(1)(a), (c)(3) of the [Sexual Offences Act](#).
2. The particulars were that on 11th November, 2018 in Nakuru East Sub-County within Nakuru County he intentionally and unlawfully caused his penis to penetrate the vagina of SNB without her consent.
3. In the alternative he was charged with committing an indecent Act contrary to Section 11A of the Sexual Offences Act the particulars being that on 11th November, 2018 in Nakuru East Sub-County within Nakuru County he intentionally touched the vagina of SNB with his penis against her will.
4. The Charge was read to the Applicant/Accused on 15th November, 2018 and he pleaded not guilty to the main and alternative charge.
5. The trial court subsequently released the accused on a bond of Ksh. 400,000/= with a surety of a similar amount and/or in the alternative cash bail of Ksh. 200,000/=
6. The receipt on record shows that the cash bail of Ksh. 200,000/= was paid by Wilfred Nyaundi Konosi on 16th November, 2018.
7. On 3rd March, 2020 the prosecution case was heard. The complainant testified and mid-way the Applicant's/Accused Person's counsel attended court and informed it that the accused had not disclosed that he was represented. The trial court ordered that PW1 would testify afresh and adjourned the matter.



8. On the next court date of 14th July,2020 the applicant/accused was absent. On further mention dates of 15th September,2020 and 29th October, 2020 the accused person was also absent.
9. On 4th March,2020 warrants of arrest were issued against him and the same were extended and cash bail forfeited on 5th October,2021.
10. On 21st December,2021 the prosecution made an application to withdraw the matter under Section 87 (a) of the CPC.The court allowed the same and ordered the warrants of arrest to remain in force.
11. The applicant/accused through his advocate wrote a letter dated 8th June, 2023 seeking revision of the above orders made on 21st December,2021. Precisely, he seeks for an order lifting the warrants of arrest issued against him, an Order setting aside the order of forfeiture of the cash bail and an order for the refund to Wilfred Nyaundi Konosi of the cash bail of Ksh.200,000.00 on grounds that the he was unaware that the matter proceeded on 5th October,2021 and 21st December,2021 owing that to the fact that during this period the courts had scaled down its operation due to Covid-19 Pandemic and moreover he had been committed at the Nakuru GK Prison from August 2020 to 17th November 2021 as a result of committal orders issued in Nakuru Magistrates Criminal Case No.2945 of 2020: Republic Vs Andrew Chege Wainaina and as such he would not have been able to attend court unless with a production order directed to the Nakuru GK Prison.
12. He stated that the forfeiture of the said cash bail was done contrary to Section 131 of the Criminal Procedure Code as one surety Wilfred Nyaundi Konosi was not accorded the right to be heard and was also not served with a notice to show cause why his bail should not be forfeited.
13. On 20th June,2023 I directed parties to file submissions. Only the Applicant filed his submissions.

Applicant's Submissions

14. The Applicant submitted that this court under Article 165(6) and (7) of the *Constitution* has supervisory jurisdiction over the subordinate courts and revisionary powers under Sections 362 and 364 of the *Criminal Procedure Code*.
15. The Applicant referred this court to the case of *Abigael Cheronso Soi v Republic* [2021] eKLR- where the court held that “Ideally, a party requires to be served with notice to show cause why the cash-bail should not be forfeited before forfeiture. Failure to do so is a breach of the rules of natural justice” and *Patrick Gitari Mwiandu v Republic* [2017] eKLR where the court expressed a similar view that the accused as well as surety is required to be granted an opportunity to show cause why his bail/bond should not be forfeited to the state and that failure to do so is a grave breach of the rules of natural justice.
16. The Applicant thus submitted that the instant application is meritorious since Mr. Wilfred Nyaundi Konosi was not issued with a notice to show cause contrary to section 131 of the Criminal Procedure Code and urged this court to issue the orders sought.

Analysis & Determination

17. The only issue for determination is whether the applicant's request for an order of revision is merited.
18. The relevant law for revision is found in Article 165(6) and (7) of *the constitution* and section 362 and 364 of the Criminal Procedure Code.
19. Article 165(6) provides;



- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
20. Section 362 of the Criminal Procedure Code provides: -
- The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.
21. Section 364 of the Criminal Procedure Code provides:
- “Powers of High Court on revision
- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;”
22. The High Court of Malaysia in *Public Prosecutor vs Muhari Bin Mohd Jani and Another* [1996] 4LRC 728 at 734 held as follows regarding the issue of revision:
- “.....The object of revisionary power of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.....”
23. In the instant case the Applicant contends that the trial court flouted Section 131 Criminal Procedure Code. Said Section provides as follows:
- “Section 131
- (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 conditions of his 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.”

24. Under Section 131, the court has two options which are:

- (1) To call upon any person bound by a cognizance to pay the penalty thereof; or
- (2) Call upon the person to show cause why the cognizance should not be paid.

25. The Applicant stated that the period in which warrants of arrest was issued against him and cash bail forfeited by the trial court he was committed at the Nakuru GK Prison from August 2020 to 17th November 2021 and therefore he would not have attended court unless a production order was directed to Nakuru GK Prison. This position is unascertainable as he has not attached the said committal orders issued in Nakuru Magistrates Criminal Case No.2945 of 2020: Republic Vs Andrew Chege Wainaina. However, the record shows that when the accused failed to attend court on 4th March,2021, the court never summoned the surety to explain why he could not produce the accused. The purpose of bail is to ensure that an accused attends the court for hearing or mention as is required of him. The first duty of the surety is therefore to ensure that an accused attends court as is required of him.

26. The court failed to issue summons and on 5th October,2021 without enquiring what steps the prosecution had undertaken to arrest the Accused/Applicant extended warrants of arrest and also forfeited the cash bail without hearing the Depositor. This in my view was irregular.

27. The court should have first summoned the Depositor to show cause why he cannot produce accused or pay the recognizance and allow him time to look for accused. In my view, the court failed to give the Depositor an opportunity to produce the accused and to show cause why the cash bail should not be forfeited. It therefore totally failed to follow the procedure provided under Section 131(1) Criminal Procedure Code.

28. The initial non-attendance by the Applicant in court was on 14th July 2020. We are all aware that the courts had scaled down their operations due to the Covid 19 pandemic. A further mention date was given but it is not clear if the accused/applicant was ever made aware of the same. In fact it is not clear if all other dates were ever communicated to the applicant or his advocate.

29. In my view, the court ought to have restrained itself from issuing the Warrant of Arrest and forfeiture of the Cash Bail. These were unprecedented times, with lock downs, curfews and so on. There was



need to be alive to such circumstances. Going by the above, I find that the forfeiture of the Cash Bail was erroneous.

30. This court invokes its supervisory powers under Section 165(6) of Constitution and revision powers under Section 364 of the Criminal Procedure Code and makes the following Orders:
1. Warrants of arrest issued on 4th March, 2021 against Andrew Chege Wanaina is hereby lifted.
 2. The order of 5th October, 2021 for forfeiture of cash bail is hereby set aside and vacated.
 3. I hereby direct that the cash bail of Ksh. 200,000.00 be refunded to one Wilfred Nyaundi Konosi.
31. The applicant to present himself before the Investigating Officer in the next twenty one (21) days, failing which Warrant of Arrest may issue.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 28TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Ms Murunga for state

Applicant present

