



**REPUBLIC OF KENYA**

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

**HIGH COURT REVISION NO.1 OF 2018**

**BENJAMIN BARNGETUNY alias ROBERT KIMUTAI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

Before me is the application dated 15.3.2018 brought under certificate of urgency accompanied by a letter dated 9.3.18 from Advocate for the applicant –Warutere & Co. Advocates to the Resident Judge through the Deputy Registrar, High Court of Kenya at Nyeri.

The applicant seeks review of the orders issued by the trial court **in Nyeri CMCR case No.563 of 2013 Republic -vs-Benjamin Barngetuny alias Robert Kimutai** on 13.2.2018 where the Chief Magistrate refused to reinstate the applicant’s bail.

The background is that on 25.11.16 the applicant was absent from court. His counsel Mr. Muhoho informed the court that he had rang that morning saying he was unwell, and since he was travelling from Eldoret he could not make it to court. Matter was fixed for mention on 9.2.17 when the accused was to appear and avail documents.

On 9.2.17 the accused was still absent. It was mentioned on 23/2/2017, and on 27/2/17 a warrant of arrest was issued against him. It was mentioned on 13/3/17, 18/4/17, 20/4/17, 15/5/17, 22/5/17, 12/6/17 accused was absent and there was no information of his whereabouts. Even his surety and counsel were not available to explain to court where he was.

On 13/7/17 the court learnt that the accused had had another case in Homabay where judgment was delivered on 3/7/17 and he was imprisoned for 2 years. A production order was issued for 27/7/17. He was produced on 17/8/2017.

This is what transpired;

*“.....Accused 2- I was sick since November*

*Court: why didn't you alert your surety?*

*Accused: even the Investigating officer and my advocate knew.....”*

Later, his counsel showed up, Mr. Muhoho and told the court that the accused had been unwell. A letter dated **16.5.15** was noted by the court. The court went on to note that the accused had been treated on 23.11.16 for malaria. However, he never bothered to inform his surety/counsel of his whereabouts. The court refused to reinstate his bond noting that the accused was also serving a jail term.

On 30/1/18, Mr. Warutere his new counsel applied for the review of the accused’s bond terms. The trial magistrate in a terse ruling delivered on 13/2/18 refused the application citing the provisions to Article 49(1) (h) of the Constitution on compelling reasons, noting the accused’s conduct, that he had demonstrated he was a flight risk.

It is this order that he now seeks review as being “illegal and irregular” as the record speaks for itself. That accused was taken ill in November 2016. That he had been charged before Homabay Law Courts and imprisoned for 2 years. That the Investigating Officer and his advocate were aware of his illness but had not told the court about it.

When the matter came for inter partes hearing Mr. Magoma state counsel did not oppose the application on the ground that the letter of 16/5/2017 from Mama Lucy Kibaki Hospital supported the accused person’s position that he had been unwell.

I have carefully considered the contents of the letter by counsel which seeks review of the lower court’s orders.

Bond/Bail is a constitutional right premised on the accused person's undertaking that he will present himself before the court for the hearing and determination of his case. He presents a surety to court who becomes the go between him and the court with regard to this undertaking and on whom, he bestows the added responsibility of ensuring he attends court, and when he fails to do so, appears to explain his whereabouts at the pain of losing his own security, his cash or even his liberty.

In this case, from the record, which I believe Mr. Magoma did not have the opportunity to peruse this very crucial person, the surety, was never at any one time mentioned by the accused person. It is this person to whom the accused owed the first information to reach the court even before his counsel and the Investigating Officer. It is this person who it is presumed is very close to the accused that even when the accused catches cold and cannot come to court, he knows and he can tell that to the court.

Surprisingly this person – the trustee so to speak of the accused person's agreement with the court that he would show up for his case was left out of the equation. Why? It is highly suspect. He is one of the hinges upon which the continued appearance of the accused in court hangs.

Secondly when the accused person finally appeared in court, he said nothing about his jail term. He only spoke about having been sick in November 2016 why? Even if the court was to take the letter from the hospital at face value he was an outpatient attending clinic.

There is no good reason why he could not appear in court, or send his surety who from the records is in the same town as himself, to court to explain his predicament.

In my view the trial magistrate's apprehension that the accused was a flight risk was not baseless.

Be that as it may, nothing stops her from exercising her discretion in reviewing the accused's bond terms: I direct that before I make any further orders

1. a Bail Review Report be prepared by the County Probation Officer, Nyeri in liaison with her colleague in Uasin Gishu on or before 14/6/2018.
2. The report to include the views of the current surety.
3. The matter be placed before me on 14.6.2018 for directions.
4. This order be extracted and served on the County Probation Office, Nyeri without delay

**Dated, delivered and signed in open court at Nyeri this 30<sup>th</sup> Day of May 2018**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Court Assistant: Atelu

Mr. Magoma for the state

Warutere for the Applicant

Applicant