



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.187 OF 2017**

**FRANCIS KAGWA MAINA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Francis Kagwa Maina stood surety for his son Ibrahim Kibe Kagwa. The said Ibrahim Kibe Kagwa was facing six counts of **causing grievous harm** contrary to **Section 234** of the **Penal Code**. The charges arose from events that allegedly took place on 29<sup>th</sup> April 2012 at God's House of Miracle Church in Ngara Estate within Nairobi County where several worshippers were attacked and seriously injured. He also faces a further charge of engaging in **organized criminal activity** contrary to **Section 3(a)** as read with **Section 4(1)** of the **Prevention of Organized Crimes Act**. The particulars of the alleged charge claim that the said Ibrahim Kibe Kagwa was a member of Al Shabaab, an outlawed organized criminal group in Kenya. The said Ibrahim Kibe Kagwa was released on bail pending the trial before the trial court in **Nairobi Chief Magistrate's Court in Criminal Case No.663 of 2012**.

From the affidavit sworn by the Applicant, and the proceedings of the trial court annexed to the application, it was apparent that the said Ibrahim Kibe Kagwa absconded from the court. A warrant of arrest was issued. That warrant is still pending execution. The Applicant was called upon to produce the said Ibrahim Kibe Kagwa before the court. On several occasions, the Applicant appeared before the trial court and told the court that he was making every effort to know the whereabouts of the said Ibrahim Kibe Kagwa. He was however not successful. He finally told the court that he could not trace the said Ibrahim Kibe Kagwa. He even filed a missing person report with the police. Upon receiving this information, the trial court ordered the Applicant to forfeit the security that he had given to the court to secure the release on bail of the said Ibrahim Kibe Kagwa. The Applicant had offered his property registered as LR. No. Ndonyo Sabuk/Komarock Block 1/813 as security. The value of the security was Kshs.500,000/-. The trial court ordered the said property to be sold so that the sum of Kshs.500,000/- that the Applicant stood surety for his son can be forfeited to the State. The court further ordered the sum of Kshs.100,000/- that had been deposited as cash bail to be forfeited to the State.

The Applicant was dissatisfied with this decision. He made an application to this court challenging the said decision by way of revision under **Section 362** of the **Criminal Procedure Code**. The Applicant sought to have the order issued by the trial court directing that his property be forfeited and be sold be set aside. The Applicant further prayed for an order that the cash bail that had been forfeited be deemed to be sufficient remedy and therefore the Applicant be discharged from further financial responsibility on account of surety that he had offered to secure the release of his son on bail pending trial.

During the hearing of the application, this court heard oral rival submission made by Mr. Mathenge for the Applicant and by Ms. Atina for the State. Mr. Mathenge submitted that the Applicant had offered surety to secure the release of his son on bail pending trial on the understanding that he would ensure that the son attended trial without fail. Unfortunately, his son went missing in January 2013 and had not been traced to date. The Applicant had even filed a missing person report with the police. Learned counsel submitted that the order issued by the trial court requiring the property offered as security to be sold was draconian because the said property was the one where the Applicant and his family resides. It would leave him homeless if the same is sold. He urged the court to issue an appropriate order so that the Applicant's property may be saved. Ms. Atina for the State opposed the application. She submitted that the trial court was justified in making the order that it did because the Applicant had given contradictory information in regard to the whereabouts of his son. The Applicant had failed to assist the authorities trace his son. She was of the view that the Applicant's application had no merit in light of the fact that he had to bear the consequences of his decision to stand surety for the said Ibrahim Kibe Kagwa.

This court has carefully considered the rival submission made by the parties to this application. That the Applicant must bear the consequences of standing surety to secure the release of his son on bail pending trial is not without doubt. The Applicant has however pleaded with the court to save the property that he had offered as security because it is where he resides with his family. The State is opposed to this application. This court forms the view that the Applicant demonstrated that he had done everything within his power to secure the attendance of his son before court. He has been unable to do so because his son has disappeared from home since January 2013. He has even filed a missing person report with the police. The Applicant alluded to the fact that the son had mental health issues at the time of his disappearance. This court agrees with the Applicant that the order issued by the trial court that he forfeits the property where his home is situate is draconian. That order of forfeiture and sale is set aside. However, this court will not let the Applicant get away scot-free. He is ordered to pay the sum of Kshs.100,000/- to court to secure the release of the security that he had offered to the court. He shall do so within sixty (60) days of this decision or in default, the order issued by the trial court shall be reinstated. It is so ordered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE 2018**

**L. KIMARU**

**JUDGE**