



**KAMAU THIONGO ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

This file was placed before me following a letter **dated 3<sup>rd</sup> August 2012** from the firm of Lumumba Nyaramba & Co., Advocates with regard to **Criminal Case No.209 of 2010 R V KAMAU THIONGO**, seeking for revision of the orders issued by the Hon. Resident Magistrate on **2<sup>nd</sup> August 2012** where she declined to reinstate the bond which had been given to the accused saying he was a flight risk. A title deed had been deposited as security in court, but on several occasions warrants of arrest were lifted but accused would always present himself in court and the same would be lifted.

The cancellation of the bond is termed as being punitive and the court is asked to intervene.

The accused is charged with the offence of defilement and had been released on bond of Kshs.300,000/= with one surety of a similar amount.

His aunt Hannah Njeri stood surety and deposited a Title Deed as security.

From the court record, on 05/1/2011, the accused was absent when the case had been set for mention and a warrant of arrest was issued. It turned out the file was taken before one court, and accused appeared before a different court, so the warrant was lifted. On 5/4/2012, another warrant of arrest was issued because accused was absent but at 4.00 p.m. it was lifted when it turned out that accused had been arrested while in court and taken to another court for plea.

On 11/7/2012 when the matter was for mention with a view to taking directions, the accused was absent and a warrant of arrest issued, with summons to his surety to attend court on 23/07/2012. On 23/07/2012 the accused appeared in court and his advocate requested that the warrant of arrest be lifted because accused had boarded a matatu which developed problems and he arrived late in court. The trial court refused to lift the warrant saying it was the third time that accused was failing to attend court. The trial magistrate view was that when she called out the file earlier on 5/4/2012, his counsel, could not explain his whereabouts and the warrant was only lifted later. But surely the record shows when the accused turned up in court and an explanation was offered for his earlier absence the trial magistrate accepted that explanation. The court cannot now revisit that on him and use it to penalize him. As regards warrant issued on 11/7/201, the trial magistrate rejected the explanation for accused's failure to attend court, saying accused did not appear keen on attending court.

On 23/7/2012, the accused's counsel informed the court that he was remorseful for his omission in attending court and had learnt his lesson and promised to consistently attend court. It was also explained that his surety was an elderly person who could not monitor him each time he was required to come to court.

The trial magistrate correctly observed that one of the fundamental rights guaranteed by the Constitution is the right to liberty which should not be interfered with unless there are compelling reasons. However the trial magistrate was of the view that accused was likely to abscond because of failing to attend court thrice. This must be considered against the history of court attendances – three failures out of how many court attendances? There have been fifteen court attendances, twelve which were regular. Out of the three instances, the first two instances were not of the accused's direct making, so that the only time he can be blamed for failing to attend is this one last occasion. I also note that the times he has failed to attend have been on mention dates not hearings, and my considered view is, that is not conduct consistent with

someone who intends to abscond or not face trial. There is reason to interfere with the orders issued by the trial court cancelling the accused's bond, indeed it is not farfetched for a matatu to break down and cause delay. I set aside the order cancelling the accused's bond – the same is reinstated on the same terms.

**Delivered and dated this 20th day of August, 2012 at Nakuru.**

**H.A. OMONDI  
JUDGE**