



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.20'B' OF 2020

JOHN NDUNGU WAIRURI.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

RULING

The Applicant, John Ndungu Muiruri, stood surety for Peter Mwangi Kimani (accused), who is facing the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** at Makadara Chief Magistrate's Court in **Criminal Case No.1448 of 2014**. The said Peter Mwangi Kimani absconded from the jurisdiction of the court. He is yet to be found and brought before the trial court. There is still a warrant pending for his arrest which is yet to be executed. The Applicant was arrested on 19th December 2019 and placed in custody. From the proceedings of the trial court, it is evident that the effort of his family to trace and bring the accused before the trial court has been in vain. The Applicant made an application before the trial court to be released on bail to enable him trace and find the accused. The trial court ordered him to deposit the sum of Kshs.400,000/= that he had stood surety for the accused. It appears that the Applicant was unable to raise the said amount. He has been in custody since his arrest to date.

The Applicant has moved this court pursuant to **Sections 131, 364 and 365** of the **Criminal Procedure Code**, seeking orders from this court to call for and examine the record of the trial court, with a view to determining whether the order issued by the trial court directing that he deposits in court the sum of Kshs.400,000/= that he had stood surety for the accused was lawful. The Applicant asked the court to alter, reverse or set aside the order with a view to attaining the objective of having the Applicant released from custody with immediate effect. The application is supported by grounds on the face of the application and the annexed affidavit of the Applicant. The prosecution did not file any documents in opposition to the application.

During the hearing of the application, this court heard the submission made by Mr. Omurwa for the Applicant and by Mr. Mutuma for the State. Mr. Mutuma told the court that having read **Section 131** of the **Criminal Procedure Code**, he was not opposed to the application for the immediate release of the Applicant from custody provided that the security offered by the Applicant is sold to realize the sum constituting the security that he had stood bail for the accused before the trial court. Mr. Omurwa for the Applicant insisted that since the Applicant had served more than the maximum period in custody as mandated by **Section 131** of the **Criminal Procedure Code**, he should be released forthwith from custody without further ado.

This court has evaluated the submission made in this application and takes the following view. **Section 131** of the **Criminal Procedure Code** Provides thus:

- 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.”

It is clear from the foregoing that the trial court correctly interpreted its mandate when it called upon the Applicant to forfeit the recognizance that he had stood surety for the accused before the trial court. Upon failure by the Applicant to forfeit the sum that he stood surety, instead of the trial court making an appropriate order under **Section 131(2)** of the **Criminal Procedure Code** for the attachment and sale of immovable property that the Applicant had offered as security, the trial court ordered for the continued detention of the Applicant in custody pending compliance with the direction that he forfeits the sum of Kshs.400,000/= that he stood surety for the accused.

The trial court clearly fell in error. As a result, the Applicant has been in custody to date from 19th December 2019 when he was arrested. The Applicant is correct in saying that since he has been in custody for a period of more than six months, then under **Section 131(4)** of the **Criminal Procedure Code**, he should be released forthwith.

In the premises therefore, the Applicant has made a case for this court to revise the order issued by the trial court directing that he be detained in custody pending compliance with the order that he forfeits the sum of Kshs.400,000/=. The Applicant is therefore ordered released from custody forthwith as he has served the period that he could lawfully remain in custody. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JULY 2020

L. KIMARU

JUDGE