



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Revision 336 of 2010**

**OSMAN IBRAHIM MOHAMMED.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The accused person on whose behalf the request for revision has been made, is facing a charge of stealing by servant contrary to **section 281** of the **Penal Code**. His trial is still pending before the Chief Magistrate’s court in Nakuru C.M.CR.C.No.2197 of 2009. He has been out on bond.

However, on 13<sup>th</sup> April, 2010, when his trial was scheduled for further hearing, he failed to attend court but his advocate did and explained that he was indisposed. The learned trial magistrate was not persuaded and issued a warrant for the arrest of the accused person and set down the case for mention on 27<sup>th</sup> April, 2010. On that day the accused person presented himself to the District Criminal Investigations Officer (D.C.I.O.), Nakuru and under the escort of the Investigating Officer, he was brought before the learned magistrate.

Before the learned magistrate, the accused person explained that he was undergoing treatment. To support this he produced treatment notes from Eastleigh Section III Medical Centre. The court

***H.C.CR.REV.NO.336/2010***

noted that the explanation was not satisfactory as the authenticity of the treatment notes was highly doubted. Consequently the accused person’s bond was withdrawn.

On 27<sup>th</sup> April, 2010, the firm of Karanja Mbugua & Company Advocates wrote to the Resident Judge, Nakuru but the letter appears to have been received on 5<sup>th</sup> May, 2010. It is not apparent when the file was placed before me although I suspect it was in the same month of May, 2010.

However, due to official engagements which took me out of my duty station for nearly two weeks and a temporary relocation from my chambers for renovation, I unfortunately overlooked this matter. In the letter, the advocates brought to the attention of this court the foregoing events and sought the exercise of this court’s revisionary and supervisory powers under **sections 362** and **364** of the **Criminal Procedure Code**.

In terms of **section 362** aforesaid, the High Court exercised its power to revise a decision of a subordinate court in order to ensure the correctness, legality or propriety of any finding, sentence or order recorded or passed as to the regularity of any proceedings of any such subordinate court. Do the circumstances of this matter present any of the grounds for revision of the order of withdrawal of the accused person’s bond?

**Section 72(1) (c)** of the **Constitution** provides that:

***H.C.CR.REV.NO.336/2010***

**“72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:**  
**(a).....**  
**(b) .....**  
**(c) in execution of an order of a court made to secure the fulfilment of an obligation imposed on him by law**  
**.....”**

The law, specifically **section 124** of the **Criminal Procedure Code**, imposed upon the accused person (and his surety, if any) an obligation to present himself before the court once released on execution of a bond.

The learned magistrate exercised his discretion in withdrawing the bond under the law. Judicial discretion is exercised to do justice and as a matter of general principle, an appellate court should not interfere with the exercise of such a discretion unless the decision of the lower court is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take in consideration matter which it should have taken into consideration and in doing so arrived at a wrong conclusion.

Before withdrawing the bond, the learned trial magistrate ought to have considered the accused person's antecedents, i.e. whether, since he was released on bond, he has absented himself prior to 13<sup>th</sup>

***H.C.CR.REV.NO.336/2010***

April, 2010. From the record, it is clear to me that the accused had as it were, religiously attended the court on the previous seven (7) occasions when the matter was set down for hearing but adjourned because the prosecution was not ready. He has only absented himself once (on the occasion in question) since the commencement of the hearing of the case.

His explanation for failing to attend court on 13<sup>th</sup> April, 2010 was dismissed by the learned magistrate who doubted the authenticity of the treatment notes. The treatment notes emanated from Eastleigh Section III Medical Centre. Nothing would have been easier than to ask the police to investigate the authenticity of those notes before the action of withdrawal of the bond was resorted to.

Thirdly, the learned magistrate failed to take into consideration the conduct of the accused person. It was not in doubt that the accused person presented himself to the investigating office on 27<sup>th</sup> April, 2010. The fourth point is that the learned magistrate failed to consider that although the accused person was absent on 13<sup>th</sup> April, 2010, he was represented by counsel. Finally, the failure by the accused person to attend court on 13<sup>th</sup> April, 2010 did not cause any prejudice to the prosecution or to the court as only one witness was in attendance.

I have stated before in a similar matter and reiterate here that courts must be slow in taking away fundamental constitutional rights

***H.C.CR.REV.NO.336/2010***

of individuals who appear before them. Exercising my discretion under **section 364(1)(b)** of the **Criminal Procedure Code**, I hereby reverse the decision of the trial court and reinstate the terms of the bond granted to the accused person on 15<sup>th</sup> April, 2009. He is accordingly released on bond unless held for any other lawful reason.

This order is to be brought to the attention of Mr. J. G. King'ori, Senior Principal Magistrate in terms of **section 367** of the **Criminal Procedure Code**.

Mention the matter before him on 25<sup>th</sup> June, 2010. Production Order to issue and the accused person's advocate to be notified accordingly.

**Dated, Signed and Delivered at Nakuru this 22<sup>nd</sup> day of June, 2010**

**W. OUKO**  
**JUDGE**

